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WITH KEY-NUMBER ANNOTATIONS

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IN THE
CIRCUIT COURTS OF APPEALS AND
DISTRICT COURTS OF THE
UNITED STATES

DECEMBER, 1918—JANUARY, 1919

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OF THE

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[2] Died January 20, 1919.

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[4] Confirmed January 7, 1919.

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# CASES

## ARGUED AND DETERMINED

IN THE

# UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

---

UNITED STATES v. BEAN, County Treasurer.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1918.)

No. 5078.

1. INDIANS ⟸15(2)—INDIAN LANDS—ALIENATION.
After Act April 26, 1906, c. 1876, § 22, and Act May 27, 1908, c. 199, § 9, lands of all full-blood Seminole Indian heirs were inalienable, save on approval of the court, etc.

2. TAXATION ⟸6—STATE TAXES—GOVERNMENT INSTRUMENTALITIES.
It is the universal rule that every instrumentality lawfully employed by the United States to execute its constitutional laws and exercise its lawful governmental authority is necessarily exempt from state taxation or interference.

3. TAXATION ⟸181—INDIAN LANDS.
Lands of full-blood Seminole Indian heirs, inalienable under Act April 26, 1906, c. 1876, § 22, and Act May 27, 1908, c. 199, § 9, are not subject to state taxation, notwithstanding provisions in each of the acts that all lands upon which restrictions are removed shall be subject to taxation.

4. TAXATION ⟸611(8) — RESTRAINING COLLECTION — JUDGMENT — INCONSISTENCY.
In a suit by the United States to enjoin the county treasurer of an Oklahoma county from selling or conveying allotted lands formerly owned by the Seminole Nation on account of taxes levied, a decree that all lands belonging to enrolled citizens of the Seminole Tribe, except homesteads then owned by the original allottees, which were alienable at the times of the assessments, were taxable, and that upon conveyance of all such lands, including homesteads, the same were taxable, *held* not erroneous, in that the two clauses were inconsistent.

5. TAXATION ⟸181—INDIAN LANDS.
While homesteads of Seminole allottees were not subject to taxation, both because inalienable and by reason of the direct terms of the Seminole Agreement, yet when the restrictions on alienation were removed, and the homesteads became alienable, they were subject to taxation whenever the allottees disposed of them.

6. EQUITY ⟸364—PROPRIETY OF DISMISSAL—DEFECT OF PARTIES.
A court of equity will on its own motion dismiss a bill, if to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties.

7. JUDGMENT ⟸17(1)—JURISDICTION—AUTHORITY OF COURTS.
A court may not directly adjudicate a person's claim of right, unless he is actually or constructively before it.

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8. PARTIES ⟸32—"INDISPENSABLE PARTIES"—WHO ARE.
An "indispensable party" is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made, without affecting his interests or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indispensable Party.]

9. TAXATION ⟸611(4)—COLLECTION—INJUNCTION—PARTIES.
Where purchasers of lands formerly belonging to the Seminole Nation, which had been sold for taxes, were not made parties to a suit by the United States against the treasurer of the Oklahoma county in which the lands lay to enjoin him from collecting the taxes and from selling or conveying the lands, the suit must be dismissed for the want of such parties, for they are indispensable.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by the United States against G. E. Bean, County Treasurer of Seminole County, Okl. From the decree, the United States appeals. Reversed and remanded, with directions.

W. P. McGinnis, U. S. Atty., of Muskogee, Okl. (C. W. Miller, Sp. Asst. U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

T. S. Cobb, J. H. Cobb, and A. M. Fowler, all of Wewoka, Okl., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

SANBORN, Circuit Judge. The United States brought this suit to prevent the county treasurer of Seminole county, Okl., from selling or conveying certain allotted lands formerly owned by the Seminole Nation or Tribe of Indians, on account of taxes levied thereon by the officers of those counties for the fiscal years ending June 30, 1910, June 30, 1911, June 30, 1912, June 30, 1913, and June 30, 1914. The court below rendered a decree, by which it classified the lands, enjoined the county treasurer from selling or conveying on account of those taxes the lands it adjudged not legally subject thereto, and dismissed the bill as to those lands which it found to be lawfully subject to such taxes. The United States has appealed, and specified several alleged errors.

The agreement between the United States and the Seminole Nation or Tribe of Indians, ratified by Act July 1, 1898, c. 542, 30 Stat. 567, 568, provides for the division, allotment, and conveyance of the lands of that nation to the enrolled members thereof in severalty, so that each member shall receive land of the same value as near as may be as the value of that which every other member receives.

It declares that each shall receive a deed of his allotment and that:

"Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity."

For convenience the tract thus selected by an allottee is called his homestead, and the remainder of his allotment his surplus land. Section 8 of the act of March 3, 1903 (32 Stat. 1008, c. 994), provides:

"That the homestead referred to in said act [the act of July 1, 1898, just cited] shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment."

Act May 27, 1908, c. 199, 35 Stat. 312, 313, is a comprehensive declaration of the status as to restrictions upon alienation of the numerous classes of allotted lands formerly held by the Five Civilized Tribes, and section 4 of that act provides:

"That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

[1] Counsel for the United States assign the third and fifth paragraphs of the decree as error. Those paragraphs read in this way:

"(3) That all inherited homestead allotments, where the allottees died prior to April 26, 1906, which were owned by said heirs during said fiscal years, were alienable and taxable during said years, regardless of whether said heirs were enrolled as full-blood Indians, or of less Indian blood."

"(5) That all allotments, both surplus and homestead, made after the death of the enrolled Seminole citizens, whether owned by full-blood heirs, or by heirs of less Indian blood, were alienable and taxable during said fiscal years, whether the death of the enrolled citizens or the selections of allotments were made before or after April 26, 1906."

The court below made these findings and rendered this decree before the decisions of the Supreme Court in Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 286, 287, 62 L. Ed. 591, and Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 288, 289, 62 L. Ed. 600, were handed down. Conceding that prior to the passage of the act of April 26, 1906 (34 Stat. 137, c. 1876), the land described in these findings were alienable, it must now be held, in deference to the opinions in these cases, that section 22 of the act of April 26, 1906, which subjected all conveyances of adult full-blood Indian heirs to the approval of the Secretary of the Interior, and all conveyances of minor full-blood Indian heirs to the approval of the court, and section 9 of the act of May 27, 1908 (35 Stat. 312, 315), which subjected all conveyances of full-blood Indian heirs to the approval of the court having jurisdiction of the estate of the deceased allottee, rendered the lands of all full-blood Seminole Indian heirs inalienable during the fiscal years for which the taxes here in controversy were levied. David v. Youngken, 250 Fed. 208, — C. C. A. —, C. C. A. 8th Circuit, filed April 3, 1918; Harris v. Bell, 250 Fed. 209, — C. C. A. —, C. C. A. 8th Circuit, filed April 30, 1918.

[2, 3] Were these inalienable lands of the full-blood Indian heirs taxable for the fiscal years 1910, 1911, 1912, 1913, and 1914? Counsel for the treasurer of the county argue that they were because Congress provided in section 19 of the act of April 26, 1906 (34 Stat. 137), that "all lands upon which restrictions are removed shall be subject to taxation," and by the act of May 27, 1908 (35 Stat. 312),

that "all lands from which restrictions have been or shall have been removed shall be subject to taxation and all other civil burdens." But this contention is overborne by the fact that by these very acts of Congress restrictions upon the alienation of these lands while held by full-blood Indian heirs were imposed, and these lands were held in trust by the United States for these heirs, and made one of the instrumentalities of the government of the United States by which it pursues its wise policy of protecting Indians from the unrestrained greed, rapacity, and cunning of the members of the white race, and of seeking to induce them to cultivate the soil, to practice the arts of civilized life, and become provident and useful citizens. The lands of the full-blood Indian heirs were not lands from which restrictions had then been removed. They were lands upon which restrictions were imposed by these very acts, and it is not probable that the legislators intended to impose taxes upon lands of Indians which the United States was holding for them, while it withheld from them the power of disposition, for such a course runs counter to its public policy and practice from the foundation of the government.

Counsel call attention to the fact that there is no provision in the agreement with the Seminole Nation that any of the lands to be allotted to the members of the tribe, except the homesteads, should be free from taxation while they remained inalienable. But when that agreement was made they were free from taxation, and those who made the agreement knew that the settled policy and practice of the United States was to protect the members of the tribe and all the property which it held the control and disposition of for them free from taxation until it granted them full power of disposition thereof. And it was doubtless for that reason that no stipulation was inserted in the treaty on the subject, except that the 40 acres to be selected by each member of the tribe for a homestead should be "nontaxable as a homestead in perpetuity." 30 Stat. 567, 568. So it was that the imposition of the restrictions upon alienation by these acts of 1906 and 1908 upon the lands of the full-blood Indian heirs brought these lands under the universal rule that every instrumentality lawfully employed by the United States to execute its constitutional laws and to exercise its lawful governmental authority is necessarily exempt from state taxation or interference. United States v. Rickert, 188 U. S. 432, 437, 438, 439, 23 Sup. Ct. 478, 47 L. Ed. 532; United States v. Thurston County, 143 Fed. 287, 289, 290, 74 C. C. A. 425. The provisions of the acts of 1906 and 1908, cited by counsel for the treasurer, are therefore so inconsistent with the imposition of the restrictions by these acts upon the alienation of the lands of full-blood Indian heirs and the legal effect of that imposition, that Congress could not have intended that they should apply to those lands, and the true construction of the acts which contain them undoubtedly limits their application and effect to other land. The result is that the allotments of Seminole lands owned and held during the fiscal years 1910, 1911, 1912, 1913, and 1914 by full-blood Indian heirs were instrumentalities of the United States re-

served and used by it to execute its laws and to exercise its governmental powers, and they were exempt from taxation by the state of Oklahoma, or any of its counties, cities or other governmental subdivisions.

[4, 5] It is assigned as error that the court below also adjudged:

"That all lands belonging to enrolled citizens of the Seminole Tribe of Indians, except homesteads then owned by the original allottees, which were alienable by such enrolled citizens at the times of the assessments for taxation for the fiscal years ending June 30, 1910, June 30, 1911, June 30, 1912, June 30, 1913, and June 30, 1914, were taxable and that upon conveyance of all such lands, including homesteads by said enrolled citizens the same were taxable thereafter."

The objection to this declaration is that the last clause thereof is inconsistent with the first. But a careful reading and consideration of the paragraph has satisfied that there is no real inconsistency in it. The first clause declares that all alienable surplus lands owned by the original allottees during the fiscal years 1910, 1911, 1912, 1913, and 1914 were taxable, and the second clause declares that these surplus lands, and also the homesteads of such enrolled citizens which were actually lawfully alienated, were taxable after such alienation. No error is perceived in this conclusion. The only exemption from taxation of the surplus lands arose from the restrictions upon their alienation. Wherever, therefore, those lands were or became alienable, they were or became taxable. The exemption of the homestead of an allottee arose from two sources: (1) The restrictions on its alienation; and (2) the provision of the Seminole Agreement that it "shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity." But when the restrictions on alienation were removed by act of Congress, and the homestead became alienable, the allottee then had the option to retain it as a homestead exempt from taxation, or to surrender his right to it as a homestead and its exemption from taxation, to convey it and receive the consideration for its sale. If he chose the latter alternative, then the land which had been his homestead was no longer such, and it was thereafter taxable. Sweet v. Schock, County Treasurer, 245 U. S. 192, 38 Sup. Ct. 101, 102, 103, 62 L. Ed. 237.

[6-9] The questions presented by counsel for the parties to this suit have been considered, and the opinion of the court regarding them has now been expressed. But the record presents a case which deprives both that expression and the opinion of the court below of the conclusiveness of an adjudication. That record consists of a complaint, a motion to dismiss the complaint on the ground that it does not contain allegations sufficient to entitle the plaintiff to the relief prayed for, or to any other relief, a stipulation between the United States and the county treasurer, by their respective attorneys, that the case may be submitted to the court upon certain stipulated facts, which are immaterial to the subject now to be considered.

The only parties to the suit are the United States and the county treasurer of Seminole county. The plaintiff alleges in its complaint, among other things, that the county treasurer has sold all the tracts

of land which are the subject of this suit, for the taxes levied thereon for the years 1910, 1911, 1912, 1913, and 1914, and has executed and delivered certificates of sale to the purchasers thereof who have paid therefor; that when no one bid the amount of the tax on any tract it was bid in for and a certificate of sale was executed by him to the county; that many of the latter certificates have been purchased from the county by various persons and have been transferred to such purchasers and are now held by them. The decree enjoins the county treasurer from collecting any of the taxes levied on the lands inherited and owned by the enrolled citizens of the Seminole Nation which the court found to be inalienable and nontaxable for the fiscal years 1910, 1911, 1912, 1913, and 1914, and it adjudges that the taxes levied and assessed, and each, every, and all tax sale certificates and certificates of purchase upon or concerning the aforesaid nontaxable and inalienable lands be, and they are annulled; that whatever liens, charges, or incumbrances the assessments, tax levies, and tax sale certificates might constitute against said land be, and the same are, annulled; and that all incumbrances upon the title to the lands created thereby are removed.

From the complaint and the decree the facts conclusively appear that this suit has been commenced, prosecuted, and a decree has been rendered against the party who has no real interest in the property in litigation, and that none of the real parties in interest adverse to the claim of the complainant have been made parties to the suit, or have appeared or been heard therein. The taxes of which complaint is made have been levied, the lands upon which they were levied have been sold to pay them, certificates of the sales thereof have been executed and delivered, the certificates and any liens they evidence are held either by the county, or by other purchasers at the sales, or from the county, or by their successors in interest; but neither the county (Revised Laws Oklahoma, § 1501), nor any of the purchasers at the sales, nor any of the holders of the certificates of sales, are parties to this suit, and as they have not been made parties, and have not been heard, or had any opportunity to be heard in this suit, nothing that the court below has adjudged and nothing that this court has decided herein is or can be binding upon them, or upon any parties claiming under them, or even upon the court below, or upon this court, when, if ever, the claims, rights, and interests of these parties who are not present in either of the courts are presented by them for adjudication.

But the decree, by its terms, annuls their certificates, destroys the liens they claim, removes all these as clouds upon the titles, without any notice to or hearing by them, and this decree doubtless has been, or, if permitted to stand, will be, spread upon the records of the titles to these lands. It cannot fail injuriously to affect—nay, practically to destroy—the value of the claims and rights of these holders of certificates, because it bears on its face no adequate notice that they are not bound by it. "The established practice of courts of equity to dismiss the plaintiff's bill," says the Supreme Court, in Minnesota v. Northern Securities Co., 184 U. S. 199, 235, 22 Sup. Ct.

308, 322 (46 L. Ed. 499), "if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject-matter who are not made parties to the suit, is founded upon clear reasons, and may be enforced by the court sua sponte, though not raised by the pleadings or suggested by the counsel. Shields v. Barrow, 17 How. 130 [15 L. Ed. 158]; Hipp v. Babin, 19 How. 271, 278 [15 L. Ed. 633]; Parker v. Winnipiseogee Lake Cotton & Woolen Co., 2 Black, 545 [17 L. Ed. 333]." To the same effect is the opinion of this court in Hawes v. First Nat. Bank, 229 Fed. 51, 57, 59, 143 C. C. A. 645, 651, 653.

It is a familiar and just rule that no court may directly adjudicate a person's claim of right, unless he is actually or constructively before it. It is an established rule of practice in the conduct of suits in equity in the federal courts that every indispensable party must be brought into the court or the suit must be dismissed. And an indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be made without affecting his interests, or leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience. Seminole County and each of the other holders of certificates of sale or of liens which they claim upon any of the lands described in the complaint which the plaintiff seeks to affect by this decree, was an indispensable party to this or any suit to avoid or injuriously affect his certificate or claimed lien. And as Justice Curtis said in Shields v. Barrow, 58 U. S. (17 How.) 130, 138, at 141 (15 L. Ed. 158):

> "It being clear that the Circuit Court could make no decree, as between the parties originally before it, so as to do complete and final justice between them without affecting the rights of absent persons," the original bill ought to have been dismissed.

See Ribon v. Railroad Companies, 83 U. S. (16 Wall.) 446, 450, 451, 21 L. Ed. 367; Bank v. Carrollton Railroad, 78 U. S. (11 Wall.) 624, 630, 631, 20 L. Ed. 82; Bogart v. Southern Pacific Co., 228 U. S. 137, 146, 147, 33 Sup. Ct. 497, 57 L. Ed. 768; Chadbourne v. Coe, 51 Fed. 479, 481, 2 C. C. A. 327, 329; Howe v. Howe & Owen Ball Bearing Co., 154 Fed. 820, 828, 83 C. C. A. 536, 544; United States v. United Shoe Machinery Co. (D. C.) 222 Fed. 349, 408.

Let the decree below be reversed, and let the case be remanded to the court below, with directions to dismiss the suit for want of indispensable parties, unless within a short time, to be fixed by the court below, some of the indispensable parties are made parties to the suit, and in case the latter course is pursued, and the plaintiff should then be found entitled to any relief, to specifically limit the terms and effect of the decree to the interests of those indispensable parties, who are later made parties to the suit.

LUDWIG et al. v. BRESSLER.

(Circuit Court of Appeals, Eighth Circuit. July 25, 1918. Rehearing Denied September 30, 1918.)

No. 5054.

1. APPEAL AND ERROR ⟸733—ASSIGNMENTS OF ERROR—SUFFICIENCY.
In a suit to set aside deeds because the grantors were incompetent and the grantees exerted undue influence, where the court sustained exceptions to a master's report in favor of defendants and entered a decree for plaintiff reciting that exceptions were sustained and the deeds set aside, etc., defendants' general assignment of error that the court found upon the issues for plaintiff, that it found the deeds were procured by undue influence, and that the grantors were incompetent, *held* sufficient under Rule 11 of the Circuit Court of Appeals (188 Fed. ix, 109 C. C. A. ix).

2. APPEAL AND ERROR ⟸766—BRIEFS—SUFFICIENCY.
Where appellant's brief complied with Rule 24 for the Circuit Court of Appeals (188 Fed. xvi, 109 C. C. A. xvi) save in so far as it failed to set forth the pages of the record where the evidence in support of the argument could be found, the appeal will not be dismissed or the judgment affirmed, as it was necessary for the appellate court to read all of the evidence on the important issues raised in order to decide them.

3. DEEDS ⟸68(1½)—VALIDITY—MENTAL CAPACITY.
The question of the mental capacity of an aged or feeble-minded person to dispose of his property depends, not on whether the powers of his mind were impaired or whether he had ordinary capacity to do business, but whether he had the smallest capacity to understand what he was doing and to determine intelligently whether or not he would do it.

4. DEEDS ⟸196(3)—VALIDITY—PRESUMPTIONS.
Notwithstanding the fiduciary relation of parent and child, a deed of gift from one to the other, in the absence of fraud, is presumed valid, and the burden of proof of its invalidity on account of undue influence is on him who asserts it.

5. DEEDS ⟸72(1)—VALIDITY—UNDUE INFLUENCE.
Influence gained by kindness, affection, care, and service will not be regarded as undue in the absence of fraud or imposition, although it induces the grantor to make an unequal distribution of his property in favor of those who have contributed or are to contribute to his wants, provided such distribution is voluntary.

6. DEEDS ⟸72(1)—VALIDITY—UNDUE INFLUENCE.
The undue influence for which a deed or will may be avoided must be such as effectually deprives the grantor or testator of the exercise of his free will and coerces him to substitute another's will for his own.

7. DEEDS ⟸211(4)—VALIDITY—EVIDENCE—SUFFICIENCY.
In a suit to set aside deeds on the ground that the grantors lacked capacity and that the deeds were procured through the grantee's undue influence, evidence *held* insufficient to show the grantors' want of capacity or establish the undue influence.

Carland, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Suit by Sarah A. Bressler against Mary C. Ludwig and another. From a decree for complainant, defendants appeal. Reversed and remanded, with directions.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

H. C. Brome, of Worland, Wyo. (Clinton Brome, of Omaha, Neb., on the brief), for appellants.

Frederick S. Berry, of Wayne, Neb. (A. R. Davis, of Wayne, Neb., and Vinton Pike, of St. Joseph, Mo., on the briefs), for appellee.

Before SANBORN and CARLAND, Circuit Judges, and BOOTH, District Judge.

SANBORN, Circuit Judge. This is a suit in equity brought on July 28, 1916, by Mrs. Sarah A. Bressler, to avoid two deeds of a farm in Nebraska made by her father and mother, Jacob D. Fenstermacher and Caroline Fenstermacher, on October 18, 1906, and April 25, 1910, respectively, to Mrs. Mary C. Ludwig, the sister of Mrs. Bressler, and a third deed of the same land to the same grantee made by Mrs. Fenstermacher on April 17, 1914, after the death of her husband. The grounds of the suit are that at the times the respective deeds were made Mrs. Fenstermacher, who held the title to the farm from 1882 until 1906, had not sufficient mental capacity to execute a valid deed, and that she was induced to make each of these deeds by the undue influence of Mr. and Mrs. Ludwig. The case was referred to Honorable Charles F. McLaughlin, the special master, who heard the evidence and made an exhaustive report of the facts and the law as he found them to be, and concluded that the plaintiff was entitled to no relief. Exceptions to this report were filed, and, after hearing them, the court below rendered a decree in favor of the plaintiff. The appeal questions this decree.

[1] Counsel for the appellee has made a motion to dismiss the appeal or to affirm the decree on account of the failure of the appellants to comply with rules 11 and 24 of this court (188 Fed. ix, xvi, 109 C. C. A. ix, xvi). Rule 11 requires the appellant to file an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. The court below made no order sustaining or overruling any of the specific exceptions to the master's report and filed no opinion or finding, but simply rendered a decree which recited that it sustained "the exceptions to the report of the master filed by the complainant herein as to the general conclusion of the master upon the law and the facts," and decreed that the three deeds be avoided and the plaintiff have an undivided half of the land. The appellants assign as errors: (1) That the court found upon the issues generally for the plaintiff and against the defendants; (2) that it found that the deeds were procured by them by undue influence; (3) that it found that Mr. and Mrs. Fenstermacher were, on October 18, 1906, and thereafter continually mentally incompetent and incapable of making valid conveyances of real estate, and that it awarded an undivided half of the land to the plaintiff. In the absence of any opinion or finding of the court below, except that which appears in the decree, this assignment of errors is clearly sufficient. The court below could not have rendered the decree without first finding either mental incompetency of the Fenstermachers or undue influence by the defendants, and the plaintiff assigned each of these findings and the general finding for the plaintiff as errors. What the court may have thought

regarding the minor issues did not appear, and the appellants should not be deprived of their right to a review of the findings on the crucial questions at issue because they did not guess what the court thought regarding others and charge it with error in that thought.

[2] Rule 24 requires the appellants to file a brief which shall contain: (1) A statement of the case exhibiting the questions involved and the manner in which they were raised; (2) a specification of the errors relied upon and a statement as particularly as may be in what the decree is alleged to be erroneous; (3) a brief of the argument presenting a clear statement of the points of law or fact to be discussed with a reference to the pages of the record and the authorities relied upon in support of each point. The brief of the appellants contains: (1) A fair statement of the case which discloses two controlling questions, the alleged incompetency of the Fenstermachers to make the deeds and the alleged undue influence that induced them to do so; (2) the assignment of errors; (3) an argument which presents the points of law which they discuss, and a citation of the authorities on which they rely. This argument also states decisive facts which appellants maintain were established by the evidence, but the brief does not set forth the pages of the record where the evidence in support of some of these facts may be found. However, as the master's report sets forth the facts which he found, and his conclusion was in favor of the appellants, and, as all the evidence on the two important issues must be read and considered in order to decide them, the court is unwilling to deprive the appellants of the review of the decision below on account of their failure to specify the pages of the record where some of the evidence in their favor may be found, especially in view of the fact that the opinions of the special master and the court below are in conflict. The motion to dismiss or affirm is therefore denied.

The real issue in this case is the validity of the deed of Mr. and Mrs. Fenstermacher to Mary C. Ludwig, dated October 18, 1906, for this deed conveyed the farm consisting of about 350 acres of land. The deed of April 25, 1910, covered the same land and 40 acres more that seems to have been omitted from the earlier deed by mistake, and the deed of April 17, 1914, was a quitclaim deed of the same property made by Mrs. Fenstermacher after the death of her husband. If the deed of October, 1906, was not invalid, the subsequent confirmatory deeds are of little account. It follows that in the examination and consideration of the evidence the date, October 18, 1906, has been kept constantly in mind, for it is the competency of Mrs. Fenstermacher on that day and the undue influence upon her of the defendants on that day, and not at later dates, that condition the validity of the deed of that date and the decision of this case.

The evidence as to the mental capacity of Mrs. Fenstermacher to understand what she was doing when she made them and intelligently to determine whether or not she would do it is conflicting, but the preponderance of it is that she had ample capacity to understand the effect of her deeds and to decide intelligently whether or not she should make them. On the question of undue influence the evidence is more evenly balanced. All the evidence on these issues has been thoughtfully

considered, but it is too voluminous for recital in this opinion. The rules of law by which the evidence upon this case must be measured, and by which the issues it presents must be decided, are established beyond controversy by the decisions of the federal courts.

[3] The question of the mental capacity of an aged or feeble person to dispose of her property is not whether or not the powers of her mind were impaired, or whether or not she had ordinary capacity to do business, but it is whether or not she had any—the smallest—capacity to understand what she was doing, and to determine intelligently whether or not she would do it. Sawyer v. White, 122 Fed. 223, 224, 58 C. C. A. 587, 588; Mann v. Keene Guaranty Sav. Bank, 29 C. C. A. 547, 548, 86 Fed. 51, 52; Rugan v. Sabin, 3 C. C. A. 578, 584, 53 Fed. 415, 421; Stewart's Ex'r v. Lispenard (N. Y.) 26 Wend. 303; Ex parte Barnsley, 3 Atk. 168; Hill v. Nash, 41 Me. 586, 66 Am. Dec. 266; Jackson v. King (N. Y.) 4 Cow. 216, 15 Am. Dec. 354; Dennett v. Dennett, 44 N. H. 531, 84 Am. Dec. 97; President, etc., v. Merritt (C. C.) 75 Fed. 480, 492. Any other test would wrest from the feeble and the aged that power over their earnings and savings which is their best safeguard against misfortune, and would produce endless uncertainty, difficulty, and litigation.

[4] Counsel for the complainant contend that the intimate and affectionate relation between Mr. and Mrs. Fenstermacher and Mr. and Mrs. Ludwig which existed while they were living together from 1903 until the death of the former in 1914 and 1915, respectively, raise the legal presumption that the deeds in question were voidable. There are cases in which fraud has been charged, and some others in which the facts have established a practical surrender of the will of the grantor to the grantee where such a presumption has been indulged. Gibson v. Hammang, 63 Neb. 349, 352, 353, 88 N. W. 500; Bennett v. Bennett, 65 Neb. 432, 440, 91 N. W. 409, 96 N. W. 994; Allore v. Jewell, 94 U. S. 506, 510, 24 L. Ed. 260. But the established rule in the courts of the United States is that, notwithstanding the fiduciary relation of parent and child, a deed of gift from one to the other in the absence of fraud is presumed to be valid, and the burden of proof of its invalidity on account of undue influence is on him who assails it. Towson v. Moore, 173 U. S. 17, 19, 20, 24, 19 Sup. Ct. 332, 43 L. Ed. 597; Jenkins v. Pye, 12 Pet. 241, 253, 254, 9 L. Ed. 1070.

[5] Influence gained by kindness, affection, care, and service will not be regarded as undue, in the absence of fraud or imposition, although it induces the grantor to make an unequal distribution of his property in favor of those who have contributed, or are to contribute, to his wants, if such distribution is voluntarily made. As was said in Mackall v. Mackall, 135 U. S. 167, 172, 10 Sup. Ct. 705, 707 (34 L. Ed. 84):

"It would be a great reproach to the law if, in its jealous watchfulness over the freedom of testamentary disposition, it should deprive age and infirmity of the kindly ministrations of affection, or of the power of rewarding those who bestow them." Sawyer v. White, 122 Fed. 223, 225, 58 C. C. A. 587, 589; McElroy v. Masterson, 156 Fed. 36, 40, 41, 84 C. C. A. 202, 206, 207; Alcorn v. Alcorn (C. C.) 194 Fed. 275, 280; Meyer v. Jacobs (C. C.) 123 Fed. 900, 912.

[6, 7] The undue influence for which a deed or will may be avoided must be such as effectually deprives the grantor or testator of the exercise of his free will and coerces him to substitute another's will for his own. Conley v. Nailor, 118 U. S. 127, 133, 135, 6 Sup. Ct. 1001, 30 L. Ed. 112. "If it does not appear," says the Supreme Court in Ralston v. Turpin, 129 U. S. 663, 670, 9 Sup. Ct. 420, 423 (32 L. Ed. 747), "that he was incapable, by reason of physical or mental debility, of exercising a discriminating judgment in respect to the disposition of his property, or was driven to make the gifts in question against his own wishes, and under some influence that he was unable, no matter from what cause, to resist, the relief asked must be denied. 'The undue influence for which a will or deed will be annulled,' this court said in Conley v. Nailor, 118 U. S. 127, 134 [6 Sup. Ct. 1001, 1005 (30 L. Ed. 112)], 'must be such as that the party making it has no free will, but stands in vinculis.'"

Guided by these rules of law, the evidence, arguments, and briefs have been considered. They have convinced that the deeds in question in this case were not carelessly or hastily made, but that they were the means of the accomplishment of a preconceived plan thoughtfully adopted and steadily pursued by the Fenstermachers from 1883 until their respective deaths. In the rural districts of the eastern part of this country for more than 150 years it has been a practice, so common that it is not beyond judicial notice, for persons who owned farms and had several children to give the home farm to one or two of the children in consideration that he or they would carry it on and care for the parents in the later years of their lives, and to let and expect the other children to seek their fortunes elsewhere, free from the duty to care for their parents. The evidence in this case has convinced that the key to the conveyances of Mr. and Mrs. Fenstermacher that are here challenged is that as early as 1882, when they bought this land, they conceived the plan to follow this practice, and in that way to insure their support and comfort and a home for themselves and those of their children who should care for and support them. To this end they caused the land to be conveyed to their son Peter and their married daughter Mrs. Ludwig, whose husband and Peter at first undertook to operate it. To the same end in 1881 they caused the land to be conveyed to Mrs. Fenstermacher, and subsequently arranged that the two daughters and their husbands should live upon and carry on the farm free of rent while the parents moved to town. Mr. and Mrs. Bressler were offered the opportunity and the option of operating the farm on the same terms that were offered to Mr. and Mrs. Ludwig. They first chose to accept it, but shortly chose to reject the opportunity and the offer and to seek their fortunes elsewhere, while Mr. and Mrs. Ludwig accepted the offer, lived upon and carried on the farm from 1883 until 1908, and from 1893 to 1908 boarded and cared for their parents at the farm, and from 1908 until their respective deaths in 1914 and 1915 at their home in West Point. To the same end in 1906, after Mr. and Mrs. Ludwig had remained with them and carried on the farm for 23 years, they conveyed it to Mrs. Ludwig, for one dollar and a recited annual consideration of $600 during the life of the sur-

vivor of them, a consideration evidently inserted to insure the suitable board, clothing, care, and comfort of the grantors during their lives. To carry out this plan, they made the second deed to convey the omitted 40 acres in 1910, and to the same end, after Mr. Fenstermacher's death, Mrs. Fenstermacher made the quitclaim deed to Mrs. Ludwig. Regarding this deed, Mr. Steuffer, who drew it, testified: That he had been connected with the West Point National Bank since 1885, and had been acquainted with Mr. and Mrs. Fenstermacher for many years; that Mr. Ludwig told him Mrs. Fenstermacher wished to see him, and he went to see her, and she gave him the data with which to prepare the deed; that he went back to his office to prepare it and then returned to her house, and she executed it on the 17th of April, 1914; that he talked with her in the German language; that he thought there was no impairment of her mental powers; that she was pretty good for her age; that no one said anything to him about the way in which the deed should be drawn except Mrs. Fenstermacher; that after he drew the deed he read it and translated it to her in German so that she would understand what it was, and she signed it on April 17, 1914.

In the light of this evident plan and the fact that the deeds of 1906 and 1910 were made when Mr. Fenstermacher was in good health and unimpaired mental powers, the evidence not only fails to convince that either Mr. or Mrs. Fenstermacher were, when they made their deeds, without mental capacity to understand what they were doing, or to determine intelligently whether or not they should make the deeds, but it leaves no doubt that each of them did understand what they were doing, and that they did intelligently determine to make the deeds to carry out the preconceived intent and purpose to which they had devoted this land from the time they bought it.

Nor has the complainant established by a fair preponderance of the evidence that Mrs. Fenstermacher was driven to make any of the deeds in question against her own wishes, or under any influence which she was unable to resist that deprived her of the exercise of her free will. The only evidence to that effect is the testimony of Mr. and Mrs. Bressler, interested witnesses, to what they testify that Mrs. Fenstermacher said about the deeds of 1906 and 1910 in 1914, on the day after her husband's funeral when she was in the depths of her grief, and this testimony is met by the denial of much of its substance by Mrs. Ludwig and by the patent and persuasive fact that never after the deed of 1906 was made until that day, so far as the evidence discloses, did either she or her husband complain or object to or question the validity of the deed of 1906, or that of 1910, that four years after they made the first deed they made a second deed of the land described in the first deed, and that after the death of her husband she quitclaimed all the property to Mrs. Ludwig. If the deed of 1906 had been made against the will of either Mr. or Mrs. Fenstermacher, they would undoubtedly have challenged it, or complained of it to Mr. and Mrs. Bressler while they were both in life, and if they desired would have had it revoked.

The conclusion is that the decree below should be reversed, with costs against the complainant, and the case must be remanded to the court below, with directions to overrule the exceptions to the master's report and to render a decree for the defendants.

It is so ordered.

CARLAND, Circuit Judge (dissenting). The errors assigned were substantially as follows:

(1) That the court erred in finding that the deeds were obtained by undue influence.

(2) That the court erred in finding that the Fenstermachers were mentally incompetent and incapable of making the deeds. There was no assignment that the court erred in finding that the deeds were obtained by fraud.

These assignments of error accompanied 330 printed pages of testimony and were simply reprinted in the brief as assignments of error. I do not think this was a compliance with Rule 24.

Coming to the merits, the majority opinion says:

"And the grounds of the suit are that at the time the respective deeds were made, Mrs. Fenstermacher, who held the title to the farm from 1882 to 1906, had not sufficient mental capacity to execute a valid deed, and that she was induced to make each of these deeds by the undue influence of Mrs. Ludwig."

Of course, want of mental capacity and undue influence have, in cases of this kind, a well-known meaning. The complaint, however, alleged:

"But the same were obtained and procured through the manipulation, fraud, and deceit of the defendants and each of them, and by means of the influence and control which said Mary C. Ludwig had over her said mother and unduly exercised."

The prayer of the complaint asked that the several deeds be declared not to be the acts and deeds of Caroline Fenstermacher, but that they were "procured by the fraud and undue influence of the defendant."

A careful reading of the evidence has convinced me that a clear case of fraud in the procurement of the deeds was made out by the plaintiff. The decision of the majority is, in my opinion, not only wrong on the facts, but convicts a mother, who the evidence shows loved her daughters wth equal affection, of conveying without consideration property of the reputed value of $75,000 to one daughter without giving the other anything. The mere statement of what was accomplished suggests something wrong.

I must dissent.

BROWN et al. v. FLETCHER et al. (two cases).

(Circuit Court of Appeals, Second Circuit. May 10, 1918.)

No. 191.

1. TRUSTS ⟸331—ACCOUNTING—CONCLUSIVENESS.
In a suit to establish a claim against a testamentary trustee by one not a bona fide purchaser from an assignee of the beneficiary, a decree of the Surrogate's Court, settling the trustee's accounts and directing the payment of the fund to the beneficiary was a good defense.

2. JUDGMENT ⟸683—BAR—JUDGMENT OF STATE COURT.
In a suit by one not a bona fide purchaser from an assignee of the beneficiary under a testamentary trust to establish a claim against the testamentary trustee and the beneficiary, a judgment of the Supreme Court of New York in a suit by the beneficiary against the trustee and the original assignee, holding that the assignment was usurious and void, was a good defense.

3. USURY ⟸72—CONTRACT OF SALE—EXPECTANT ESTATE—INQUIRY.
A contract by the beneficiary under a testamentary trust containing no words of loan or intimation of a borrowing, and which was in terms a contract of sale or assignment of his beneficial interest, did not prevent investigation of circumstances to test transaction for usury, as the purchaser of an expectant estate takes a risk which explains the small consideration, and the value on vesting is no criterion of the value when the bargain is made.

4. TRUSTS ⟸147(1)—TESTAMENTARY TRUST—ASSIGNMENT BY BENEFICIARY.
If the beneficiary under a testamentary trust, by a contract purporting to sell or convey his beneficial interest, surrendered no more than his chance of living long enough to reduce the fund to possession, he should be held to his bargain, though ill-advised.

5. USURY ⟸41—TRANSACTION—ASSIGNMENT OF BENEFICIAL INTEREST.
An absolute assignment of a beneficial interest under a testamentary trust in consideration of a loan of $5,000 or $6,000, which, less commissions, etc., netted about $3,500, and under which the lenders might receive $17,500, and were to pay the premiums on the beneficiary's life insurance assigned to them, whereby the lenders avoided any legal contingencies or dangers, and would receive the capital at all events, with unlawful additions, was usurious.

Ward, Circuit Judge, dissenting.

Appeals from the District Court of the United States for the Southern District of New York.

Bills by John A. S. Brown and Frank E. Schermerhorn, as trustees for Clara Schermerhorn under the will of Thomas Cunningham, deceased, against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the will of Conrad Braker, Jr., deceased, and Conrad Morris Braker. From decrees (244 Fed. 854) dismissing the bills, plaintiffs in each suit appeal. Affirmed.

Plaintiffs appeal from decrees dismissing bills, with costs. The father of defendant Braker left a will under which defendant Fletcher ultimately became trustee, inter alia, to retain the principal of certain portions of his estate (meantime paying his son, said defendant, the income) until in the case of one fund of $10,000 20 years had passed from testator's death, and as to another fund of $17,500 and upwards said son should reach the age of 55, at which dates the son defendant should receive the funds absolutely, if then living.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In 1901, 11 years after testator's decease, defendant Braker being then 43 years old and in receipt of a considerable income from his father's estate, sought to borrow money on these interests in expectancy. He got about $6,000 (less "commissions") in consideration of executing to one Rabe what purport to be absolute assignments or conveyances of all his "estate, right, title, and interest of, in and to" the funds aforesaid. Rabe was a "dummy" for one Burr, who shortly after organized the New York Finance Company, to which Rabe transferred what he had gotten from Braker. These plaintiffs, by divers conveyances not thought necessary to enumerate, assert the title Rabe obtained, and claim the additional protection of being bona fide purchasers without notice or knowledge of any equities of Braker's or defects in Rabe's or Burr's title. In 1910 defendant Braker was 52 years old, when the 20 years after his father's death expired, and the $10,000 fund fell in; and when he was 55, in 1913, the $17,500 fund likewise vested.

The suit to recover the $10,000 fund (Equity 7–231) was begun against Fletcher, trustee, alone in 1911, was dismissed on the merits in the District Court (203 Fed. 70), reversed and dismissed for lack of jurisdiction by this court (206 Fed. 461, 124 C. C. A. 367), but jurisdiction established by the Supreme Court (237 U. S. 583, 35 Sup. Ct. 750, 59 L. Ed. 1128), after which this court (231 Fed. 92, 145 C. C. A. 280) held (1) that a judgment of the Supreme Court of New York, dated February 5, 1912, in suit of Braker v. New York Finance Co. et al. (sufficiently described in above reported opinions) was not a defense, because the present plaintiffs "obtained their lien before suit was brought"; (2) that a surrogate's decree of August 2, 1912 (sufficiently described in 203 Fed. 70, supra), denying the fund to these plaintiffs, was also not a defense, because the proceeding in that court was not begun until after this action in equity was instituted; and (3) that Braker was a party to this action, so necessary that in his absence "the court cannot adjudicate the case." Thereupon an amended bill was filed, and subpœna served on Braker April 20, 1916. So far as he is concerned, this action is no older than that service, and in his answer he sets up both judgment and decree as bars to suit.

The action to recover the $17,500 fund (Equity 10/112) was begun in 1913, and the proceedings in the Supreme and Surrogate's Courts do not affect it. The bill was dismissed in the District Court for lack of jurisdiction, which was, however, established on appeal (235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374), and the cause returned for trial. The two actions were then tried together, and both transactions held to be usurious loans; the testimony showing circumstances both as to relation of parties and documents executed similar to that considered in a long line of decisions in the courts of this state (enumerated in Provident Life & Trust Co. v. Fletcher [D. C.] 237 Fed. 108), some of which relate to dealings under this Braker will, and by this defendant.

On this appeal, the contentions requiring consideration are, on appellee defendant's part, that it was fully shown and properly held below that as matter of fact these pretended sales of expectancies were in truth mere covers for usurious loans, that the doctrine of "catching bargains" invalidates both transactions, and that both the judgment and decree above mentioned are complete defenses as to the action first brought.

Fredric W. Frost, of New York City (Herbert C. Smyth, of New York City, and Monroe Buckley, of Philadelphia, Pa., of counsel), for appellants.

Selden Bacon, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). That the defendant Braker is an incompetent spendthrift, of no judgment whatever, may be quite true. His father's opinion of his wisdom is

plainly inferable from the will giving rise to this (and much other) litigation. But when in 1901 he either borrowed from or sold to the dummy Rabe, at rates which gave Rabe's principals the chance or certainty of profits at the rate of five to one, he was of mature years, not impoverished, except temporarily and by his own extravagances; he was no raw and needy youth. To such a man we are agreed that the doctrine of catching bargains has no application. A majority of the court do not find it necessary to express, as to the New York decisions above referred to and relied on below, either general assent or dissent. It is preferred to dispose of these appeals on narrower grounds.

[1, 2] In the suit for the $10,000 fund we hold that both the judgment of the Supreme Court of this state and the Surrogate's decree are good defenses in bar of any such claim as is here advanced against Braker, and unless plaintiffs can have decree against Braker they can never recover, if for no other reason than that their title flows from him alone. The trustee, Fletcher, is a stakeholder only.

In 231 Fed. 92, 145 C. C. A. 280, this court had not Braker before it; he was not then served. When he was brought in the Surrogate's decree was years old, and upon the trial of this case he proved a chain of connections between Burr, who was to all intents the New York Finance Company, and these plaintiffs, which convince us that Brown et al. are not bona fide pruchasers of or lienors upon anything the New York Finance Company had from or through Braker; on the other hand, they are but the cloak or cover for Burr, who from the beginning has been and still is in control of this litigation. There were not even purchasers "pendente lite," as was supposed; they are not purchasers at all, but tools of Burr. This is a finding of fact on the evidence now before us.

[3] As to the suit for the $17,500 fund, it is undoubtedly true that the paper title given to Rabe, and lying at the foundation of plaintiff's claim, contains no words of loan, nor any intimation of a borrowing by Braker. It is in terms a contract of sale and in the present tense. But this fact does not prevent investigation of the circumstances attending its execution and delivery, in order to test the transaction for usury. One who really buys an expectant estate, by the very nature of his purchase takes a risk, which explains and justifies the small price he pays. The value on vesting, the worth when danger of loss is past, is no criterion of value when bargain made.

[4] If Braker gave up or forewent no more than his chance of living long enough to reduce to possession his father's bounty, he should be held to his bargain, ill-advised and foolish as it may have been.

[5] In this instance, however, two things occurred which in the judgment of a majority of this court gave a different aspect to the transaction. Braker wanted $5,000, he got $3,500 (out of which he paid a broker $500 for introducing him to Rabe et al.), and it was substantially agreed that the difference between request and receipt was so great that the Rabe-Burr party agreed to pay the premiums on such life insurance as they wanted and for which Braker agreed to

apply. This was a part of the agreement, and as much a part as was the document of sale on which plaintiffs must and do rely. Policies were accordingly obtained, and assigned to Rabe, "creditor" of Braker. He certainly was no creditor, if there was a bona fide present sale made.

The second matter deemed important is that the assignment or document of transfer, after vesting in Rabe as fully as words could do it Braker's rights in and to the fund in question, continues thus:

"I do by these presents, for myself, my heirs and executors and administrators, covenant, grant, and agree to and with the said Frank L. Rabe, his heirs, executors, administrators, and assigns, that he, the said Frank L. Rabe, his heirs, executors, administrators, and assigns, shall and will as hereinbefore declared and set forth receive the net sum of [$17,500] when and as soon as [the fund of which the amount in suit is a part] shall become due and payable under and by virtue of the provisions [of Braker, Sr.'s, will], to have and to hold the same unto the said Frank L. Rabe, his heirs," etc.

Thus (first) by insurance at Braker's expense (the difference between his paying direct and having his price or advance abated in consideration of Rabe's paying being nil) covering the period of suspense when Braker might by dying prevent vesting, and (second) by Braker's covenant to pay out of whatever he had whencesoever procured, if the estate of Braker, Sr., proved valueless, the $3,500 principal of plaintiff's assignors was placed beyond the hazard of every contingency, except inability to collect out of Braker or his insurers, as the case might be. This avoidance of legal (as distinguished from natural) contingencies or dangers is one of the oldest marks of usury, when such elimination of genuine hazard secures gains above lawful usance. Chesterfield v. Janssen, 2 Vesey, 125; Colton v. Dunham, 2 Paige (N. Y.) 272. And as to the effect of such superadded personal liability as that of Braker's, see Leavitt v. Enos, 155 App. Div. 584, 140 N. Y. Supp. 862.

It is said that Braker's covenant is no more than the guaranty considered in Orvis v. Curtiss, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810. We cannot think so, for there was in that case no advance or transfer of money from plaintiff to defendant, but (as definitely found) a joint venture or "contract of partnership," with a guaranty against positive loss by one partner to the other. Here any personal responsibility is utterly inconsistent with that present sale of a real contingency on which alone plaintiffs can securely rest.

It follows that, without considering the wholly contradictory and irreconcilable tale told by Braker on one side and Burr et al. on the other, as to what was contemporaneously said, we find the written or admitted words evidencing the contract made, such as to show something more than and different from the purchase of a contingency, viz. an avoidance of all hazard except that of being paid by Braker or his insurers, whose obligation was held by Braker's "creditor"—i. e., Rabe or his assignees. From this apparatus of papers plaintiff cannot escape. The "treaty was for a loan." Every effort was made to avoid that word by those furnishing the money, but when it was furnished the would-be borrower had in substance and

effect agreed to "return the capital at all events" with unlawful additions. This is usury. Dowdall v. Lenox, 2 Edw. Ch. [N. Y.] 274.

Decrees affirmed, with one bill of costs.

WARD, Circuit Judge (dissenting). Unless we are to hold that there can be no such thing as an improvident sale of an expectancy in a decedent's estate, on the ground that an attempted sale must be regarded as a cover for a loan of money on usury, the assignments by Braker to Rabe of his legacies under the fourteenth and fifteenth articles of his father's will were sales. The instruments he executed expressly so stated, and the testimony of the witnesses to the same effect is overwhelming. There was in neither assignment any promise by Braker to repay the money he received. It is true that in the assignment of seven-tenths of his legacy of $50,000 under the fifteenth article of the will he guaranteed that it should produce $35,000 to the purchaser. In the case of Orvis v. Curtiss, 157 N. Y. 657, 52 N. E. 690, 68 Am. St. Rep. 810, the defendant not only guaranteed plaintiff against loss of the money he put into a joint adventure in stocks, but also guaranteed him a profit of $5,000. The similarity between that case and this is that the court below held in it that the contract made was really a loan upon usury (12 Misc. Rep. 434, 33 N. Y. Supp. 589), whereas the Court of Appeals refuse to treat the contract as anything else than what it professed to be. In that respect the decision is an authority for our treating the transactions in this case as sales.

The policies of insurance on Braker's life were assigned to Rabe and his assigns, and the premiums were paid by him and them. It was natural and proper for the purchaser to take out insurance against the contingency of Braker's death before anything should vest in him under his father's will. I do not suppose that a loan upon bottomry would become usurious if the lender protected himself against loss by insuring the arrival of the vessel. That would be a perfectly independent contract.

The policies were not assigned to Rabe "as creditor," as stated in the opinion of the court. On the contrary, the form of assignment used was absolute, and not the form of assignment of the policy as collateral.

The complainants sued as owners of one-half the legacy under the fifteenth article and of the last installment of $10,000 under the fourteenth article of the will, by virtue of a sale of the same to them under a collateral note securing an advance of $10,000. The court holds that a decree of the surrogate in August, 1912, made after this suit had been instituted in the District Court, is res adjudicata as to the legacy under the fourteenth article of the will. It is quite clear, however, under Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, and Waterman v. Bank, 215 U. S. 33, 30 Sup. Ct.10, 54 L. Ed. 80, that the federal courts may determine the rights of citizens of other states in a decedent's estate, and that the state court must recognize that determination in making distribution. The complainants in this case, citizens of Pennsylvania, submitted their

claim to the legacy under the fourteenth article of the will to the District Court of the United States, and that court obtained jurisdiction of them and of the trustee and of the claim, which jurisdiction continued unless or until the bill should be dismissed. The fact that Braker was subsequently brought in as an indispensable party did not create jurisdiction in the court for the first time. The joinder related and enabled the court to render a decree with the same effect as if he had originally been a party.

Of course, if the complainants were mere tools of Burr et al., as the court finds, they are bound by the judgment in the state court action; but I think the proofs show that they were bona fide lenders of $10,000 four years before the action in the state court was brought. The proofs leave much to be desired in respect to straightforwardness of all the parties concerned, but for these reasons I think both judgments should be reversed.

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## THE WALTER ADAMS.

## SEABOARD FISHERIES CO. v. PIEDMONT & GEORGES CREEK COAL CO.

(Circuit Court of Appeals, First Circuit. June 21, 1918.)

Nos. 1327–1332.

1. MARITIME LIENS ⟸26—CONTRACT BASIS OF LIEN.
   A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature as to all its provisions, so as to be cognizable in admiralty.
2. ADMIRALTY ⟸14—JURISDICTION—"MARITIME CONTRACT."
   Admiralty has no jurisdiction over breach of a contract to furnish owners of 19 fishing steamers such coal as the 19 vessels might require during the season; such contract not being maritime in character, in that it did not begin and end in the necessities of a particular vessel for her own voyage.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]
3. MARITIME LIENS ⟸27—COAL—CONSTRUCTION OF STATUTE—"SUPPLIES FURNISHED TO VESSELS."
   Under Act June 23, 1910, giving a maritime lien for "supplies furnished to vessels," a lien does not attach to a vessel because of coal used by such vessel, where the coal, instead of being delivered to the vessel, was part of large quantity of coal delivered to the owner, to be used by any of its 19 fishing steamers; the owner determining the vessels to use the coal, the amount to be used by each vessel, and time of putting it on board—the coal, under such circumstances, not having been supplies furnished to a vessel.
4. MARITIME LIENS ⟸27—SUPPLIES FOR DESIGNATED VESSEL.
   Where specific supplies have been furnished to owner upon distinct understanding that they were for specified vessel, and owner, after delivery to him, has appropriated them to designated vessel, supplies have been furnished to vessel, within Act June 23, 1910, giving maritime lien for supplies furnished to vessels.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Libels by the Piedmont & Georges Creek Coal Company to enforce maritime liens against the fishing steamer Walter Adams and certain other fishing steamers; the Seaboard Fisheries Company, claimant. Decrees for libelant, and claimant appeals. Reversed, and cases remanded, with instructions to dismiss libels.

See, also, 240 Fed. 147.

Rathbone Gardner, of Providence, R. I., and Philip L. Miller, of New York City (Charles R. Haslam and Gardner, Pirce & Thornley, all of Providence, R. I., and Sullivan & Cromwell, of New York City, on the brief), for appellant.

John M. Woolsey, of New York City, and Frank Healy, of Providence, R. I. (Harry D. Thirkield, of New York City, on the brief), for appellee.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. Maritime liens, asserted by the libelant company upon each of the vessels proceeded against in these cases, for amounts of coal alleged to have been furnished to them respectively during the fishing season of 1914, have been sustained as valid by the District Court. The claimant appeals from the decrees, contending that upon the facts proved the libelant acquired no maritime lien upon either of said vessels.

There is little or no dispute as to the material facts. They are for the most part sufficiently set forth in the opinion below. The William B. Murray et al., 240 Fed. 147.

The libelant had no dealings regarding the furnishing of coal with either of the vessels libeled, through their officers in command; nor did any of its dealings with their owner regarding the coal it claims to have furnished relate to coal required at the time for use by either of said vessels, or to either of said vessels as distinguished from the other vessels included with them in a "fleet" of nineteen fishing steamers in all. Its dealings were only with the then owner of the entire fleet, referred to in the opinion below as the "Oil Corporation," which corporation was employing the fleet, in connection with lands and fishing factories belonging to it at Promised Land, on Long Island, in New York, and at Tiverton, R. I., in a manufacturing business. At the two above-named places the vessels of the fleet delivered fish taken on their successive trips, and also coaled for further trips.

The libelant did not deliver any of the coal it claims to have furnished directly to the vessels libeled, or either of them; nor does it appear to have delivered any of said coal to the Oil Corporation directly, either at Promised Land or at Tiverton. The coal for which it claims liens came to those places in five different shipments, on various dates in May, June and July, 1914. Four of said shipments were delivered, as the opinion below states, at Promised Land, and one at Tiverton. But all the shipments came to those places on barges which had taken the coal on board at the libelant's loading piers near New York City, where the libelant had agreed to deliver it under a previous general agreement with the Oil Corporation so to deliver such coal

as said corporation might require for its needs at Promised Land and at Tiverton, during said season, at agreed prices per ton; the delivery of all the coal being f. o. b. at said pier. The above facts regarding said shipments from the libelant's piers, not referred to in the opinion below, but appearing from the invoices and bills of lading relating to the shipments, indicate that delivery of all the coal so shipped to the Oil Corporation took place at the libelant's loading piers. In view of them, we do not think it can be taken as proved that the libelant delivered any of said coal to the Oil Corporation, under the above agreement for delivery, either at Promised Land or at Tiverton. But, even if such delivery can be taken as proved, there is no question that the coal included in the five cargoes was put on board the barges by the libelant at its New York piers without any understanding that it, or any definite part of it, was for either of the vessels libeled, or for any particular vessel of the fleet, or that all of it was for the vessels then composing the fleet. The first shipment, indeed, was expressly identified on the invoice as "coal for factory." There can be no doubt that, according to the understanding between the parties, some at least of the coal to be furnished would be needed in the factories, and the Oil Corporation was left, so far as any understanding with the libelant was concerned, to use the coal either in the factories or on the vessels of its fleet, as it might subsequently desire.

If the libelant can be said to have delivered any of the coal comprised in these five shipments to the Oil Corporation, at Promised Land or at Tiverton, there was still no understanding as to the coal so delivered, or any definite part of it, that it was for either of the vessels libeled, or for all of them, or even for all the vessels in the fleet, as distinguished from the factories; and, except that the coal was understood to be for use in its business as carried on at those places, its ultimate disposition was left as above for determination by the Oil Corporation subsequently to the making of the agreement regarding coal for the season, and subsequently to both its shipments and its delivery.

The five shipments were all charged by the libelant on its books to the Oil Corporation, without any entries charging any of it either to a specific vessel, or to specific vessels, or to the fleet; and they were billed to the Oil Corporation only, without any reference to vessels or fleet. When the first shipment to Promised Land arrived there, it was put into the Oil Corporation's bins, which already contained 1,068 tons previously received and paid for by the Oil Corporation in full, under the same general agreement. The remaining three shipments received at Promised Land were dumped on the same pile, and from the entire pile the Oil Corporation used coal as needed, for all the vessels in its fleet of nineteen, and also for running its boiler plant on shore at that place. The shipment received at Tiverton went upon the Oil Corporation's pier there, and was used by it in part for ten of the vessels belonging to its fleet as they needed it, and in part by its boiler plant on shore at that place. Among the vessels which took on board and used some part of the coal included in the five shipments were the vessels proceeded against in this case.

There was evidence tending to show how much coal each of said vessels took on board at Promised Land out of the entire stock at that place, and how much at Tiverton out of the entire stock there, after the five shipments had been received as above. The District Court determined the quantity of coal subsequently received and used by each vessel libeled, out of the coal included in said shipments, as follows: The respective quantities found to have been taken on board at Promised Land by each of said vessels respectively were reduced by an estimated proportion, being the proportion which the 1,068 tons in the pile at Promised Land, before the first of the above shipments to that place had been added thereto, bore to the whole quantity in said pile, after the coal included in said shipments had been added. To the quantities so ascertained were then added the quantities found to have been taken on board by each vessel libeled at Tiverton.

Whether the libelant has shown itself entitled to maritime liens upon these vessels respectively for the respective amounts of coal thus ascertained is a question to be determined, not between it and the owner at the time of said vessels, but between the libelant and the present claimant, who had nothing to do with the libelant's agreement with the Oil Corporation, nor with ordering, receiving, or using the coal shipped under it as above, and who did not become owner of said vessels until after they had received and used the coal. The Oil Corporation mortgaged its property in 1913, including these vessels, to secure its bonds. A bill to foreclose the mortgage so given had been filed in the same District Court wherein the decree now appealed from was rendered. There was a decree of foreclosure upon said bill, ordering the sale of the mortgaged property, and under it these and the other vessels of the fleet were sold April 24, 1915, before this suit was begun. The claimant was the purchaser of these vessels at the sale. The present libels were afterwards filed against them on June 16, 1915. While the sale did not divest valid maritime liens to which the vessels were subject when sold, the question of the validity of the liens asserted in this suit is, so far as the present claim is concerned, a question as to the validity of secret or unrecorded incumbrances.

As to the libelant's original agreement with the Oil Corporation to furnish it with coal for the season, it was never completely embodied in any written document. It appeared that when this agreement was made there was a balance due for coal from the previous year, and that the Oil Corporation was known to be largely indebted, in view whereof there was an understanding between the parties to the effect that the latter should have a maritime lien for the coal it was to furnish, not for the above five shipments specifically, and upon the Oil Corporation's entire fleet, or such vessels belonging to it as might thereafter use any of the coal, not upon any specific vessels included in it. The District Court found it to have been understood by the parties "that the law would afford a lien upon the vessels for the coal and that the Coal Company would thus have security," and also understood that "a large part of the coal furnished was to be used by vessels of the fleet."

[1] A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty; and it is not enough that the contract is maritime as to some of its provisions—it must be maritime in its entirety. It was long ago said by high authority:

"In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime." Story, J., in Plummer v. Webb, 4 Mason, 380, Fed. Cas. No. 11,233.

The principle stated has since been repeatedly recognized and acted on. The following District Court decisions may be cited: Diefenthal v. Hamburg, etc., 46 Fed. 397, 399; Richard v. Hogarth, 94 Fed. 684; The James T. Furber, 129 Fed. 811; Id., 157 Fed. 128; Berton v. Tietjen, etc., Co., 219 Fed. 763—also the following decisions on appeal: The Harvey and Henry, 86 Fed. 657, 30 C. C. A. 330; Pacific, etc., Co. v. Leatham, etc., Co., 151 Fed. 440, 80 C. C. A. 670; The Pennsylvania, 154 Fed. 9, 83 C. C. A. 139.

[2] Nor, even if the libelant's agreement with the Oil Corporation had covered no coal for factory use, and had been an agreement only for the furnishing of such coal as the nineteen vessels of its fleet might thereafter require during the season, could it be regarded as maritime in character. It did not "begin and end in the necessities of a particular vessel for a particular vessel for her own voyage," as a contract for supplies must, in order to be within admiralty jurisdiction. "Where owners group together a large number of vessels, and make annual contracts for their supplies, the admiralty jurisdiction does not include them because the reason for it does not." The Oil Corporation could not, therefore, have sued the libelant in admiralty for failure to supply coal according to the agreement, nor could it have been sued in admiralty for a refusal to take and pay for coal offered under the agreement. Diefenthal v. Hamburg, etc. (D. C.) 46 Fed. 397, already cited; S. S. Overdale Co. v. Turner (D. C.) 206 Fed. 339.

Part of the agreement is said to have been that the libelant should have the security of a maritime lien for such coal as it should furnish thereunder. It may well be doubted whether, in a contract nonmaritime in character as above, a maritime lien for supplies later to be furnished could ever be created by express stipulation therein on the part of the vessel owner. It is at any rate clear, as pointed out in the opinion of the District Court, that no such security could be created upon the entire fleet, irrespective of what use should be made of the coal, nor upon particular vessels of the fleet for coal furnished to the other vessels. Astor, etc., Co. v. E. V. White, etc., Co., 241 Fed. 57, 154 C. C. A. 57, L. R. A. 1917E, 526. Whenever maritime liens created by express contract with the owner have been sustained, the agreed liens have been upon vessels or freights specified at the time of the agreement, and for supplies or advances then agreed to be furnished to them specifically upon such specific credit, and afterward so furnished. The evidence as to the precise agreement made in this case as to liens upon the Oil Corporation vessels is far from definite, and by no means such as would be sufficient in any event for the

establishment of a maritime lien by express consent of the owner. The general manager of the Oil Corporation testified that, as he understood, a maritime lien on the entire fleet should be security upon which the libelant was to furnish coal; but to such an agreement no effect can be allowed, as has been stated. We regard the evidence as establishing, at most, such an understanding as the District Court found to have existed—that "the law would afford a lien upon the vessels for the coal"; that is, according to the libelant's present contention, upon each vessel afterwards supplied, for the coal supplied to her.

Under the circumstances of this case, the libelant has a lien upon any one of these vessels, if it has proved that it "furnished" the coal received by her as above "to the vessel," upon the order of her owner, within the meaning of Act June 23, 1910, c. 373, 36 Stats. 604 (Comp. St. 1916, §§ 7783-7787), but not in the absence of such proof. This, under the circumstances shown, we consider the only lien which the law afforded it.

Assuming that the libelant can be said, in the case of any one of the vessels, to have "furnished to" her the coal she received, in the statutory sense, the furnishing may be said to have been "upon the order of her owner." But the question is whether any such assumption can be made, in view of the facts that, after turning over to the owner of the fleet the entire quantity of coal shipped as above, the libelant left it wholly to the owner to select, out of the fleet, the particular vessels by which the coal was to be received and used, and to determine the particular part of said quantity to be put on board each such vessel, as well as the particular time for putting it on board.

The federal statute enlarged the maritime law as it had previously stood, by permitting the acquirement of maritime liens upon vessels, for supplies furnished to them, as well in their home ports as in foreign ports. This it accomplished by providing that proof of furnishing such supplies to a vessel should be sufficient proof of credit given to the vessel therefor; definite proof of credit so given having always previously been held necessary, whenever what had been furnished had been furnished at the port of the owner's residence. We see no reason to believe that the statute intends the same result to be accomplished without proof that the supplies for which a lien is claimed have been furnished directly to the vessel, and not merely furnished to the owner without definite and distinct reference to her.

When the statute was passed in 1910, no principles of the maritime law of the United States were more fully recognized or more firmly adhered to than those set forth in the familiar statements by the Supreme Court in Vandewater v. Mills (The Yankee Blade) 19 How. 82, 89, 15 L. Ed. 554, to the effect that maritime liens are stricti juris, because they may operate to the prejudice of general creditors and purchasers without notice, and that they cannot be extended by construction, analogy, or inference.

It was also well settled, prior to the statute, that credit given by a materialman to a vessel was not proved unless supplies or materials intended for her were shown to have been furnished directly to her. While actual delivery by him on board, or (in the case of materials)

actual incorporation in the vessel, was not necessary under all circumstances to constitute such direct furnishing by him, mere delivery to the owner without special reference to the particular vessel, was not accepted as sufficient proof; there must have been at least such delivery to the vessel sought to be charged with a maritime lien as would have bound her under a contract of affreightment for transportation of the goods by her. See The James H. Prentice (D. C.) 36 Fed. 777, 781, and cases cited; The Vigilancia (D. C.) 58 Fed. 698, 700, and cases cited; The Cimbria (D. C.) 156 Fed. 378.

In like manner, it had been held necessary, in order to establish an admiralty lien upon a vessel for maritime services rendered to her, that the services should appear to have been rendered to the particular vessel sought to be charged. Proof that they had been rendered under a contract with her owner for future services to a number of his vessels indiscriminately, at an agreed price per day or for the season, though including the particular vessel, was not accepted as sufficient for the purpose. The Newport, 114 Fed. 713, 52 C. C. A. 415; The Alligator, 161 Fed. 37, 88 C. C. A. 201. In the latter case it was said by the Court of Appeals for the Third Circuit:

"A lien does not and should not attach for a supposed credit given to a vessel unless the services or supplies are clearly shown to have been rendered or furnished to the particular vessel to which the credit is given."

The statute of 1910 has not, in our opinion, made proof that the supplies for which a maritime lien is claimed were furnished directly to the particular vessel by the materialman any less necessary than before, nor does it afford any ground for attaching any meaning other than that previously recognized to the expression "furnished to a vessel." The decisions made since the statute was passed have insisted upon the same necessity and have given the same effect to the words quoted. See The Geisha, The Bethulia (D. C.) 200 Fed. 865, 876; Astor, etc., Co. v. White, etc., Co., 241 Fed. 57, 154 C. C. A. 57, L. R. A. 1917E, 526; The Cora P. White (D. C.) 243 Fed. 246.

The statute with which we are here concerned must thus be regarded as differing materially in its terms from state statutes purporting to give liens—which may or may not be maritime liens—for supplies or materials furnished "for" or "on account of" a vessel, or for materials furnished "in, or about, or during, her construction," like the Maine statute considered in The Kiersage, 2 Curtis, 421, Fed. Cas. No. 7,762, or the Massachusetts, Michigan, and Virginia statutes referred to in The Geisha (D. C.) 200 Fed. 865, 867, 868. In Berwind-White, etc., Co. v. Metropolitan, etc., Co. (C. C.) 166 Fed. 784, affirmed American Trust Co. v. W. & A. Fletcher Co., 173 Fed. 471, 97 C. C. A. 477, referred to in the opinion below, the Court of Appeals for this Circuit sustained liens claimed for machinery which had gone into each of two vessels respectively while being constructed, under a single contract to furnish machinery for both, but which did not appropriate any of it specifically to either. The liens so sustained, however, relating as they did to construction, were not maritime liens; nor were they asserted in an admiralty court. See 173 Fed. 480, 97

C. C. A. 477. The decision sustaining them, made in an equity suit, gave effect to a New Jersey statute with reference to which the machinery had been contracted for, which statute purported to secure by a lien any debt contracted by the owner of a vessel "on account of" any materials furnished "for or towards the building, repairing, furnishing or equipping such vessel." 166 Fed. 785. But the agreement here relied on must be taken to have had reference to the terms of the above federal statute, and the parties to have understood that "the law would afford a lien" upon any one vessel of the Oil Corporation fleet for such coal only as might be "furnished to" her according to the accepted meaning of that expression. The question here is whether compliance with the terms of that statute is proved, not whether any underlying equity can be found which might support a lien in the libelant's favor.

[3] We are unable to believe, in view of all the above, that the provisions of the statute can properly be understood in the less restricted sense accepted by the District Court, according to which, although the libelant had obtained no lien upon any vessel in the Oil Corporation's fleet when it parted with its coal by delivery to said corporation, liens in its favor might afterward be created by the Oil Corporation's subsequent acts in selecting particular vessels out of said fleet to receive portions of the coal which had been so delivered.

[4] Where specific supplies or materials have been furnished to the owner upon a distinct understanding that they were for a specified vessel, and the owner has, after delivery to him, appropriated them to the vessel so designated between the parties, they have been held to have been furnished to her in the sense of the statute; and maritime liens for them under it have been sustained. Ely v. Murray, etc., Co., 200 Fed. 368, 118 C. C. A. 520; The Yankee, 233 Fed. 919, 147 C. C. A. 593.

The Court of Appeals for the Third Circuit was careful, in the case last cited, to limit its decision as follows:

> "We hold that a materialman may make actual delivery of supplies to a vessel in the maritime sense, by causing them to be transported by rail and water carriers by interrupted stages from their point of origin to the vessel side, when the transaction is begun by a valid order indicating that the supplies are for the vessel and are to be delivered to her, and is completed by an actual delivery to the vessel consistent with the instructions of the order and the intentions of the parties giving and accepting it."

Further than this no court had gone, in interpreting the provisions of the statute here in question, prior to the decision here appealed from. We are obliged to regard the construction adopted by the court below as one not intended by the statute.

We therefore hold that the District Court erred in sustaining the liens asserted, upon the evidence before it. This conclusion renders it unnecessary to consider certain other errors assigned.

The decree of the District Court is reversed, and the cases are remanded to that court, with instructions to dismiss the libels. The appellant in each case recovers its costs of appeal.

## In re WEIDHORN.

### Petition of LEVY.

(Circuit Court of Appeals, First Circuit. May 28, 1918.)

No. 1302.

1. BANKRUPTCY ⟸440—JURISDICTION OF REFEREE—REVIEW—"QUESTION OF PROCEDURE."

The question raised in the District Court by denial of a referee's jurisdiction to investigate the merits of a controversy under the forms of a plenary suit by the trustee is a question of procedure, which, under Bankr. Act, § 24b (Comp. St. 1916, § 9608), may be raised before the appellate court by petition to revise, though a decision on the merits, had there been jurisdiction, could have been reviewed only on appeal.

2. BANKRUPTCY ⟸224—JURISDICTION OF REFEREE—SUIT TO AVOID TRANSFERS.

In a case referred generally, after adjudication, under Bankr. Act, § 22 (Comp. St. 1916, § 9606), and according to General Order XII, whereby all proceedings, except such as are required to be had before the judge, were thereafter to be had before the referee, who was to perform duties he was empowered by the act to perform, the referee had jurisdiction of a bill in equity, filed by the trustee under section 70e (Comp. St. 1916, § 9654), to avoid transfers in fraud of creditors; nothing in the act or general orders expressly requiring such proceedings to be had before the judge, and sections 1(7), 38(4), 42a, 42c (Comp. St. 1916, §§ 9585, 9622, 9626), and General Order III, permitting an inference in favor of the referee exercising jurisdiction.

Petition to Revise in the Matter of Law the Proceedings of the District Court of Massachusetts.

In the matter of J. Herbert Weidhorn, bankrupt. On petition of Benjamin A. Levy, trustee, to revise a decree directing the vacation of a decree made by the referee on a bill in equity. Reversed.

For opinion below, see 243 Fed. 756.

Lee M. Friedman, of Boston, Mass., and Albert S. Woodman, of Portland, Me. (Swift, Friedman & Atherton, of Boston, Mass., on the brief), for petitioner.

William M. Blatt, of Boston, Mass., for respondent.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The order or decree of the District Court, which this petition seeks to revise, directed the vacation of a decree made by the referee upon a bill in equity, filed and answered before him, and sustained by him after hearing the merits of the case as in plenary proceedings before the court, and it directed the dismissal of the bill on the ground that the referee had been without jurisdiction so to entertain or hear it.

[1] 1. We are asked to dismiss the petition to revise on the ground that it is not a petition within section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9608]). It is contended that the question raised as to the referee's jurisdiction can be brought before us only by appeal under section 24a.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The bill in equity, filed by the trustee in bankruptcy of the estate under administration, sought to avoid two conveyances by the bankrupt to his brother, on the alleged ground that they had been made with intent to hinder, delay, or defraud his creditors. The referee held the conveyances void, and ordered the defendant to account for or restore the property transferred.

The defendant's petition for review of the referee's decree by the District Court alleged only that the above findings and conclusions were not justified by the evidence. It did not allege that the referee had acted without jurisdiction. The referee's certificate to the District Judge, however, recited that the defendant had contended "that the referee, sitting as a court of bankruptcy, has no jurisdiction," and that he had ruled to the contrary. The District Judge dealt only with the question of jurisdiction, undertaking no consideration of the merits of the controversy passed upon by the referee.

The trustee's present petition to this court, while it asks reversal of the decree of dismissal, and for affirmance of the decree entered by the referee, raises before us only the question of the referee's jurisdiction. If he had jurisdiction, his result on the merits remains to be reviewed by the District Court.

Since the petition before us thus presents only the preliminary question of the referee's jurisdiction to proceed on the bill before him, we think it raises rather a question of procedure, under section 24b, than a "controversy arising in bankruptcy proceedings," within the meaning of section 24a. Such "controversies" arise over steps in bankruptcy proceedings which the court or referee has jurisdiction to take or refuse to take. When the referee's jurisdiction to investigate the merits of a controversy like this in summary proceedings is attacked, the question is properly raised before the Appellate Court by petition to revise an order of the District Court sustaining such jurisdiction. Schweer v. Brown, 195 U. S. 171, 25 Sup. Ct. 15, 49 L. Ed. 144; Shea v. Lewis, 206 Fed. 877, 124 C. C. A. 537; Gibbon v. Goldsmith, 222 Fed. 826, 138 C. C. A. 252. We see no sufficient reason to doubt that the question raised by a denial of the referee's jurisdiction to investigate the merits of such a controversy under the forms of a plenary suit may be equally well raised by petition to revise. The question is one of law only. That a result on the merits, had there been jurisdiction, could have been reviewed here only on appeal, does not prove that we are without power to determine the question of jurisdiction under such a petition as this.

[2] 2. The case had been referred generally, under section 22 of the Bankruptcy Act (Comp. St. 1916, § 9606), and according to General Order XII. The reference was not for any special or limited purpose. According to clause 1 of said general order, "all the proceedings except such as are required by the act or by these general orders to be had before the judge," were thereafter to be had before the referee, and according to clause 2 of said order the referee was thereafter to perform the duties which he was "empowered by this act to perform" in the matters arising in the case referred to him. We are unable to agree with the learned District Judge that "all the pro-

ceedings," in clause 1, must be taken to mean only such proceedings of the bankruptcy courts as have been distinguished from controversies arising in bankruptcy proceedings for the purposes of section 24. We think the order requires a broader construction, in view of all its provisions, and of other provisions applicable, found in the act.

Nothing either in the act or in the general orders expressly requires the proceedings upon a bill filed by a trustee like this, whereof "any court of bankruptcy" has jurisdiction under section 70e (Comp. St. 1916, § 9654), to be had before the judge. On the contrary, section 38 (4), being Comp. St. 1916, § 9622, invests the referee with jurisdiction, "subject always to a review by the judge," "to perform such part of the duties (with express exceptions not here applicable) as are by this act conferred on courts of bankruptcy and as shall be prescribed by rules or orders * * * except as herein otherwise provided."

Neither in the act nor the rules nor the orders referred to are any provisions found which exclude such cases from the general operation of this section. The jurisdiction given by section 70e, over such a proceeding, is in equity, as affording a remedy more adequate and complete than can be had at law. Wall v. Cox, 101 Fed. 403, 41 C. C. A. 408; Pond v. New York, etc., Bank (D. C.) 124 Fed. 992; Davis v. Gates (D. C.) 235 Fed. 192, 195. There are certain injunctions which only the judge can order (Gen. Order XII, 3); but no such injunction was sought by the bill which the trustee filed.

Section 42a of the act (Comp. St. 1916, § 9626) provides for the keeping of records of proceedings in cases before the referee corresponding to those kept in equity cases before the federal courts. Section 42c makes the records so kept part of the records of the court, when certified and transmitted by the referee as there required. By General Order III, process, summons, and subpœnas, under the court's seal and signed by the clerk, are to be furnished referees upon application therefor. In view of these provisions, we are not prepared to agree with the District Judge that to affirm the referee's jurisdiction in cases like this would amount to creating a new court having concurrent equity jurisdiction with the state courts and with the District Court. The jurisdiction so exercised would be that of the District Court as a court of bankruptcy, though exercised by an officer of that court given for defined purposes, the powers of the court, with the right to issue its process, always, of course, subject to review by the judge.

Section 1 (7) of the act (Comp. St. 1916, § 9585) provides that "courts," as used in the act, may include the referee; and for the purposes here material we think section 38 (4) must be taken as intending to make that word as there used include the referee.

From the sections of the act above referred to an intent on the part of Congress may reasonably be inferred to permit the exercise of all functions of the bankruptcy courts not specifically excepted, by a number of local officers of the court, easily accessible throughout each district, instead of empowering the District Judge alone to exercise them, at the statutory places for holding his court. The provisions

have been recognized as manifesting such an intention. Remington, Bankruptcy (2d Ed.) §§ 496, 501; In re Steuer (D. C.) 104 Fed. 976, 980.

We find no decisive objection to the above view in the fact that matters involving considerable amounts will be thereby often left to the referee's determination in the first instance. The same is true regarding matters as to which the referee's jurisdiction under the act is unquestioned. It is true that the referee cannot punish for the contempts referred to in section 41, but must certify the facts to the judge for his action. This, however, is only matter of procedure, and is also applicable to proceedings whereof the referee's jurisdiction is unquestioned. That the referee has jurisdiction to act upon such a bill is the view which seems to us most in accordance with the general scheme contemplated by the act for the primary hearing and determination of such controversies as are likely to arise between trustees of estates and adverse claimants. If the property in controversy here had been in the trustee's possession and claimed from him, or a lien upon it asserted, by the defendant, the referee's jurisdiction would have been undeniable, though the above objections to its exercise would have been no less applicable.

Such a construction of the above provisions of the act involves no substantial prejudice to any right of a defendant against whom such a bill is brought. If it were addressed to the judge, instead of the referee, filed, not with the referee, but in the clerk's office, and heard by the referee under directions from the court to ascertain the facts and report thereon, no one would doubt that the "duties conferred upon the bankruptcy court" in the case had been so far properly performed. The referee's report, with the evidence before him, if necessary, would then come before the District Judge for confirmation or disaffirmance, and the final decree of the court accordingly would follow. If heard and decided by the referee, as in this case, a petition for review would also bring the whole matter, with the evidence heard, before the judge, whose order affirming or disaffirming that made by the referee would also amount to a final decree by the District Court. We see no difference between the two methods of reaching a final result in the District Court sufficiently important to require the conclusion that the latter method cannot be one contemplated by the act. It will always be in the judge's power to prevent its adoption, as was not done here, by limiting the powers given the referee, in the order of reference.

No court of appeals has yet passed upon the question here raised. Conflicting decisions regarding it may be found, made in other District Courts either by the judge or a referee. In this district the decisions prior to that here appealed from have tended to sustain the referee's jurisdiction. In re Steuer, 104 Fed. 976, and In re Scherber, 131 Fed. 121, are the earliest in date which refer to the question. Neither decides it, but the suggestions regarding it in Re Steuer show much disinclination on the part of the court to hold the referee wholly without jurisdiction. Jurisdiction has been exercised by the referee in similar cases, and its exercise, apparent from the record, and there-

fore subject to disapproval by the court at any stage of the proceedings, has met with no objection either from the parties or from the courts either on review or appeal, in not a few reported cases in this and other circuits. See particularly Clarke v. Rogers, 183 Fed. 518, 106 C. C. A. 64, and 228 U. S. 534, 33 Sup. Ct. 587, 57 L. Ed. 953; Studley v. Bank, 200 Fed. 249, 118 C. C. A. 435, and 229 U. S. 523, 33 Sup. Ct. 806, 57 L. Ed. 1313. We find no reason sufficient to require a decision involving the conclusion that the referee's jurisdiction was exercised in all such cases without statutory warrant, and must regard the decision that it was unlawfully exercised in this case as erroneous. We reach this conclusion without reference to the question whether or not there was seasonable objection to the jurisdiction by the defendant. It is not contended that his consent could have given a jurisdiction not given by the act.

Let there be a decree reversing the decree of the District Court, and remanding the case to that court for further proceedings in accordance with this opinion. The trustee in bankruptcy recovers his costs in this court.

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GRAHAM v. FAITH.

In re W. P. B. BROOKS & CO., Inc.

(Circuit Court of Appeals, First Circuit. May 28, 1918.)

No. 1347.

1. BANKRUPTCY ⟸224—JURISDICTION OF REFEREE—SUIT TO AVOID TRANSFER.
A referee has jurisdiction of a bill by the trustee to avoid a transfer in fraud of creditors.

2. BANKRUPTCY ⟸461—JURISDICTION OF REFEREE—REVIEW.
An appeal not taken in time required by Bankr. Act, § 25a (Comp. St. 1916, § 9609), from the affirmance by the District Court of the dismissal of a bill by a referee for want of jurisdiction may be treated as a petition to revise, which would be in time; the question raised being a question of law only reviewable on such petition.

Appeal from the District Court of the United States for the District of Massachusetts; Jas. M. Morton, Judge.

In the matter of W. P. B. Brooks & Co., Incorporated, bankrupt. A bill in equity by the trustee, John L. Graham, against Lillian M. Faith, before the referee, was dismissed for want of jurisdiction, and from an order of the District Court, affirming the dismissal, the trustee appeals. Reversed.

Harvey H. Pratt and John Comerford, both of Boston, Mass., for appellant.

Harlan H. Ballard, Jr., of Boston, Mass. (Ballard & Little, of Boston, Mass., on the brief), for appellee.

Before DODGE, BINGHAM, and JOHNSON, Circuit Judges.

DODGE, Circuit Judge. The trustee in bankruptcy of W. P. B. Brooks & Co., Incorporated, adjudged bankrupt in the District Court

on January 17, 1916, filed a bill in equity before the referee, to whom there had been a general reference of the case, to recover property alleged to have been preferentially transferred by the bankrupt to the defendant named therein, here the appellee. In her answer the defendant denied jurisdiction in the referee to hear and determine the merits of the bill. The referee sustained this objection and dismissed the bill for want of jurisdiction, on the authority of the decision previously made by the District Court in Re Weidhorn, 243 Fed. 756. From an order of the District Court, affirming the dismissal by the referee, the trustee appeals.

[1] A petition to revise the decree of the District Court in Re Weidhorn has been heard by us at the present sitting. No. 1302, Levy, Trustee, Petitioner, 253 Fed. 28, — C. C. A. —. The District Court had held in that case that the referee was without jurisdiction of a bill by the trustee to avoid a transfer by the bankrupt alleged to have been in fraud of creditors. We have reversed the District Court, and sustained the referee's jurisdiction, by a decree entered also on the date hereof. This requires a similar result in the present case.

[2] We have held in No. 1302 that the question of the referee's jurisdiction was properly before us upon a petition to revise under section 24b. We do not think, however, that we are required to dismiss the present appeal on the sole ground that the question presented should have been brought here by such a petition. The decree below in this case was entered February 25, 1918. The trustee was obliged by section 25a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9609]) to take his appeal within ten days, if it was to be taken at all. A petition to revise, however, he may bring, according to the decisions in this circuit, at any time within six months after the decree complained of. In re Worcester County, 102 Fed. 808, 42 C. C. A. 637. We see no reason why, under the circumstances, the appeal now before us may not be treated as a petition to revise. The question it raises is a question of law only. In re Williams' Estate, 156 Fed. 934, 84 C. C. A. 434; In re Blanchard Shingle Co., 164 Fed. 311, 90 C. C. A. 243.

Let there be a decree reversing the decree of the District Court and remanding the case to that court for further proceedings in accordance with our opinions in this case and in No. 1302 above referred to. The trustee in bankruptcy recovers his costs in this court.

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PUGET SOUND ELECTRIC RY. v. MATSON.

(Circuit Court of Appeals, Ninth Circuit. May 6, 1918.)

No. 3092.

1. APPEAL AND ERROR ⊜1002—REVIEW—VERDICT.
A verdict on conflicting evidence will not be reviewed on appeal.

2. APPEAL AND ERROR ⊜1060(4)—HARMLESS ERROR—MISCONDUCT OF COUNSEL.
Though plaintiff's counsel was guilty of misconduct in telling defendant's witness that he would have him punished for perjury, if he testi-

fied as he had on a previous trial, yet, where the witness did not change his testimony, and the jury disregarded its finding for plaintiff, the verdict need not be set aside because of the improper conduct of plaintiff's counsel.

3. TRIAL ⟸295(10)—INJURIES TO PASSENGERS—INSTRUCTION ASSUMING FACTS.
Where defendant asserted that plaintiff was not a passenger at the time of his injuries, a charge on the respective degrees of care to be exercised by passenger and carrier *held*, in view of the remainder of the charge, not to take that contention from the jury by assuming that plaintiff was a passenger.

4. CARRIERS ⟸321(6)—INJURIES TO PASSENGERS—ACTIONS—INSTRUCTIONS.
In an action for injuries received when plaintiff attempted to board defendant's car, where it was defendant's contention that plaintiff was not accepted as a passenger, and that car was moving at the time, instruction charging that if defendant did not encourage plaintiff to board the car, and he "flew" at the side of the car, defendant only owed him the duty to refrain from willfully injuring him, *held* not improper by reason of the use of the word "flew."

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Alexander Matson against the Puget Sound Electric Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Frank D. Oakley, of Tacoma, Wash., for plaintiff in error.

Ralph Woods and Charles L. Wescott, both of Tacoma, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. Plaintiff below, Matson, was injured by an electric train operated by the defendant below. Matson recovered a verdict. He testified: That at about 11 o'clock at night, when the train came into Pacific City bound for Tacoma, it stopped an instant at the depot and let one man off; that he was standing at the lower end of the depot when the train came in and stopped; that he started to go up to board the car, grabbed the handhold with his right hand and was going to step on the car, when the train started with a jerk, pulled him, overbalanced him, threw him around, and the wheel went sideways across his foot; that he saw no conductor; that when the train stopped before the accident he was standing close to a turnstile, which was at the end of the platform in front of the station house; that he did not run to catch the car; that the vestibule was open; that he saw a man when he came from the car, but he could not say what step the man got off of; that he passed the man near the turnstile; that when he boarded the car the door was opposite the door of the depot.

[1] There was evidence by the defendant to the effect that Matson was seen running on the road toward the depot about the middle of the street at the time that the train was standing at the depot. But, at most, there was a conflict of evidence, and the verdict upon the facts will not be disturbed by this court.

[2] The defendant asks reversal because of the misconduct of counsel for plaintiff during the trial. The defendant called a witness named

Shull, who testified to the effect that just before the accident he saw Matson running in the road, about the middle of the street, toward the depot. We quote from the redirect examination carried on by counsel for defendant:

"Q. Now, did you have a conversation this morning with Mr. Woods in reference to what would happen to you if you testified this morning? A. Mr. Woods spoke to me in the hall out there this morning. Q. What did he say with reference to your appearing here as a witness? A. He said, if I lied like I did the other time, he would send me to the penitentiary. Q. When did he tell you that? A. About an hour ago. Q. He told you, if you lied like you did the other time, he would have you arrested for perjury, didn't he? A. Yes, and have me sent to the penitentiary."

The witness was then excused, and the following colloquy was had:

"The Court (addressing Mr. Woods): If he lied the other time, why have you not had him arrested before this time?

"Mr. Woods: Your honor will remember that in the other trial (interrupted)—

"Mr. Oakley: I do not think it is necessary to have any explanation.

"The Court: If you made that remark in good faith (interrupted)—

"Mr. Woods: I made that remark in good faith.

"The Court: Why didn't you have him arrested when this trial came off? Why were you holding it over him when he was a witness in this case?

"Mr. Woods: The testimony is practically the same now as it was before, that he stood there 50 or 75 feet away; he testified that he recognized the witness; I understood the witness to testify in the other trial that he recognized this man (interrupted)—

"The Court: I did not ask you to rehash this testimony, but if you thought he had perjured himself, and if you were able to prove it, it would seem to be your duty to start that prosecution, and not try to influence his testimony in this trial by talking to him about it.

"Mr. Woods: Well, all I want is the truth, and I cannot see where he is telling the truth.

"Mr. Oakley: It is an attempt to intimidate a witness.

"(Defendant rests.)"

We are of one mind in condemning the conduct of counsel for Matson. It was highly discreditable, and the authority of the court might with all fitness have been invoked to punish in appropriate manner. Savin, Petitioner, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150. But there is nothing to warrant the belief that the witness was affected by the threat of counsel. His testimony as to the material points in the case was positive, and directly in support of the theory advanced by defendant. The jury weighed the credibility of the witness, and evidently did not believe his statements. As no direct prejudice to the rights of the defendant appears, we are not prepared to say that as a matter of public policy the District Court erred in not setting aside the verdict of the jury.

[3] Error is assigned because the court, in the course of an instruction explaining that it was the duty of a passenger to exercise ordinary care for his own safety when he attempts to board a train, said:

"* * * But the passenger, and the plaintiff in this case, by the same rule is not held to that high degree of care which the carrier was bound to use."

It is argued that by the instruction the plaintiff was to be considered a passenger, whereas defendant denied that he was in such relationship to it. But the force of such a contention is lost when the whole instruction is examined, for by its terms the court expressly told the jury that before applying the rules of degree of care it was necessary for them to find that the plaintiff had become a passenger, and that before he could be considered a passenger he must have either mounted upon the train, or been in such a position that by his conduct it was shown that he desired to board the train, and that he was either seen by the agents of the carrier operating the train, or that his actions were such that, if they were vigilant, they should realize that he desired to take the train. Furthermore, after the court concluded its main charge, and defendant had excepted to the possible assumption by the court that the plaintiff was a passenger, the court said to the jury that he "did not mean in any way to intimate that the plaintiff was a passenger; whether the plaintiff was a passenger or not, he was bound to exercise ordinary care for his own safety." We think this removed all chance of misunderstanding.

[4] The court also charged that if the train were moving, and the vestibule were closed, and there was no invitation on the part of the defendant company to encourage the plaintiff in any way to board the car, and he "flew" at the side of the car, defendant did not owe him the exercise of ordinary degree of care, and only owed him the duty of refraining from willfully and purposely injuring him. The defendant criticized the statement of the court that, if the plaintiff "flew" at the side of the car, defendant owed him no duty, except as explained. We cannot think, however, that there could have been any prejudice to the defendant by the use of the word "flew." The meaning of the court was evidently that, if the plaintiff ran for the car after the vestibule was closed and the train was moving, the defendant carrier was relieved of the obligation to exercise that degree of care which was imposed upon it, if he had been a passenger seeking to board the train when it was standing still.

When the whole charge of the court is considered, we believe it fairly stated the law, and that none of the assignments of error is well founded. The judgment is therefore affirmed.

Affirmed.

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FIRTH et al. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. May 3, 1918.)

No. 1606.

1. INDICTMENT AND INFORMATION ⟸87(8)—AVERMENT OF TIME.
An averment in an indictment that the conspiracy charged was formed "on the ——— day of May, 1917," *held* sufficiently definite, where the statute charged to have been violated was enacted on May 18, 1917.

2. CONSPIRACY ⟸43(1)—SUFFICIENCY OF INDICTMENT.
An indictment for conspiracy is not bad for indefiniteness, where it alleges the purpose of the conspiracy, and describes the precise methods taken for carrying it out.

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3. CONSPIRACY ⟸33—TO DEFRAUD UNITED STATES—OBSTRUCTING REGISTRATION FOR MILITARY SERVICE—"FUNCTION OF GOVERNMENT."
A conspiracy to prevent persons of draft age from registering as required by law is one to defraud the United States by obstructing a "function of the government."
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Governmental Function.]

4. CONSPIRACY ⟸48—TO PREVENT DRAFT REGISTRATIONS—INSTRUCTIONS.
Instructions, in a prosecution for conspiracy to defraud the United States by preventing registration of persons for military service, approved.

In Error to the District Court of the United States for the Southern District of West Virginia, at Huntington; Benjamin F. Keller, Judge.

Criminal prosecution by the United States against Edwin Firth, Hilton Bias, Raymond Green, and Henry Howes. Judgment of conviction, and defendants bring error. Affirmed.

Seymour Stedman, of Chicago, Ill., for plaintiffs in error.
Lon H. Kelly, U. S. Atty., of Gassaway, W. Va.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

WOODS, Circuit Judge. [1] The defendants were convicted under an indictment charging conspiracy "on ——— day of May, 1917, * * * to defraud the said United States, by impairing, obstructing, and defeating a lawful function of the government of the said United States, to wit, the registration for military service of all male persons between the ages of twenty-one and thirty, both inclusive, as provided by the act of Congress passed May 18, 1917." The overt act charged was the circulation of a printed circular in these words:

"Are we facing a militarized America? War has been declared without a referendum vote of the people. Conscription has been thrust on an unwilling people without a referendum. Will compulsory military service be the next questionable innovation? We have newspaper talk about 'Democracy'; let us have it in reality, in our political, social and industrial relations. Demand the referendum on all vital public questions. Demand the repeal of the Conscript Act. West Virginia Legislature is planning to penalize strikes during war time. Oppose it.—Workmen's Council of Defense."

On the circular was a cartoon, representing a German soldier and a member of Congress in grotesque attitudes, and a citizen speaking to the congressman. Under the cartoon were the words:

"American Father: Come now, Mr. Congressman—none of that for my sons."

A demurrer to the indictment was overruled. The statute providing for registration for military service was enacted on May 18, 1917. 40 Stat. 76, c. 15. Obviously the defendants were informed that they were charged with formation of conspiracy in the month of May after the enactment of the statute, for the indictment spe-

cifically alleges that the conspiracy was formed in violation of the statute. Ledbetter v. United States, 170 U. S. 606–612, 18 Sup. Ct. 774, 42 L. Ed. 1162; Day v. United States, 229 Fed. 534, 143 C. C. A. 602.

[2] The indictment is not subject to the objection of indefiniteness, for it not only alleges conspiracy to obstruct registration for military service, but sets forth the precise methods the defendants intended to use to effect that purpose. Crawford v. United States, 212 U. S. 183–192, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392.

[3] Counsel earnestly argued that, since the citizens who were called to register for military service had not commenced any service to the government, exhortation or persuasion to them not to register was not an obstruction of a function of the government. It is too plain for argument that preparation for war by registration for military service is as much a function of the government as the actual waging of war.

[4] There was sufficient evidence of conspiracy to go to the jury, and hence no error was committed in refusing to direct an acquittal of any of the defendants. Detailed statement of the analysis of the evidence would be of no value. The defendants worked together in the same shop, and all were opposed to registration and draft for military service. Printed circulars were placed by the defendant Firth, in the shop, tending to obstruct registration by inducing others to oppose it. The common understanding among the defendants was that these circulars should be distributed by all of them for the purpose for which they were prepared, and there was evidence that each of the defendants did distribute some of these circulars. It was the province of the jury to determine the credibility of the evidence and the inference to be drawn from it. It was not necessary to prove an expressly formulated agreement to obstruct the registration. An unlawful combination may be inferred from conduct, and the conduct of these defendants taken in connection with their admissions was sufficient to warrant the inference of guilt.

Since the evidence on behalf of the government consisted, not only of circumstances, but admissions of the defendants, the instruction based on the assumption that the evidence was entirely circumstantial was properly refused.

We are unable to find any language in the charge expressing the opinion that the distribution of the circulars set out in the indictment did obstruct the registration. On the contrary, the inference of purpose and effect to be drawn from the evidence was in explicit language left to the jury.

Error is assigned in the refusal of this instruction:

"It is your duty to presume the defendants and each of them innocent, and this presumption you should carry with you into the jury room; it is an essential principle of the law of the land and is imposed upon you during your deliberation as a jury."

The District Judge properly charged that the presumption of innocence continues only until it is overcome by evidence which satisfies the jury of the guilt of the accused beyond a reasonable doubt.

Coffin v. United States, 156 U. S. 432, 15 Sup. Ct. 394, 39 L. Ed. 481; Wilson v. United States, 232 U. S. 563, 34 Sup. Ct. 347, 58 L. Ed. 728.

A careful examination of the whole record discloses no error.

Affirmed.

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WELCH v. DANIELS et al.

(Circuit Court of Appeals, Eighth Circuit. July 29, 1918.)

No. 5088.

JUDGMENT ⊜828(4)—CONCLUSIVENESS—BILL—SUFFICIENCY.

A bill in federal court to quiet title to land in Oklahoma, which alleged a prior decree of the Oklahoma circuit court, quieting title in defendant and determining the invalidity of the marriage under which plaintiff asserted title, was void by reason of statutes of Arkansas, in which state the marriage was celebrated, *held* defective, and properly dismissed; there being no showing that such statutes were not put in issue by the pleadings, or that the decree of the Oklahoma court was not based on its interpretation thereof.

Appeal from the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Suit by Helen Welch against John A. Daniels, guardian, and others. From a decree dismissing the suit, complainant appeals. Affirmed.

Eugene S. Quinton, of Topeka, Kan., and George D. Rodgers, of Muskogee, Okl. (A. H. Vance, of counsel), for appellant.

A. C. Towne, of Miami, Okl., W. H. Kornegay, of Vinita, Okl., and A. C. Wallace, of Miami, Okl., for appellees.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. Appellant brought suit to quiet her title to lands in Oklahoma and for an accounting, claiming to have an interest in property as the widow of James Welch. The defendants were the daughter of James Welch, his administrators, and the receivers who had had possession of some of the property. The court sustained a motion to dismiss the bill, and this appeal is prosecuted from that order.

Appellant's bill alleged that she was married to James Welch in Arkansas on May 5, 1913, and that he died intestate in Oklahoma on July 26, 1913. She also alleged that the defendant daughter of James Welch had brought suit against appellant about three years before, in the district court of Ottawa county, Okl., seeking to annul appellant's marriage to James Welch and to quiet her title to these lands as against appellant, and had procured a decree by that court finding that James Welch did not have sufficient mental capacity to make a marriage contract, nor to ratify and confirm it thereafter, and finding that appellant

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never was the wife of James Welch, and that the marriage was void, and the title to the lands was quieted in the daughter.

The bill charged that this decree was void because the court was without jurisdiction to annul the marriage by reason of certain statutes of Arkansas (Kirby's Digest 1904), quoted as follows:

"Sec. 5172. Every male who shall have arrived at the full age of seventeen years, and every female who shall have arrived at the full age of fourteen years, shall be capable in law of contracting marriage; if under those ages, their marriages are void."

Also:

"Sec. 5175. When either of the parties to a marriage shall be incapable, from want of age or understanding, of consenting to any marriage, or shall be incapable from physical causes of entering into the marriage state, or where the consent of either party shall have been obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent jurisdiction."

The chief question in the case is whether appellant was entitled to relief against the daughter of James Welch, as appellant was not otherwise entitled to relief against the other defendants. The argument of appellant concedes that the decree of the Oklahoma district court conclusively determines this case against her, if that court had jurisdiction to enter such a decree. The District Court of Oklahoma is a court of general jurisdiction (section 10, art. 7, Const. Okl.), and appellant makes no complaint of its power to hear and determine that suit, but complains because the court did not apply the laws of Arkansas, relating to annulment of marriages, in deciding the case, and asserts that it had no jurisdiction if it did not apply those statutes.

Appellant claims that a proper construction of the Arkansas statutes prevents the annulment of a marriage except from and after the date of the decree. Without conceding that the Oklahoma court was bound to apply the Arkansas statute, we do not find it necessary to decide this, the only question presented by appellant, because it does not arise on the record. The bill alleged that the suit in the Ottawa county district court was one to annul the marriage and to quiet title to these lands, and it set forth the findings of fact and conclusions of law and the decree entered by that court, but it does not appear from anything alleged in the bill, that the Arkansas statutes were not made an issue by the pleadings, nor that the decree of the court was not based upon its interpretation and application of those statutes to the facts in the case.

As the claim of appellant that the decree was beyond the court's jurisdiction rests upon a basis of fact that has no foundation in the record, the decree will be affirmed.

## BRIDGETON NAT. BANK v. WAY.

### In re SEELEY.

(Circuit Court of Appeals, Fourth Circuit. May 8, 1918.)

No. 1631.

BANKRUPTCY ⟸440—REVIEW—PROCEDURE.

A "petition for review," filed in a District Court in a bankruptcy proceeding, is ineffectual to remove the case for any purpose into the Circuit Court of Appeals.

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of August Scriber Seeley, bankrupt. Petition by the Bridgeton National Bank for review of order. On motion by Luther B. Way, trustee, to strike cause from docket and to dismiss petition. Motion granted.

J. D. Hank, Jr., Asst. Atty. Gen., of Richmond, Va., for the motion.

G. R. Swink, of Norfolk, Va., opposed.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. Within four months prior to his adjudication in a voluntary proceeding, the bankrupt executed a deed of trust on certain personal property to secure two notes, amounting to $1,500, given by him to one of his creditors for a debt long overdue, and on which suit had been brought in a state court. The petitioning bank claims to have discounted these notes before maturity, in good faith, and in the ordinary course of business. After hearing the parties in interest, the referee held that the deed of trust was a voidable preference, directed the trustee to administer the proceeds of the property, which had been sold in the meantime, "as unincumbered assets of the bankrupt," and allowed the bank to prove the notes only as an unsecured claim. On March 7, 1918, the decision of the referee was "approved and affirmed" by the District Court. Nine days later, March 16, the bank filed in that court a "petition for review," as it is styled, which recites the proceedings, quotes the conclusion of the court respecting the deed of trust, alleges that it is erroneous in matter of law, and asks that it may be reviewed "by the Circuit Court of Appeals of the Fourth Circuit of the United States." Thereupon the District Court ordered a review by this court of its order of March 7th, and directed the record to be filed with the clerk of this court within 30 days. No petition to superintend and revise has been filed in this court as provided by rule 36 (233 Fed. xx, 146 C. C. A. xx), nor has any appeal to this court been taken. The trustee here moves to strike the cause from the docket and to dismiss the petition.

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There is no need of discussion. It is enough to say that the so-called "petition for review," filed in the court below, was wholly ineffectual to bring the case into this court for any purpose, and consequently there is nothing before us for review. The motion to strike from the docket must therefore be granted, and it will be so ordered. Inasmuch, however, as the time within which an appeal might be taken appears not to have expired, the order will be without prejudice to the right of appeal by the bank, if it be so advised. Whether the question sought to be reviewed can be brought up by appeal we do not decide.

Motion to strike cause from the docket granted.

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## EASTERN TRANSP. CO. v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. April 2, 1918.)

No. 1598.

COLLISION ⊂=153—SUIT FOR DAMAGES—REVIEW ON APPEAL.

Where the decree in a suit for collision has ample support in conflicting evidence, it cannot be reversed by the appellate court.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit in admiralty for collision by the Eastern Transportation Company against the United States. From a decree for half damages, libelant appeals. Affirmed.

John Henry Skeen, of Baltimore, Md., for appellant.
Samuel K. Dennis, U. S. Atty., of Baltimore, Md.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. Under statutory permission the Eastern Transportation Company filed a libel against the United States for damages to the barge John T. Donohue caused by collision with the United States steamer C-2 off Smith's Point, Chesapeake Bay. After hearing very conflicting evidence, the District Court found as a conclusion of fact that both vessels were at fault, and charged the United States with one-half of the damages to the John T. Donohue. Discussion of the evidence would be of no value. The conclusion of the District Court, having ample support in the evidence, cannot be reversed by this court.

Affirmed.

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## BAY STATE ST. RY. CO. v. RUST.

(Circuit Court of Appeals, First Circuit. June 21, 1918.)

No. 1349.

MASTER AND SERVANT ⟸356—MASTER'S LIABILITY FOR INJURY TO SERVANT—WORKMEN'S COMPENSATION ACT.

Under Rhode Island Workmen's Compensation Act, § 1, providing that it shall not be a defense "that the employé has assumed the risk of the injury," it is immaterial whether the risk was assumed by acts of the employé or by his contract of employment.

In Error to the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Action at law by Cecelia Rust against the Bay State Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

William R. Harvey, of Newport, R. I. (Sheffield & Harvey, of Newport, R. I., on the brief), for plaintiff in error.

Everett L. Walling, of Providence, R. I., for defendant in error.

Before BINGHAM and JOHNSON, Circuit Judges, and HALE, District Judge.

HALE, District Judge. The plaintiff below recovered judgment against the defendant, under the Rhode Island Employers' Liability Act (section 14, c. 283, of the General Laws of Rhode Island 1909), as supplemented by the Rhode Island Workmen's Compensation Act (chapter 831 of the Public Laws of 1912), for the death of her husband, Harold H. Rust, on December 11, 1916, alleged to have been caused by the negligence of the defendant, while in its employ as a lineman, engaged in renewing wires on one of its poles in Newport, R. I.

The railroad had not accepted the Workmen's Compensation Act. Section 1 of that act provides as follows:

"In an action to recover damages for personal injury sustained by accident by an employé arising out of and in the course of his employment, or for death resulting from personal injury so sustained, it shall not be a defense: (a) That the employé was negligent; (b) that the injury was caused by the negligence of a fellow employé; (c) that the employé has assumed the risk of the injury."

The railroad contends that, although the above statute applied, and deprived it of the defense that Rust "had assumed the risk of the injury," still, under its general denial, it is entitled to rely upon a contractual assumption of the risk by him, as opposed to a voluntary assumption of the risk; that, upon the evidence, it appears that he contractually assumed the risk of the dangers which caused his death; and that, at the end of the testimony, the District Court should have directed a verdict for the defendant. This question is raised by the assignments of error.

The issue brought before the court below was the question of the defendant's negligence. The plaintiff stated a case of negligence. In

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the several counts, which we need not recite in detail, it was alleged by the plaintiff in substance: That on December 11, 1916, Rust was a lineman on the defendant's electric railway in Newport, engaged in renewing wires; that the defendant failed to meet its duty of providing him with a reasonably safe place to work; that it set him to work in close proximity with electrical appliances and instrumentalities which were not reasonably safe and suitable; or, if safe and suitable under some circumstances, on the morning in question they were not safely and suitably insulated so as to protect the lineman from dangers of which he was ignorant and of which he was not warned; that the defendant was negligent, in that it failed to insulate dangerous terminals while Rust was working on the top of the pole near such terminals, and in failing to warn him of the dangerous condition of the various terminals. The issue of fact at the trial was the question of defendant's negligence. The plaintiff offered testimony tending to show that Rust was ordered upon a pole by the defendant's foreman, to renew certain wires; that there was on the pole a pothead which was the direct cause of his death; that this pothead was attached by a bracket projecting outward from the second cross-arm; that the pothead was a device for attaching overhead wires to certain other wires which came up the side of the pole inside a lead cable; that these latter wires were not attached to the overhead wires, but were connected in a manhole in the sidewalk to an underground cable which carried a high voltage and was dangerous to human life; that, when not so arranged, these wires did not indicate electrical dangers. There was testimony tending to show that Rust did not have knowledge of certain dangerous conditions to which he was exposed and was not warned. There was also testimony that the potheads were not of a reasonably safe and suitable construction; that they were not properly insulated; and that it was not proper construction to allow exposed contacts to remain with high voltage current running through them, without some means, in the nature of a warning sign, to indicate that they were alive.

The defendant offered testimony to show that the potheads were of the best kind known to the art, that they were properly insulated, that they were kept in a reasonably safe and suitable condition, and that there was some warning given. On the question of negligence there was conflicting evidence. The railroad contends that there was conclusive evidence that its electrical system was of approved construction; that the conditions confronting Rust at the time of the injury presented obvious dangers, which should have become apparent to the lineman by the reasonable exercise of his faculties; that, by his agreement, he contractually assumed the risks from which he suffered injury and death; that the provisions of the Workmen's Compensation Act do not apply, so far as they relate to the taking away of this assumption of risk as a defense, inasmuch as his contract of employment necessarily required him to work around obviously dangerous apparatus; and that defendant is entitled to rely upon this fact under its general denial.

The courts undoubtedly recognize two ways by which an employé may assume the risk of the dangers arising in the course of his em-

ployment. He may assume a risk by his own acts. He may also assume a risk which is well stated in Tuttle v. Milwaukee Railway, 122 U. S. 189, 195, 7 Sup. Ct. 1166, 30 L. Ed. 1114, in which case Judge Cooley is referred to as saying that, when an employé engages in his employment, he does so in view of all the incidental hazards of the business when reasonably conducted, and that he and his employer, when fixing the terms and agreeing upon the compensation, must have contemplated these hazards as having an immediate bearing upon their agreement; that the employé well knows that he will be exposed to an incidental risk; and that he must be supposed to have contracted that, as between himself and the master, he would run this risk.

In passing the Workmen's Compensation Act, the Rhode Island Legislature was dealing with a matter of public interest, for the protection of a great class of our citizens. Its legislation should not receive a narrow construction. The Legislature used the plain, broad language that in an action to recover damages for personal injuries sustained by accident by an employé, in the course of his employment, it shall not be a defense "that the employé assumed the risk of the injury." The Legislature had before it the well-known condition that there are the two ways which we have mentioned by which an employé may assume the risk of injury; namely, by his acts and by his agreements. Nothing is brought to our attention which tends to the conclusion that the Legislature intended to exclude one way of assuming risk, and to permit another. Nothing before us leads to the inference that the Legislature did not intend to exclude the entire matter of assumed risk, regardless of classifications as to the different ways by which a risk may be assumed. The Legislature may well have had in mind, also, that the master's liability depends upon negligence; and that evidence of negligence is often directed to what an employé is doing under his agreement of service. And it is sometimes of little practical importance whether it be found that a certain risk is assumed, or that, under the contractual relations existing between the master and the servant, no negligence is found on the part of the master. This is illustrated in Ashton v. Boston & Maine Railroad, 222 Mass. 65, 109 N. E. 820, L. R. A. 1916B, 1281, which case is relied on by the defendant. In that case, the Massachusetts court had before it a condition in which the plaintiff's intestate was a foreman in the defendant's employ; he was skilled in electrical matters; he was under the duty of seeing whether the electric wires and appliances within the electric zone were in repair, and to maintain and keep them in repair. When injured, Ashton was in the performance of this duty. In doing it he was killed. The court found that the record did not disclose any evidence of negligence on the part of the defendant. That was the decision of the case. What the court said further, beyond deciding the case, it is not necessary for us to consider. It is clear that if dangers ordinarily incident to a business, when properly conducted, are contractually assumed or, standing alone, are not evidence upon which a finding of negligence on the part of an employer could be predicated, we are not concerned with such a case.

In the case at bar nothing happened like the facts in the Ashton Case. Rust was a lineman; he was not a hunter for electrical trouble; he was under no duty to discover whether electrical appliances and instrumentalities were out of repair, and, if so, to repair them; he did not go upon the pole to see whether the pothead needed to be repaired or needed any further insulation; he was there to do his duty as a lineman in renewing wires on defendant's poles; and his injury was not due to a danger incident to the business in which he was engaged, when such business was reasonably conducted. There was evidence tending to show that he met his death by reason of the failure of the railroad to exercise the care of a reasonably prudent man in providing suitable electrical appliances and instrumentalities, in keeping them properly insulated, and in sufficiently warning its employé. There was evidence, also, to the contrary. All this evidence was given to the jury under proper instructions by the court below. We find no error in the action of the District Court in such submission of the case to the jury, and in refusing to direct a verdict for the defendant.

The judgment of the District Court is affirmed, with interest; the defendant in error recovers her costs in this court.

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## LA CROSSE PLOW CO. v. PAGENSTECHER.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1918. Rehearing Denied July 8, 1918.)

No. 4797.

1. APPEAL AND ERROR ⊕=866(3)—REVIEW—QUESTIONS PRESENTED.
Where the court directed a verdict for plaintiff, and defendant's motion for directed verdict was unaccompanied by any other request, and neither party requested that any fact in issue be submitted to the jury, the only question for review by the appellate court is whether there is any evidence to support the verdict.

2. TRIAL ⊕=177—DIRECTION OF VERDICT—ARGUMENT.
Where each party moved for a directed verdict in its favor, the court had power to direct a verdict, notwithstanding the case had been partially argued to the jury.

3. APPEAL AND ERROR ⊕=883—DIRECTION OF VERDICT—PROPRIETY.
Where defendant requested a directed verdict at the close of plaintiff's evidence, and again at the close of all of the evidence, it cannot be heard to say that the case ought to have gone to the jury; plaintiff's motion for directed verdict having been granted.

4. PRINCIPAL AND AGENT ⊕=89(8)—COMMISSIONS—SALES AGENT.
In an action for commissions claimed as a sales agent, evidence *held* to warrant a finding that the plaintiff did not agree to wait for commissions until purchase-money notes received by defendants should be paid.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Louis Pagenstecher against the La Crosse Plow Company, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

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⊕=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Charles H. Schweizer, of La Crosse, Wis. (M. A. Hall, of Omaha, Neb., on the brief), for plaintiff in error.

David A. Fitch, of Omaha, Neb. (Raymond T. Coffey and Gurley & Fitch, both of Omaha, Neb., on the brief), for defendant in error.

Before CARLAND and STONE, Circuit Judges, and RINER, District Judge.

CARLAND, Circuit Judge. Defendant in error, plaintiff below, sued the Plow Company to recover commissions claimed to be due him under a written contract as sales agent. The commissions sued for were claimed on sales made to one Howard. They consisted of two items. The first item, of $6,621.09, was for sales for which notes were given by Howard. The second item, of $2,105, was for implements sold to Howard, but taken back by the Plow Company. The contract provided that one-half of the commission should be payable "on receipt of and acceptance of order, balance when accounts are paid or settled by note." The sales were made prior to November, 1912, under a contract dated November 9, 1910, and extended until November, 1912. That the first item and one-half of the second had been earned and were due by November, 1912, is not disputed. The whole contention at the trial was over the question as to whether the plaintiff had agreed to waive the payment of the commissions until the Plow Company had received payment from Howard, there being no evidence that such payment had been received by the Plow Company.

At the close of all the evidence, counsel for both parties moved the court for a directed verdict. The court denied the motion of counsel for the Plow Company, and directed a verdict in favor of plaintiff for the sum of the first item and one-half of the second, with interest, less $876.95, the amount of a counterclaim pleaded by the Plow Company, which was undisputed. The Plow Company has removed the case here assigning the following errors: (a) The refusal to direct a verdict in its favor; (b) the granting of the motion of the plaintiff for a directed verdict; (c) the allowance by the court of interest on plaintiff's demands thereof from December 12, 1912.

[1] The motion for a directed verdict on the part of counsel for the Plow Company was unaccompanied by any other request, and neither party requested that any fact in issue be submitted to the jury. In this condition of the record the only question now open is as to whether there is any evidence to support the verdict. Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Empire State Cattle Co. et al., v. Atchison, Topeka & S. F. Ry. Co., 147 Fed. 457, 77 C. C. A. 601; Id., 210 U. S. 1, 28 Sup. Ct. 607, 52 L. Ed. 931, 15 Ann. Cas. 70; Minahan v. Grand Trunk Western R. Co., 138 Fed. 37, 70 C. C. A. 463; Melton et al. v. Pensacola Bank & Trust Co., 190 Fed. 126, 111 C. C. A. 166; Farmers' & Merchants' Bank v. Maines, 183 Fed. 37, 105 C. C. A. 329; American National Bank v. Miller, 185 Fed. 338, 107 C. C. A. 456; United States v. Two Baskets, 205 Fed. 37, 123 C. C. A. 310; In re Iron Clad Manufacturing Co., 197 Fed. 280, 116 C. C. A. 642; Southern Pac. R. Co. v. United States, 222 Fed. 46, 137 C. C. A. 584; Breakwater Co. v. Donovan, 218 Fed. 340, 134 C. C. A. 148;

Allegheny Valley Brick Co. v. C. W. Raymond Co., 219 Fed. 477, 135 C. C. A. 189; Anderson v. Messinger, 158 Fed. 251, 85 C. C. A. 468; Western Express Co. v. United States, 141 Fed. 28, 72 C. C. A. 516.

[2, 3] The fact that the case had been partially argued to the jury when the court directed the verdict for the plaintiff does not alter the legal relations of the parties to the record. The power to direct a verdict existed at the time the direction was made. Counsel for the Plow Company, having requested the court to direct a verdict at the close of the plaintiff's evidence and again at the close of all the evidence, cannot be heard to say that the case ought to have gone to the jury. That the plaintiff was entitled under the contract to what the court gave him is undisputed, unless the evidence introduced by the Plow Company, tending to show that the plaintiff had agreed to wait for the amount due him until the Plow Company had received payment for the implements sold, was so clear and undisputed that no verdict in opposition thereto would be allowed to stand.

[4] We proceed, then, to consider whether the evidence upon the subject mentioned was undisputed. In this connection we quote the following from the brief of counsel for the Plow Company:

"The principal issue of fact relied upon by plaintiff in error, and resting in part upon oral testimony which was disputed by the defendant in error, was whether the latter had made an agreement in respect to the Howard commissions to the effect that he would wait for the payment of the same until the Howard notes were paid."

We agree with counsel for the Plow Company that there was a disputed question of fact, and a careful consideration of the evidence convinces that there was evidence to sustain the verdict. We do not think the court erred in regard to the question of interest. The debt on which the interest was allowed was the debt which both parties agreed had been earned December 12, 1912.

The judgment below is therefore affirmed.

STONE, Circuit Judge (dissenting). I am compelled to dissent from the conclusion reached by the majority of the court. To my mind the evidence is conclusive that defendant in error waived the present payment of the sums in suit.

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## WILLARD et al. v. UNION TOOL CO.

(Circuit Court of Appeals, Ninth Circuit. August 5, 1918. Rehearing Denied October 30, 1918.) No. 3131.

1. PATENTS ⟸90(1)—ANTICIPATION—PRIOR ART.
   Where two bona fide applications for patents are pending at the same time, neither is prior in art to the other.
2. PATENTS ⟸90(1)—PRIORITY BETWEEN PATENTS.
   When two patents for the same invention have been issued to independent inventors, the rule is that the dates of their inventions are (1) the dates of the patents, (2) the dates of the applications, provided they sufficiently describe the invention, and (3) the dates of actual reduction to practice.
3. PATENTS ⟸90(5)—DATE OF INVENTION—REDUCTION TO PRACTICE.
   In the absence of other proof, the filing of application for a patent is taken to be a reduction to practice of the invention.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. PATENTS ⟸91(1)—PRIORITY BETWEEN PATENTS—BURDEN AND MEASURE OF PROOF.
As between rival inventors whose applications are pending at the same time, the burden is on him whose application is second to show that he was first to reduce the invention to practice.

5. PATENTS ⟸91(3)—PRIORITY BETWEEN PATENTS—MEASURE OF PROOF.
In a contest between rival inventors for priority of invention, their applications being pending at the same time and both inventors having reduced their conceptions to practice, the one whose application is second, in sustaining the burden of proving that he was the first to reduce the invention to practice, is required to establish his priority only by fair preponderance of evidence and not by proof conclusive in character or beyond a reasonable doubt.

6. PATENTS ⟸26(1)—VALIDITY—COMBINATIONS.
The mere fact that human agency intervenes in an operation does not render a combination unpatentable, nor is it necessary that the action of the elements be simultaneous, nor that one of the elements shall so enter into the combination as to change the action of the others; but it is sufficient if there be some joint operation of the elements producing a result due to their co-operative action.

7. PATENTS ⟸26(2)—"COMBINATION"—NEW RESULT.
To constitute a patentable "combination," the result itself need not be new, but it is sufficient if an old result be produced in a more facile, economical, or efficient way.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Combination.]

8. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—WELL-BORING APPARATUS.
The Willard and Wilcox patent, No. 1,064,270, for a well-boring apparatus, claims 6, 7, 8, and 9, *held* not anticipated, valid, and infringed. Claims 1, 2, 3, 4, and 5 for combinations *held* invalid as not for true combinations in a unitary structure.

9. PATENTS ⟸25—AGGREGATION—DETACHED PARTS.
A well-boring apparatus patent, for combination of a drive bushing device for rotating the string, with "slips" for holding the string in position while removing or restoring it, the slips being removable by hand when not in use, *held* a mere aggregation, and not a combination, since the manual use of a tool or an unattached movable device cannot be made an element of a combination claim.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Edward E. Cushman, Judge.

Suit in equity by Arthur G. Willard and William W. Wilson against the Union Tool Company. Decree for defendant, and complainants appeal. Reversed in part and affirmed in part.

Raymond Ives Blakeslee, of Los Angeles, Cal., for appellants.
Frederick S. Lyon, of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appeal in this case involves the decrees of the court below in two suits for infringements of patents, namely, Willard and Wilson against the Union Tool Company, and the same plaintiffs against the Oil Well Supply Company and R. H. Herron. Both suits are upon patent No. 1,064,270 issued to Willard and Wilcox on June 10, 1913, on an application filed March 11, 1912. Submitted with these cases in the court below was the case of Griffin et al. v. Wilson et al., upon patent No. 1,067,330, issued

July 15, 1913, to T. J. Griffin, on his application which was filed October 5, 1911. From the decree in the latter case which held the Griffin patent void as anticipated by the prior art, no appeal has been taken.

The appellants' patent is for a well-boring apparatus, and relates to well borers which are provided with rotary tops whereby the rotation of the boring tool and the string of pipe sections extending from the same is caused; the rig being employed in raising and lowering the boring tool and string in performing the operations incident to drilling. The patent contains two general groups of claims. The second group, which embraces claims 6, 7, 8, and 9, will be first considered. The nature of those claims is fairly represented by claim 6, which is as follows:

"In improvements of the character disclosed, the combination with a rotary table and a well-boring string; of a bushing fitting within the table and formed to surround and grip the string and impart rotation from the table thereto; and a member upon the string formed and disposed in a position to engage with said bushing and withdraw the same from the table upon the elevation of of the string."

The court below found that all of this combination was covered by the patent to Griffin of July 15, 1913, except the last element, the "member upon the string formed and disposed in position to engage with said bushing and withdraw the same from the table upon the elevation of the string," and held that, although that element was not mentioned or claimed in the Griffin patent, it was plainly disclosed therein, and that Griffin had the conception of all the claims involved in the patent in suit at the time of the filing of his application which was prior to the application for the appellants' patent, and that the presumption arose therefrom that Griffin had then reduced the same to practice, and held that where the contest is between a patentee or his successors in interest and another person, or his successors in interest, and such other person has been shown to have reduced to practice the combination claimed prior to the filing date of the application of the patentee, the burden rests upon those suing under the patent to show a reduction to practice prior to that of the alleged infringer, and that, since such reduction to practice was not shown by the high degree of proof required, it followed that the claims of the Willard and Wilcox patent were void. In brief, the position of the trial court was, not that the combination described in the appellants' patent did not involve invention and was not patentable, but that Willard and Wilcox were not the first inventors thereof, and that, since Griffin made no claim for that element of the combination which would have rendered his invention patentable, he thereby relinquished the combination to the public, and all were free thereafter to use it.

The contest here does not arise between two rival patentees. It is not between the owners of the patent to Willard and Wilcox, and a manufacturer under the Griffin patent. It is between the owners of the former patent and persons who are admittedly infringers if the claims of that patent are sustainable. It is not claimed that Willard and Wilcox got from Griffin the idea of their combination, or that they were not original inventors of the same.

[1] The contention is that inasmuch as Griffin's application for patent was prior in time and therein the combination was described, although one of its elements was not claimed as part of the invention, it follows that Willard and Wilcox were not the inventors of the combination. If it be assumed that the Griffin invention covers the combination here in question, we have the situation of two independent inventors whose applications were pending at the same time, both of whom, in the absence of proof to the contrary, will be presumed to be original inventors. Where two bona fide applications are pending at the same time, neither is prior in art to the other, for neither can know of the contents of the other's confidential communication on file in the Patent Office. Mergenthaler Linotype Co. v. International Typesetting Mach. Co. (D. C.) 229 Fed. 168.

[2, 3] When two patents for the same invention have been issued to independent inventors, the rule is that the dates of their inventions are: (1) The date of the patents; (2) the dates of the applications, provided the application sufficiently describes the invention; and (3) the dates of actual reduction to practice. In the absence of other proof, the filing of the application is taken to be a constructive reduction to practice. In Kearney v. Lehigh Valley R. Co. (C. C.) 32 Fed. 321, 322, Mr. Justice Bradley said:

"The date of the application, if it describes the invention sufficiently, is conclusive evidence that the invention was made prior to such date."

[4, 5] The date of the Willard and Wilcox patent was prior to that of Griffin, but the latter's application was first in time. There was no evidence that the Griffin invention was ever reduced to practice otherwise than by the filing of his application. There was evidence that the Willard and Wilcox invention was reduced to practice prior to the date of Griffin's application; but the court below held that the evidence was not of that high degree which was required, and applied the rule which the appellee herein contends for, that the evidence must be of that conclusive character which is required to establish the defense of anticipation or of prior public use, to which contention the appellee cites authorities which hold that in suits for infringement of patents the defense of anticipation or prior use must be established by proof, clear, positive, and unequivocal, and that nothing must be left to speculation or conjecture. We cannot agree that the rule is applicable here. We think the rule to be applied is that which governs contests between rival inventors for priority of invention whose applications are pending at the same time, which is that, where both inventors have reduced their conceptions to practice, the burden of proof is on him whose application is second to show that he was the first to reduce the invention to practice, and that in sustaining such burden he is controlled by the ordinary rules of courts of law with respect to the burden of proof, and is required to establish his priority only by a fair preponderance of the evidence, and not by proof conclusive in character, or beyond a reasonable doubt. Wurts v. Harrington, 79 O. G. 337, 10 App. D. C. 149; Sundh Electric Co. v. Interborough Rapid Transit Co., 198 Fed. 94, 117 C. C. A. 280; Evans v. Associated Automatic Sprinkler Co., 241 Fed.

252, 154 C. C. A. 172; Automatic Sprinkler Co. v. Walworth Mfg. Co. (C. C.) 60 Fed. 605.

On behalf of the appellants, testimony was introduced to show that in the summer of 1911 the Wilson & Willard Manufacturing Company, for the appellants, had manufactured and sold devices which embodied all the features of the second group of the claims of their patent. The witness Madsen, owner of the Madsen Iron Works, made the castings for those devices, and he testified that they were made of such diameter that the collar on the pipe would lift the bushing when the stem was raised into the derrick. He produced copies of invoices of castings which he made at different periods between May and September of that year. He testified that the first devices made were not so constructed that the bushing would be lifted when the stem was raised, but that during the summer the change was made, and he was positive that it occurred before September, because on the 1st of September he changed his place of business, and in his memory he associated the making of the devices with his former place of business. E. C. Wilson, the president of the Wilson & Willard Manufacturing Company, testified that one of the devices was so made in the summer of 1911, and that early in the summer it was installed and in operation by the Pacific Light & Power Company in the Salt Lake oil field west of Los Angeles, under the superintendence of M. L. Thorn, and that he saw it there in use. It was in evidence that, at the time of taking the testimony in the case, Thorn was snowbound and inaccessible in the mountains of Nevada, and that, while the case was under submission, the appellants made application for leave to take his testimony, presenting his affidavit in which he deposed that in the summer of 1911, and prior to September he as such superintendent purchased from the appellants and used the rotary well-drilling outfit, with a drive bushing, and that the drive bushing of that outfit was directly engaged and withdrawn by the collar upon the elevation of the drive stem. The application was denied for want of diligence, and because the offered testimony was cumulative. W. W. Wilson, vice president of the Wilson & Willard Manufacturing Company, testified that in August, 1911, he saw in use, under the superintendence of M. L. Thorn, a rotary rig containing the appellants' combination. Charles E. Wilcox, salesman for the Wilson & Willard Manufacturing Company, and one of the patentees, testified that he saw the device in operation by the Pacific Light & Power Company in the spring or summer of 1911, and that it was furnished by the Wilson & Willard Manufacturing Company. Arthur G. Willard, the other patentee, testified that the change in the diameter of the bushing so as to permit it to engage the collar on the stem was made at his direction at the instance of Wilcox from drawings produced by him, and that the first device so made was constructed by the Madsen Iron Works in July, 1911. There was no contradiction of any of this testimony, and it was sufficient we think to sustain the burden of proof and to show that the Willard and Wilcox invention was reduced to practice two or three months before the date of the Griffin application for patent.

Turning to the other group of claims, we find that they are founded on a combination of the drive bushing device with certain devices called

"slips," which are employed for temporarily gripping the string and holding it suspended at any particular point of elevation. The slips are used in the operation of removing the string from the well and in the operation of restoring it thereto. The purpose is to hold the string firmly in place in order to permit its disjunction piece by piece, or the reconstruction of the same in a similar manner. In that operation the bushing device suspended on a collar of the stem is raised into the derrick, leaving in the rotating table an inverted conical space, in which space the slips are placed by hand around the suspended string. The slips are adapted when in position to form a cylindrical opening slightly less than the outside surface of the pipe. The inner faces of the slips are cut with transverse serrations adapted to grip the outer surface of the pipe and thereby support the weight of the suspended string. The combination claims are fairly presented in claim 2, which is as follows:

"Improvements of the character disclosed comprising in combination with a rotary table, a plurality of means of operative connection between the same and a string and each formed for separate application to the table in substitution for the other, there being interlocking means effective between one of said means of operative connection and the table whereby the string may be rotated upon rotation of the table; the other of said means of operative connection being formed and adapted to coact through the table and with slips to sustain the weight of the string."

The combination claims were held void by the court below on the ground that they present an aggregation and not a patentable combination. Said the court:

"When the slips or wedges are removed from the opening to allow the substitution of the drive bushing or nut, they are removed by hand and laid aside, here or there; far or near, as chance and the inclination of the operator may determine, leaving them, for the time, to be a part neither of this or any other machine, becoming a separate tool to be gone in search of when again needed, recovered, returned, and again placed by hand in the opening before assuming any relation to the rest of the machine."

And the court held that the mere fact that the opening in the table may be formed to accommodate in succession both the drive bushing for rotating the string, and the slips for hauling it up, does not render the table, the stem, the drive bushing, or the slips any part of one combination.

**[6, 7]** As we read the letters patent, the invention claimed is a combination of elements to be used in connection with a rotary well-drilling apparatus, to facilitate changing from the operation of drilling to the operation of removing the drill string from the well, and vice versa, and its function is fulfilled in the accomplishment of those results. The actual drilling of a well is only incidental, and is a function aside from that of the combination. It is not therefore a combination of a rotary boring device with a device for holding the boring pipe in position for disintegration or reconstruction, but it is a combination of certain features only of a boring device with a device for holding the same in position for a designated purpose. The mere fact that human agency intervenes in an operation does not render a combination unpatentable. Nor is it necessary that the action of the elements be simultaneous. Pelton Waterwheel Co. v. Doble, 190 Fed. 760, 111 C. C. A. 488; Burdett-Rowntree Mfg. Co. v. Standard Plung-

er E. Co. (C. C.) 196 Fed. 43; Novelty Glass Mfg. Co. v. Brookfield, 170 Fed. 946, 95 C. C. A. 516; Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 125 C. C. A. 394. Nor is it necessary that one of the constituent elements shall so enter into the combination as to change the action of the others. International Mausoleum Co. v. Sievert, 213 Fed. 225, 129 C. C. A. 569. It is sufficient if there be some joint operation performed by the elements producing a result due to their co-operative action. National Cash Register Co. v. American Cash Register Co., 53 Fed. 367, 3 C. C. A. 559; Toledo Computing Scale Co. v. Moneyweight Scale Co. (C. C.) 178 Fed. 557; New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138; Ohmer Fare Register Co. v. Ohmer, 238 Fed. 182, 151 C. C. A. 258. And the result itself need not be new. It is sufficient if an old result be produced in a more "facile, economical, or efficient way." New York Scaffolding Co. v. Whitney, supra; Pelton Waterwheel Co. v. Doble, supra.

[8, 9] But the difficulty in the way of sustaining the appellants' claims is that they do not exhibit a true combination. Under the patent laws protection is afforded to an invention or improvement of an art, machine, manufacture, or composition of matter. In Yale & Greenleaf Manufacturing Co. v. North, 5 Blatchf. 455, Fed. Cas. No. 18,123, Judge Shipman said:

"A combination in mechanism must consist of distinct mechanical parts, having some relation to each other, and each having some function in the organism."

Says Robinson, section 153:

"A combination is an instrument or operation formed by uniting two or more subordinate instruments or operations in a new idea of means."

Here the elements are not contained in a unitary structure, and the instrument is not formed by uniting two or more subordinate instruments. The device for holding the pipe string in position is a detached instrument which is no part of a machine or manufacture. The manual use of a tool or an unattached movable device cannot, we think, be made an element of a combination claim.

The decree as to claims 1, 2, 3, 4, and 5 is affirmed. As to the other claims, the decree is reversed, and the cause is remanded for further proceedings.

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LIQUID CARBONIC CO. et al. v. GILCHRIST CO.

(Circuit Court of Appeals, Seventh Circuit. January 2, 1918. Rehearing Denied March 11, 1918. On Petition for Modification, May 1, 1918.)

No. 2504.

1. PATENTS ⟸26(2)—VALIDITY—"INVENTION."

While one who, by enlarging the size of a patented article, makes it suitable for a new use, is not entitled to a patent, yet, where the inventor combines a new element with the old device, whereby a new and useful result is obtained, there is "invention," which is patentable.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Invention.]

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PATENTS ⊂⊃328—VALIDITY—INFRINGEMENT.

The Berman patent, No. 962,300, for a dispensing apparatus for use at bars and soda fountains, to contain straws for drinking purposes, *held* valid and infringed as to claim 2, though invalid as to claim 1.

On Petition for Modification.

3. PATENTS ⊂⊃325—EXCESSIVE CLAIM—DISCLAIMER—COSTS.

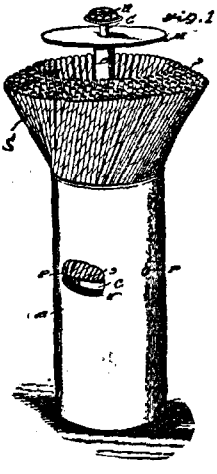
Where, through inadvertence, etc., a patentee has claimed that of which he was not the first inventor, he cannot, under Rev. St. § 4922 (Comp. St. 1916, § 9468), recover costs for infringement of the valid portion of the patent, where his disclaimer was not filed prior to the beginning of suit.

4. PATENTS ⊂⊃156—EXCESSIVE CLAIMS—INFRINGEMENT—DISCLAIMER.

Under Rev. St. §§ 4917, 4922 (Comp. St. 1916, §§ 9462, 9468), where a patentee through inadvertence, etc., claimed that of which he was not the original discoverer, but a disclaimer was not filed before suit, no recovery by the patentee for infringement of the valid portion of the patent can be allowed, unless disclaimer be filed within a reasonable time.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Gilchrist Company against the Liquid Carbonic Company and William J. Eisenhardt. From a decree for complainant, defendants appeal. Reversed, with directions.




The patent involved is for a straw dispensing device for use at bars, soda fountains, and the like, to contain straws used for drinking purposes, so that customers may take some therefrom, leaving the rest covered and protected. A patent therefor, No. 962,300, was issued to Berman June 21, 1910. The device is shown in patent Fig. 1.

*C* is the plate or straw holder, attached in its center to rod *B*, which, by grasping the handle *H*, is moved up or down within the outer cylinder *A*. Cover *M* is attached to the upper part of the rod just below the handle, so that, when the holder *C* is lowered to the bottom of the cylinder, the cover engages the top of the cylinder, closing it to air, dust, flies, etc. Indentations *P* in the cylinder arrest at the proper point the upward movement of the plate or holder. When the handle is raised, the straws *SS* are placed in the cylinder, resting on the plate or holder. They naturally spread out at the top and arrange themselves in spiral form, as shown in Fig. 1. Releasing the handle, the holder drops, and with it the straws, which in descending contract together in the cylinder, and when they reach the bottom are wholly contained within it; the cover closing over the top. When it is desired to use a straw, the customer or the attendant at the bar lifts the handle, and when high enough the straws spread out as shown, one or more are withdrawn, and the handle released, whereupon the straws again drop into the cylinder as before.

The two claims of the patent are alleged to be infringed. They are:

"1. In a dispensing apparatus, an outer cylinder having a perforation in its bottom, a carrier comprising a central rod, a lower plate arranged to fit within said outer cylinder, an upper plate secured to said rod and constituting a cover for said outer cylinder, and an integral handle projecting upwardly from said cover.

"2. In a straw dispensing device, an outer cylinder, a carrier comprising a central rod, a lower plate arranged to fit within said cylinder secured to said rod and constituting a support for the straws, an upper plate secured to said rod and constituting a cover for said cylinder, an upwardly projecting handle for said cover, and means carried by said outer cylinder for limiting the movement of the carrier."

The defense is invalidity of the patent, on the prior art, and noninfringement. The District Court found both claims valid and infringed, and decreed accordingly.

George P. Fisher, of Chicago, Ill., for appellants.
Fred Gerlach, of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). [1, 2] The nearest citation in the prior art, and the one mainly relied on for reversal, is McIntyre, No. 629,586, 1899. It assumes to be in the "box or case" art, and to relate more particularly to boxes "adapted to receive and hold pencils, penholders, rules," etc. Fig. 2 of that patent shows the device.



The rod *B* is connected with the top *G*, which serves also the purpose of a handle to grasp it, and to the lower disk *C*. When *G* is grasped and raised it also raises disk *C*, bringing up and exposing pencils, etc., which have been placed within the cylinder *A*, and when *C* is lowered the contents are retained wholly within the then covered cylinder.

McIntyre's device, used as a "scholar's companion" for holding pencils, etc., clearly presents in reduced form the structure of Berman's claim 1. If McIntyre's device had only to be made on a larger scale, in order to use it as a straw dispenser, as described in Berman's claim 1, the latter would not be patentable over McIntyre. The fact that a patented article, without addition, subtraction, or reorganization, except to change its size, may be suited to a use wholly different from that contemplated by its inventor, does not entitle the one who so enlarges it, and subjects it to the new use, to a patent for the enlarged device. But if, to adapt the patented device to the new use, an element must be brought in, not found in the patented article, the combining of the new element with the old device, whereby a new and useful result is obtained, generally involves invention, which is patentable.

Unlike McIntyre's device, which was evidently designed for the individual use of its possessor, Berman's contrivance is intended to be placed on bars and counters where the public may operate it, helping themselves to straws as may be required for use in drinking. If just the enlarged McIntyre box were devoted to this use, it would find serious handicap in the fact that, in lifting the straws, they would frequently be raised too high, thereby causing them to fall out of the cylinder onto the bar or floor, exposing them to unsanitary conditions, subjecting them to breakage, and involving the annoyance and labor of gathering them up and replacing them in the cylinder, perhaps only to be thrown out again by the next user. If Berman may be said to

have had the McIntyre device in mind, he not only conceived its possible adaptability to the new use, but realized that to make practical and successful the intended new use would require a limitation on the upward movement of the straws to avoid the danger of spilling them out of the cylinder. This result he achieved by the very simple expedient of making indentations in the cylinder at places where the straws would be prevented from going higher than just high enough to spread them so the customer may withdraw such as he desires, retaining the others in the cylinder, without danger of their being thrown out through being lifted too high.

Appellant maintains that the expedient of an indentation for such a purpose is so old and so simple that its employment would not involve invention. Considered merely as an element in a device this is undoubtedly true. But, simple as it is, it remained for Berman to conceive, not only the possibility of the McIntyre device in this new use, but also the additional element essential to make the new structure practical and desirable for that use. In this we find Berman exercised invention which was patentable, and which is covered by his claim 2. Claim 1 omits this added element. Respecting the validity of the patent, we therefore conclude that claim 2 is valid, and that claim 1 is invalid on McIntyre.

To escape the charge of infringement, it is claimed appellant's device does not show that the lower plate or holder "fits" in the cylinder, as stated in claim 2, and does not have "an upper plate secured to said rod." We do not think that the word "fit," as employed in claim 2, is to be considered as indicating such a fitting of parts as might be implied between a steam cylinder and its piston, but must be considered with reference to the object of the patent and the function of the plate or holder in such structures. There is no reason why the fit of the plate or holder in the cylinder should be exact, and difference shown in this regard between appellant's and appellee's device is not at all functional or essential. Appellant does not avoid infringement by fitting his plate within the cylinder more loosely than the patentee seems to have done. Appellant's upper plate or lid does not appear to be rigidly secured to the rod, but it is slidably secured to it. The lid could not be removed from the rod without removing screws or cutting the metal. The construction of appellant's device is such that the user must lift a handle at the upper part of the lid. But in lifting this handle he must at the same time lift the rod thus slidably secured to it, and in lifting the rod he lifts the lower plate on which the straws repose, and he thus lifts and exposes the straws in the precise manner of Berman's claim 2. Therefore to all intents and purposes appellant's lid is secured to the rod the same as is Berman's. It accomplishes the same result and in the same manner, and does not escape infringement merely because, after his lid is raised, there is the possibility of an additional movement by sliding the lid down the rod. This slidability in appellant's device is protected by a junior patent grant to Eisenhardt, No. 1,195,451, 1916; and, while this may show improvement of decided merit, which is not necessary here to be considered, yet, in so far as appellant's device incorporates the Berman conception of a rod to be

lifted at its upper end whether by grasping a handle integral with the rod proper, or a handle on the upper end of the lid, which engages the rod, it infringes in this respect. The alleged infringing device incorporating as it does, also, the indentations in the outer cylinder for arresting at the proper place the upward movement of the plate or strawholder, we find claim 2 is infringed.

The decree of the District Court should be modified, by finding claim 1 invalid, and, as so modified, it is affirmed.

On Petition for Modification.

[3, 4] Petition for modification of the order of this court directs attention to sections 4917 and 4922, Rev. Stat. U. S. (Comp. St. 1916, §§ 9462, 9468) (see margin[1]) and it is urged there should be no decree in appellee's favor under valid and infringed claim 2 of the patent, unless claim 1, which we found to be void, was disclaimed as in these statutes provided, and that in no event is appellee entitled to recover any costs.

That under the circumstances indicated in these statutes, benefit of any recovery by the patentee is denied unless or until disclaimer is filed, and that he is entitled to recover no costs where disclaimer is not filed prior to the beginning of the suit, appears to be too well settled by the statutes and the decisions applying them, to require further elucidation. Sessions v. Romadka, 145 U. S. 29, 12 Sup. Ct. 799, 36 L. Ed. 609; Gage v. Herring, 107 U. S. 640, 2 Sup. Ct. 819, 27 L. Ed. 601; Seymour v. McCormick, 19 How. 96, 15 L. Ed. 557; O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601; Westinghouse v. Cooper, 245 Fed. 463, 157 C. C. A. 625; Cummer & Son v. Atlas Dryer Co., 193 Fed. 993, 113 C. C. A. 611; Herman v. Youngstown Car Co., 191 Fed. 579, 112 C.

[1] Sec. 4917. Whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent.

Sec. 4922. Whenever, through inadvertence, accident, or mistake, and without any wilful default or intent to defraud or mislead the public, a patentee has, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor or discoverer, every such patentee, his executors, administrators, and assigns, whether of the whole or any sectional interest in the patent, may maintain a suit at law or in equity, for the infringement of any part thereof, which was bona fide his own, if it is a material and substantial part of the thing patented, and definitely distinguishable from the parts claimed without right, notwithstanding the specifications may embrace more than that of which the patentee was the first inventor or discoverer. But in every such case in which a judgment or decree shall be rendered for the plaintiff no costs shall be recovered unless the proper disclaimer has been entered at the Patent Office before the commencement of the suit. But no patentee shall be entitled to the benefits of this section if he has unreasonably neglected or delayed to enter a disclaimer.

C. A. 185; Novelty Glass Co. v. Brookfield, 172 Fed. 221, 97 C. C. A. 25; Fairbanks, Morse & Co. v. Stickney, 123 Fed. 79, 59 C. C. A. 209; Metallic Extraction Co. v. Brown, 110 Fed. 665, 49 C. C. A. 147.

Claim 1, which we found void, is material and substantial, though it does not appear that the claim was made through "any willful default or intent to defraud or mislead the public," but rather "through an inadvertence, accident or mistake." No disclaimer of it appearing to have been entered as in the statutes provided, but no unreasonable delay or neglect therein appearing, the order we heretofore made must be and is set aside, and in lieu thereof we make the following order:

The decree of the District Court is reversed, and appellee shall have 60 days after mandate herein is filed in the district court, in which to file there a certified copy of disclaimer of claim 1 of the patent which disclaimer is to be entered in the United States Patent Office; and on the filing of such certified copy of disclaimer the District Court shall enter the usual decree for injunction and accounting under claim 2 of said patent, without costs to appellee. Failing to enter and to file such disclaimer as prescribed, the bill shall be dismissed at appellee's costs. Neither party shall recover costs of this appeal.

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## WATERBURY FARRELL FOUNDRY & MACHINE CO. v. E. J. MANVILLE MACH. CO.

(Circuit Court of Appeals, Second Circuit. April 25, 1918.)

No. 235.

Appeal from the District Court of the United States for the District of Connecticut.

Bill by the Waterbury Farrell Foundry & Machine Company against the E. J. Manville Machine Company. From a decree for defendant, complainant appeals. Affirmed.

For opinion below, see 253 Fed. 59.

P. Farnsworth, of New York City (J. Edgar Bull, of New York City, of counsel), for appellant.

Wetmore & Jenner and Oscar W. Jeffery, all of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

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## WATERBURY FARRELL FOUNDRY & MACHINE CO. v. E. J. MANVILLE MACH. CO.

(District Court, D. Connecticut. September 13, 1917.)

No. 1464.

1. PATENTS ⟸174—MINOR IMPROVEMENTS—CONSTRUCTION.
Claims in patents for minor improvements in an art already well understood should be strictly construed.

2. PATENTS ⟸246—INFRINGEMENT—OMISSION OF ELEMENTS.
The omission of one element of a claim to a patent averts infringement.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. PATENTS ⟸328—INFRINGEMENT—MACHINES.

Patent No. 1,108,958, for an improvement in die blocks used in metal heading machines, *held* not infringed by patent No. 1,166,668, for an improvement in swinging die caps for heading machines.

In Equity. Bill by the Waterbury Farrell Foundry & Machine Company against the E. J. Manville Machine Company to enjoin infringement of a patent and for accounting. Bill dismissed.

Decree affirmed 253 Fed. 59, — C. C. A. —.

Philip Farnsworth, of New York City, for plaintiff.

Oscar W. Jeffery, of New York City, for defendant.

THOMAS, District Judge. This case arises on final hearing on pleadings and proofs on a bill of complaint charging infringement of letters patent of the United States No. 1,108,958, issued September 1, 1914, to Richard Lester Wilcox, assignor to the Waterbury Farrell Foundry & Machine Company, for new and useful "improvement in die blocks" used in metal heading machines. The bill asks for an injunction and an accounting. The answer denies the material allegations of the bill, and the defense is that the patent in suit, if construed so broadly as to include the defendant's structure, lacks patentable novelty, and, if strictly construed, as the defendant insists it should be, by reason of the prior art, the proceedings in the Patent Office, and the self-imposed limitations in the specification and the claims, it is not infringed.

The invention, as stated in the specification—

"relates to a die block of the type used in a heading machine for holding the dies, and has for its object, among other things, to so design and construct the several parts of the block that the body member thereof may be attached to the header, and not require removal therefrom to adjust the dies, or for any similar reason, and to connect therewith a cap or cover that may be readily moved into and out of its closed position, without separation from the body member, and with the minimum labor and inconvenience."

The patentee, in the specification, continues and says:

"My invention consists in the die block, having certain details of construction and combinations of parts, as will be hereinafter described and more particularly pointed out in the claims."

The claims alleged to be infringed are the first, third, and fourth, which are as follows:

"1. In a die block, the combination, with a body member, of a cap pivotally connected therewith, and means for securing said cap to said body member in its closed position."

"3. In a die block, the combination with a body member, having two walls at an angular relation to each other, of a cap, means for pivotally securing said cap to said body member, and threaded means for securing said cap to said body member when in its closed position.

"4. In a die block, the combination with a body member of a cap, means for inseparably and movably securing said cap to said body member, whereby it may occupy at different points of its movement a closed or an open position in relation to said body member, and means for securing said cap to said body member when in its closed position."

Thus it will be seen that the invention of the patent in suit is limited to a die block. The title of the invention is "die block." In the

specification, the patentee says he has invented "new and useful improvements in die blocks"; that the "invention * * * relates to a die block"; that "my invention consists in the die block." And further on in the specification, in speaking of the prior art, he says:

"The prior art discloses generally two types of header die blocks, one type requiring removal of the block with its connecting parts, as a unit, from the header to have access to the dies, an operation requiring much labor and strength, and involving serious difficulties in the fine relative adjustment of the several parts; another type, differing only in that the body of the die block is held within the header while the cover or cap is removed therefrom."

The patent in suit is for an improvement on the latter type of block. That type of die block was patented to the patentee herein on August 13, 1912, by patent No. 1,035,400, which, according to the specification, related—

"to new and useful improvements in die blocks * * * and has for its object * * * to construct such a block, with readily detachable parts, so as to allow convenient and quick access to the dies without removal of the entire block from the machine."

The evidence in this case shows that the art of upsetting the ends of metal pieces by heading machines is very old. All headers have punches and dies, and blocks or other means for supporting and holding the dies while the punches are acting. The Wilcox patent, No. 1,035,400, was for one particular means for supporting and holding header dies, to wit, a die block with a removable cover, and the Wilcox patent in suit is for an improvement on the die block, with the cover hinged thereto, instead of removable therefrom. In both patents, Wilcox pointed out a number of times that he had made an improvement in die blocks. This is the only thing he emphasized, and he obtained his patents based on claims for improvements in die blocks.

At the time the Wilcox patents were issued, the defendant was manufacturing and selling a heading machine, under the Campbell patent, No. 926,170, which had as one of its characteristics an integral die recess; that is, a recess for holding the dies formed directly in the walls of the frame. In this recess was a cover which was movable, so as to permit easy access to the dies without lifting the cover from the recess. No such thing as a die block was used in the Campbell machine. In 1914 the defendant adopted, and has ever since used, a cover for the dies which is hinged directly to the frame of the machine. This cover is turned up and out of contact with the dies, and down and fastened over them as desired; and it was for this structure, on the application of A. H. Gaess, that patent No. 1,166,668 was issued on January 4, 1916, to the defendant. This patent is for a "improvement in swinging die caps for heading machines." It is stated in the specification of this patent that the invention relates to a metal heading machine of the class shown in the Campbell patent, No. 926,170. In referring to this old type of machine, Gaess stated that the dies are "set into a pocket in the end of the frame, which pocket has end, side, and bottom walls integral with the frame, and a cap is placed in the pocket and bolted down on the top of the dies." The improvement which Gaess conceived was to hinge the cap directly to the frame, so the die recess could be opened without removing the cap from the machine, instead of, as in the Camp-

bell patent, having the cap slide on the frame, so the die recess could be opened without removing the cap from the machine.

When the Wilcox patent in suit was cited against the application of Gaess, the Patent Office properly allowed the patent to Gaess, for all the claims made by Wilcox were based on a die block having a body member and a cap hinged to said body member, whereas all of Gaess' claims were based on the combination with the frame, of the cap hinged to the frame, as will clearly appear from a reading of the first claim of the Gaess patent, which is as follows:

"1. The combination with the frame of a heading machine having a die pocket in one end, of the dies located in said pocket, and a cap hinged to the frame and adapted to be swung down and fastened in said pocket over the dies, or to be unfastened and swung back out of the pocket, so as to free the dies."

This claim described defendant's structure. It therefore appears that the complainant's and defendant's structures are not the same, and that the patent to Gaess was issued, not as an improvement over Wilcox's structures, but as an improvement on an entirely different structure, viz. a machine which has no die block, but has the die pocket in the machine frame. In other words, the Gaess patent was for an improvement on the structure shown in the early Campbell patent, whereas the Wilcox patent in suit is for an improvement on the die block of the Wilcox first patent.

In Thacher v. Transit Construction Co. (D. C.) 228 Fed. 905, this court said:

"Furthermore, the patentee must be presumed to have meant what he said. He has described a particular construction, and in his claim he has stated that it is this particular construction upon which he desired to secure a monopoly. Such self-imposed limitations are always recognized as precluding a patentee from showing that the invention is broader than his claims, and, if broader, he must be deemed to have surrendered the surplus to the public. Railroad Company v. Mellon, 104 U. S. 112, 119, 26 L. Ed. 639; White v. Dunbar, 119 U. S. 47, 51, 52 [7 Sup. Ct. 72, 30 L. Ed. 303]; McClain v. Ortmayer, 141 U. S. 419 [12 Sup. Ct. 76, 35 L. Ed. 800]."

[1] I cannot escape the conclusion that the defendant does not use a die block, and, not using a die block, it does not use the invention described in the specification and clearly defined by the patentee in the claims of the patent in suit. Claims in patents for minor improvements in an art already well understood should be strictly construed. American Graphophone Co. v. American Parlorgraph Co., 235 Fed. 137, 148 C. C. A. 631; Murray v. Greeno, 234 Fed. 91, 148 C. C. A. 107.

[2] The omission of one element of a claim averts infringement. Walker on Patents, § 349; Cimiotti v. American Fur Refining Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; Hall Mammoth Incubator Co. v. Teabout, 215 Fed. 109, 131 C. C. A. 417; Underwood Typewriter Co. v. Royal Typewriter Co., 224 Fed. 477, 140 C. C. A. 163; Evans et al. v. Hall Printing Press Co., 223 Fed. 539, 139 C. C. A. 129.

[3] I am of the opinion that defendant does not infringe the claims of the patent in suit, and in view of this conclusion it is unnecessary to discuss the other claims made by counsel.

Let the bill of complaint be dismissed. Ordered accordingly.

## I. T. S. RUBBER CO. v. PANTHER RUBBER MFG. CO.

(District Court, D. Massachusetts. May 20, 1918.

No. 740.

PATENTS ⟸328—VALIDITY—INFRINGEMENT.

The Tufford patent, No. 1,177,833, for a mold for making rubber heels, claim 11 of which specified a mold chamber having one wall convex and the other concave, *held* invalid, and further *held* not infringed, if deemed limited to the particular structure shown and described in the patent.

In Equity. Suit by the I. T. S. Rubber Company against the Panther Rubber Manufacturing Company. On hearing on pleadings and proof. Bill dismissed.

Nathan Heard and Frederick A. Tennant, both of Boston, Mass., F. O. Richey, of Elyria, Ohio, Maurice M. Moore, of Boston, Mass., and Charles A. Brown, of Chicago, Ill., for plaintiff.

Horace Van Everen and Van Everen, Fish & Hildreth, all of Boston, Mass., for defendant.

DODGE, Circuit Judge. The plaintiff in this bill, filed July 20, 1916, owns United States patent No. 1,177,833, issued April 4, 1916, to John G. Tufford, assignor to the plaintiff company, for mold for making rubber heels. As the case was presented at the hearing, the plaintiff contended that only one of the twelve claims of the patent had been infringed by the defendant, viz. claim 11, which is as follows:

"11. A mold for forming heel lifts, including assembled parts, one of which is provided with a molding chamber having the general outlines of a heel lift, one wall of the molding chamber being concave, and the opposed wall of said chamber having a convex surface coacting with said concave wall, one of said walls being provided with washer supporting devices."

September 18, 1916, in compliance with an order of court, the plaintiff specified, as the structure which it would "contend at the hearing constitutes an infringement," the mold structure illustrated in certain annexed drawings, marked "Plaintiff's Exhibit 1, Sheets 1 and 2."

December 4, 1916, in answer to interrogatories filed by the plaintiff, the defendant produced a three-part rubber heel mold, marked for identification "Defendant's Mold," and admitted that said mold, or others identical therewith, were used by it since April 4, 1916, and prior to the filing of the bill.

Assuming the validity of the above-quoted claim in suit, according to its broad terms, there seems to me no doubt that molds like the one marked "Defendant's Mold" which are, for all essential purposes, such molds as the above drawings marked "Plaintiff's Exhibit 1" show are within the terms of the claim, so that their use by the defendant would have to be regarded as an infringing use.

A question of more difficulty, however, arises as to the validity of the claim in issue, which is denied by the defendant.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the plaintiff's patent a mold said to embody the patented invention is described, with references to drawings which show both a "mold unit" and an "assembled multiple or gang mold." The mold so shown and described has certain features to which no reference is made in the above claim in suit, although they appear as elements of other claims of the patent not here in suit. The mold shown and described is a three-part mold, consisting of a base plate, an intermediate plate, and a top plate. Claim 11 purports to cover any mold for forming heel lifts, without regard to the number of parts composing it, in one part whereof there is a molding chamber having the general outline of a heel lift, one wall of which chamber is concave, the opposed wall convex and coacting with the concave wall, and one of the two walls provided with washer supporting devices.

The first inquiry is as to the substantial difference between a mold having the above-claimed features and heel lift molds previously known and used.

Heel lift molds for forming rubber heels, whose molding chamber had the general outline of a heel lift, were and long had been familiar. In most of them, one or both the opposed walls of the molding chamber were flat. In some, one of the walls, being that intended to form the top of the heel lift, had a projection or convexity, while the opposed wall, intended to form the bottom of the heel lift, was flat. From such molds, molds satisfying the requirements of the claim in suit differ only in having the opposed wall of the molding chamber and intended to form the bottom of the heel lift concave, instead of flat, and thus coact, if so shaped, with the convexity opposed to it. As to the washer-supporting devices wherewith one wall of the chamber is to be provided, according to the claim in suit, they were familiar in the prior molds referred to and can be regarded as a novelty, if at all, only in combination with the other features of the claim.

In molds for forming articles of molded rubber other than heel lifts, the idea of having one wall of the molding chamber convex, so as to coact with a concave opposing wall, was old; as is shown by Defendant's Exhibits I, K, M, and O, and by the evidence relating to those exhibits. There would be difficulty, in any event, in discovering anything amounting to invention in merely making one wall of a heel lift molding chamber, having a convex wall opposed to it, concave instead of flat, as in the prior heel lift molds above referred to; but whether or not to do this could be regarded as patentably new, if Tufford had been the first to do it, need not be determined, because the evidence satisfies me that it had been done long before the patent in suit issued, in molds like "Defendant's Exhibit Nerger Mold," made and used by Morgan & Wright Company, at their factory in Chicago, between 1897 and 1902.

The evidence regarding such molds and their prior use was taken under an order made herein on July 24, 1917, upon a motion by the defendant to reopen the case for the introduction of newly discovered evidence, filed July 3, 1917, after completion of the original hearing on June 14, 1917. By stipulation between the parties, the

evidence consists of the defendant's affidavits in support of said motion, the plaintiff's answering affidavits, and defendant's reply affidavits. The Nerger mold, produced as an exhibit, answers, so far as I can see, each and every requirement of the plaintiff's claim 11 here in suit. It is a single cavity mold, or mold unit. With it, or molds like it, were made over 2,000 heels, upon Nerger's order, of merchantable quality so far as appears. There was no concealment regarding their manufacture, and it was known to Nerger himself and to a number of employés of the Morgan & Wright Company, who have testified about it. Specimens of them are exhibits in the case. The heels produced were made under United States patent to Nerger, No. 661,129, issued November 6, 1900, for an improvement in rubber heel lifts. There is evidence that the mold produced many imperfect heels, and that the cost of the heels produced was too great for profit. But this was partly because of the fact that it is more economical to use multiple molds than single unit molds—a fact which seems to me immaterial upon the question here involved, because there can be no invention in combining single into multiple molds. I see no reason to doubt that the Nerger mold, properly adjusted and handled, is entirely capable of producing satisfactory heels. In 1916 Nerger sold his patent to the plaintiff in this case, together with six of the molds which had been used by Morgan & Wright in the manufacture above described. Although Nerger does not appear to have further continued the use of his mold in making heels, I am unable to hold that, as the plaintiff contends, it was merely an unsuccessful and abandoned experiment. Upon the evidence regarding it, I must regard his mold as an anticipation of the structure covered by the plaintiff's claim in suit sufficient to prevent any conclusion that the claim covers anything involving invention or patentably new. The mold described in the patent has various features to which the claim in suit makes no reference, as further stated below; but these, as will also appear, are not found in the defendant's mold.

The plaintiff's evidence sufficiently shows that concavo-convex heel lifts, such as may be made by using the mold described in the patent in the manner therein set forth, have had great commercial success and possess qualities rendering them superior to heel lifts not shaped as the patented mold shapes them, and made according to the method which the patent describes.

But, although the plaintiff is understood to have a patent purporting to cover such heel lifts, it is not complaining in this suit of any infringement of that patent. Nor is the patent upon which it sues in this case a patent for a method or process. It is a patent for a mold only, and for the purposes of this case, for a mold having only the features specified in claim 11.

The patent, it is true, contains a full description of a method or process which includes use of the patented mold. It contains also a full statement and explanation of the advantages claimed to reside in such heel lifts as are so produced. But all this cannot make it a patent for anything beyond the mold described, nor import into the broad

terms of the particular claim in suit anything not fairly expressed by those terms in connection with the description given of the patented mold.

The patentee begins his specification by saying that his improvement in molds relates to the manufacture of resilient heels, and has special reference (1) "to the method of acting upon the plastic rubber or composition to produce a heel," and (2) "as the mold employed in practicing the method." But, as has been stated, neither the patent nor the claim in suit cover a method, although a method is thus put forward as the most important feature of the invention.

The specification goes on to declare that the object of the invention is to produce a resilient heel which will have its attaching face concave throughout its area, so that a vacuum or suction cup may be formed whereby it will be held to the shoe temporarily until the nails can be applied, and that a further object is to produce a heel which will have a flat tread surface when applied to a shoe, and which may be equipped with fastening devices so located that it can be easily trimmed down. But, as has been stated, the patent cannot be treated as for a product, either of the unpatented method set forth at length in the specification, or of the patented mold.

After describing the mold, which, and not the heel to be produced by means of it, must be regarded as the only improvement in manufacture which the patent can cover, the specification proceeds to describe "the practice of the invention." The invention being for present purposes a mold, and nothing more, this description of a method wherein the mold is used is significant only so far as it tends to describe the alleged new mold by describing its operation in use.

According to said description, rubber or composition is to be placed in the chamber of the mold so as to completely fill its opening. This is the chamber having, according to claim 11, the general outline of a heel lift and one concave wall. A top plate forming the opposed wall of the chamber, and having a convex surface coacting with the concave wall, is then to be put in position, with its convex projection entering a depression which surrounds the molding chamber. To this depression claim 11 makes no reference, nor is there any such depression to be found in the defendant's mold.

The specification provides that the recess or cavity forming the concave wall of the molding chamber is to be "a true section of a sphere," and also that the convex surface of the projection on the under side of the top plate, which is to form the opposed wall, is also to be "a true section of a sphere and an exact complement of" the concave wall of said chamber wherewith it is to coact. It further provides that said convex surface is to be "adapted to fit in the concave depression" surrounding the molding chamber and referred to in the preceding paragraph hereof. Nothing of all this is to be found either in the claim in suit, or in the defendant's mold. From that mold, not only is any depression surrounding the molding chamber absent, but neither the convex nor concave wall thereof can be properly described as a true section of a sphere.

The description requires the plates composing the mold to be steam heated, and, when the mold is filled, subjected to hydraulic pressure, so as to compress and solidify the plastic contents of the mold. It may be taken for granted that any mold for making rubber heels would be treated, when in use, substantially in the same way. There is a statement that surplus material overflowing in the process is to be accommodated in an annular cavity surrounding the above depression which surrounds the molding chamber, therein forming a "fin" to be trimmed off before marketing the product. No such annular cavity is referred to in claim 11 or found in the defendant's alleged infringing mold. According to further statements in the specification, by means of ribs upon the top plate of the mold, about which claim 11 is silent, and which are also absent from the defendant's mold, grooves in the upper face of the heel will be produced, which will "mark off separate suction areas at the center of the heel." And finally, the pins—i. e., the "washer supporting devices"—of claim 11, are to "converge on radii of the arcs described by the concavity from which they rise, and thus form openings in the heel converging toward the concave or attaching face thereof, brought into parallel relation when the heel lift is flattened against the shoe, so that nails driven through them will enter the shoe heel perpendicularly. No suggestion as to any of this is to be gathered from claim 11, nor are there any pins or washer supporting devices so arranged in the defendant's mold.

According to the plaintiff's own evidence, the mode of operation it follows, in practice, when its patented mold is used, differs in important respects from the mode of operation described in the patent. Instead of beginning by placing rubber or composition in the molding chamber, so as to completely fill its opening, what is first done is to place a disc-like heel blank, containing a desired weight of rubber or composition, on the pins in the cavity of the chamber, upon which the convex upper member is then forced down by hydraulic pressure, whereby it is said that air is pocketed or trapped between the lower surface of the disc-like blank and the concave bottom of the chamber, the resistance of air so confined thereupon operating, as is claimed, to force the outer edges of the disc-like blank to the outer edges of the mold. It is further said that all this results in securing more density and less porosity in the edges of the heel produced. An intermittent sudden pressure upon the upper member of the mold is said to be employed in order to expel the air confined as above.

The evidence relied on by the plaintiff to show that any such effect upon the product is in fact produced seems to me by no means convincing. But, taking the facts to be as stated, it is clear that the plaintiff is using its patented mold to carry out a method other than that directed by the patent to be followed in "the practice of the invention" or in producing heels "by my improved method." Nothing is said in the patent about using the stock in disc-like blanks, and such blanks can hardly be supposed to "completely fill the opening" of the cavity in the mold, according to the directions of the patent. Nor is anything found in the patent about trapping or pocketing air underneath what is put into the cavity, nor any suggestion that any result of importance to the

product may be secured thereby. Though a patentee is entitled to all the advantages of the invention he describes, he cannot claim the benefit of any others; and here, so far as he has undertaken to describe his invention by describing a method, he has relied only on the method described in the patent.

The defendant, if it could in any case be said to follow the method of the patent while it uses a mold constructed in so many particulars differently from the mold shown and described in the patent, does not, according to its evidence, follow the plaintiff's method as described in the plaintiff's evidence. Instead of disc-like blanks, it uses blanks in size and shape substantially like the finished heel, and leaving little scope for the production of any effect upon the outer edges thereof, such as the plaintiff claims to secure.

To the differences in construction between the mold described in the patent and the defendant's mold it may well be that some part of the success of the plaintiff's product may be due. There is at any rate nothing to show that said success is due only to those features of the patented mold which it has claimed in claim 11. The attempt appears to have been made to cover by that claim all concave-convex molds, whether in other respects such as described in the patent or not. The result has been, in my opinion, to make the claim one for what the patentee did not invent and was not patentable. If the claim could be regarded as valid, if limited to the particular structure shown and described in the patent, so as to cover only molds having the described features of the patented molds, the defendant's mold, from which so many of those features are absent as above, does not infringe it.

These conclusions require dismissal of the bill, and there may be a decree accordingly. The defendant may submit a draft decree, under rule 23 of this court, on or before May 27, and the plaintiff may file corrections thereof on or before June 2, 1918.

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## HILDRETH v. MASTORAS.

(District Court, D. Oregon. July 29, 1918.)

No. 7466.

1. PATENTS ⊂=168(2)—CLAIMS—CONSTRUCTION.

Where the first two claims of plaintiff's patent, after being rejected by the examiner, were later allowed as claims 10 and 11, there is no reason for a strict construction of the third claim, which, after the disallowance, was made No. 1.

2. PATENTS ⊂=90(5)—INVENTION—PRIORITY.

The original and first inventor is he who has not only first originated the novel concept, but who through the exercise of reasonable diligence has reduced it to practice; for a mere concept, not reduced to practice, is not in itself patentable.

3. PATENTS ⊂=311—INFRINGEMENT SUIT—EVIDENCE.

In a suit for infringement, evidence that complainant's device is not operative is provable under the general issue.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. PATENTS ⟸49—VALIDITY—OPERATIVE DEVICE.
A patent *held*, in view of the long interference proceedings and the subsequent decision of the Court of Appeals for the District of Columbia wherein it was decided that the patent was basic, to afford prima facie proof of the operativeness and utility of the machine.

5. PATENTS ⟸47—PIONEER PATENTS—OPERATIVE CHARACTER.
A device need not be perfect in order to escape the charge of inoperativeness, and in case of a pioneer patent no one can expect the operative character of the device to respond to the highest test of perfection in the art.

6. PATENTS ⟸173—CONSTRUCTION—CLAIMS.
A pioneer patent is entitled to a broad construction of its claims, though of course it cannot be broader than the claims.

7. PATENTS ⟸328—VALIDITY—INFRINGEMENT.
The Dickinson patent, No. 831,501, claim 1 of which was for a candy-pulling machine comprising a plurality of oppositely disposed candy hooks or supports, and means for producing an in-and-out motion of those parts, *held* valid and infringed by defendant's device.

In Equity. Suit by Herbert L. Hildreth against Jim M. Mastoras. Decree for complainant.

Macleod, Calver, Copeland & Dike, of Boston, Mass., and Chester G. Murphy, of Portland, Or., for complainant.

A. W. Lafferty, D. E. Lofgren, J. L. Atkins, and W. A. Robbins, all of Portland, Or., for defendant.

WOLVERTON, District Judge. This is a suit for injunction to restrain an alleged infringement by defendant of complainant's patent. Complainant is the owner of what is known as the Herbert M. Dickinson patent, letters patent for which were issued to him, being numbered 831,501. The device is for pulling candy. Claim 1, which it is claimed is being infringed, is as follows:

"A candy-pulling machine, comprising a plurality of oppositely disposed candy hooks or supports, a candy puller, and means for producing a specified relative in-and-out motion of these parts, for the purpose set forth."

The hooks consist of a perpendicular standard or pin affixed to the bottom of a trough and in the center thereof, and two other pins or standards suspended from an arm or plate, which in turn is affixed to a support and made to rotate nearly a one-half revolution. By suitable contrivance the support which carries the pins is made to move back and forth from end to end of the trough, and at each end of the trough the pins are made, by the rotary motion of the plate to which they are suspended, to reverse their positions from one side of the trough to the other before beginning their movement in the opposite direction. In this way there is produced an in-and-out movement of the suspended pins relative to the stationary pin every time they reach and depart from the ends of the trough. This movement causes the hank of candy which is placed in the trough to be pulled by lapping on itself, as the suspended pins pass and repass the fixed pin and as their positions are reversed. The operation of the device pulls the candy, or at least that is the theory advanced by the complainant.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Defendant is the assignee of the Langer patent, No. 1,232,697, and his device, which it is alleged infringes claim 1 of the complainant's patent, consists simply of two stationary pins, each extending horizontally from the center of a disk, and a third pin, which is made to rotate about the disks in opposite directions, so as to pass and repass between the stationary pins at each revolution. The candy is placed on the pins in operation, and is lapped and relapped as the rotating pin passes and repasses between the stationary pins. When the candy is in proper elasticity, it needs no support aside from that afforded by the pins.

[1] Preliminary to entering upon the more salient features of the present inquiry, I will dispose of a suggestion of counsel for the defendant to the effect that the Patent Office, in an interference proceeding had involving the Dickinson patent with others, has rendered claim 1 of the patent subject to a narrow rather than a broad construction. Originally Dickinson made but three claims, of which what is now claim 1 was the third, and the suggestion is based upon the fact that at one stage in the proceeding claims 1 and 2 were rejected by the examiner. However, further action was taken respecting the rejected claims, a matter which counsel seem to have overlooked, whereby claim 1 was eventually allowed in exactly the same language as first written. It now constitutes claim 10 in the patent. Claim 2 was also allowed, with an amendment to avoid a supposed conflict with Firchau, making it read "a series of more than two pins or pulling members," instead of "a series of pins or pulling members." As amended, it is now claim 11. The Firchau concept was not in its operation a machine for pulling candy at all, but one for working or mixing candy. The contrivance consists of a drum with two pins or fingers extending therein, which are rotated in opposite directions, and has none of the elements of the Dickinson machine. This disposes of any inference of narrow construction that might otherwise have been drawn from the fact of the examiner first rejecting claims 1 and 2 as first propounded by Dickinson, and also of any contention that the Firchau patent anticipates the Dickinson device. These matters of conflict were settled in the Patent Office in the interference proceeding, and need no further elucidation.

[2] Another argument presented by counsel for defendant is that there has never been any reduction to practice of the Dickinson machine, and hence that there was no completion of the inventive act, or that because thereof the thing claimed by him never eventuated into a completed invention. Reduction to practice is but an element in an investigation for determining who is the original and first inventor, where two or more persons who have conceived a supposedly novel idea respecting a device or combination not theretofore known or used are each seeking to establish the right to a patent as the prior and first inventor. The concept is not in itself patentable, and it is only after the supposed novel device has been reduced to practice that the inventor is entitled to patent. So it is that the person who is first to conceive the invention, but is later than his rival in reducing it to practice, is not regarded as the first inventor, unless he has exercised due diligence

in efforts to perfect the invention at and continuously after the time his rival entered the field against him. And it may happen that the first to originate the concept, but last to reduce the device to practice, if he has exercised reasonable diligence under all the circumstances, will be entitled to the patent. 30 Cyc. 876. It results, therefore, that the original and first inventor is he who has not only first originated the novel concept, but who, through the exercise of reasonable diligence, in view of the surrounding and attending circumstances, was first to reduce it to practice.

[3] There is no dispute here involving priority of invention. There is a dispute, however, which presents the question whether the complainant has any invention at all, or an invention presenting any utility or importance. This is predicated upon the insistence of one of counsel for the defendant that there is a total inoperativeness of the machine constructed under the Dickinson patent. That the device is inoperative, if such is the case, is provable under the general issue. Reckendorfer v. Faber, 92 U. S. 347, 354, 23 L. Ed. 719.

[4, 5] Aside from the presumption that the patent affords that the Dickinson machine is operative, the testimony here satisfactorily shows it to be a fact. Complainant, the present owner of the patent, had and still has one of the machines in his factory. He testifies that he has used it in practical operation, and that while, as originally constructed, it did not pull candy satisfactorily, yet by shortening the reach of the pull, and speeding up the mechanical apparatus for moving the pins, it did the work all right, and would pull candy commercially. The change in construction to speed up the operation in no way affected the principle involved by the invention. A model has been introduced in evidence, showing the mechanical operation of the machine, and it is within itself a demonstration that it pulls candy.

Take any plastic, cohesive substance, held by two objects, separately adjusted, which are made to pass a stationary intervening object, one upon each side thereof, and the substance, when contact is made with the intervening object, will be caused to lap on itself and to stretch or be pulled as candy is pulled by hand. Again, when the positions of the two objects are reversed, in manner as the Dickinson device designs they shall be, one of the objects passes between the intervening or stationary object and the other of the two, and another contact with the substance is made, which will cause it to stretch or be pulled, but in a less degree, because the reach of the movement is shorter. Can there be any doubt about a device of the kind, and thus operated, stretching or pulling the substance mechanically? Surely there can be none. If none, what becomes of the alleged inoperativeness of the Dickinson device? By causing the two objects to move in opposite directions past the intervening or stationary object, and to be reversed at the respective extremities, the substance will again be caused to be twice stretched or pulled, in the same way as above indicated, and thus will be completed a cycle in operation of the Dickinson device. The continued operation consists in repeating the cycles in movement of the moving objects in relation to the stationary object.

No further argument is necessary to convince one that the device is mechanically operative for pulling candy in some form. It may not be the best device possible for the purpose, but it is self-evident that it will pull candy. The question will receive further elaboration in the discussion of a somewhat correlated contention made by one of defendant's counsel. The contention is that, while it is conceded that the Dickinson patent is valid and the device useful, yet it cannot be used to pull candy, or rather that claim 1 of the Dickinson patent is susceptible only of a narrow construction, and, so construed, that the Langer patent does not infringe.

No better illustration in discussion can be produced than that which comes out of the interference proceeding in the Patent Office. In the long struggle Dickinson had in the Patent Office by reason of the interference proceedings, which extended over a period of five years, five other applications for patents were at one time and another involved in the controversy. In some instances, the applicants withdrew the broad claims which were said to be in conflict with those of the other inventors, and accepted patents which covered merely the special types of machines designed by them. In other cases, the question of priority was, after more or less prolonged contest, determined by the Patent Office. The five were those of Hildreth, Jenner, Thibodeau, Robinson, and Henry. The one idea common to all these applications, including Dickinson's, is that couched in the exact language of claim 1 of the Dickinson patent as finally approved and issued by the Patent Office. That the claim was considered to contain the basic principle or elements dominating the claims of all the applicants is attested by the strenuous contest made upon the part of each applicant to have it read into his patent above that of the other contestants. The Patent Office not only declared Dickinson to be the original and first inventor of the device embodying the principle, but further declared that the principle itself was basic in character and dominated all the other devices for which applications were then pending, or at some time had been during the interference proceedings. Brief reference will be made to the patents awarded in the interference proceeding, and attention directed to the different types.

The Hildreth device consists of two pins adjusted in a vertical position on oppositely disposed arms of an oscillating beam, and a third in the form of a swinging pendulum. By co-operation of the pendulum with the oscillating pins there is produced an in-and-out movement of the pins with relation to each other, which produces contact with the candy, and causes a lapping and pulling of the same, and in each cycle of operation the candy is four times lapped and pulled, the same as by the Dickinson machine.

The Jenner machine is provided with five pins horizontally disposed, three of which are stationary and the other two but the handles of a crank, which are made to revolve in the same direction, so relatively disposed to the stationary pins as to move in intersecting paths; each crank pin in its revolution circumscribing two of the stationary pins. Thus contact by the pins is three times made with the candy at each revolution of each crankpin, and the candy is accordingly lapped and

pulled. Here again is found the in-and-out or intersecting movement, although the pins are horizontally and differently disposed, three being stationary and two moving.

The Thibodeau machine has four pins horizontally disposed, supported by two levers, a pair being attached to each lever, and the arms caused to rotate in the same direction. The levers have each a short arm and a long arm, and when the rotation takes place the in-and-out or intersecting movement is produced, and the candy when laid on the pins is lapped and pulled.

The Robinson machine contains three horizontally disposed pins, one of which is stationary. The other two are really crank-shaped arms, which are made to revolve about the stationary pin in opposite directions. Thus is secured the intersecting or in-and-out movement for lapping and stretching the candy.

The Henry machine is much of the same order, except the crank pins have the form of hooks, and are so called, and the cranks revolve in unison. The machine is double, having a set of pins on each side of the operating machinery, so that two batches of candy may be pulled at the same time.

Now, the principle of pulling candy is common to all these machines. They all have the intersecting or in-and-out movement of the pins acting relatively to each other, by which the candy is engaged and lapped, and stretched or pulled. This is practically the only way that candy can be pulled commercially. The idea was suggested, no doubt, by the method of hand pulling, by which the candy is thrown over a stationary hook and stretched. Then by holding the end in one hand, the elongated hank is seized in the center with the other, and the hank again thrown over the hook, and the pulling repeated. What was desired was a machine that would pull candy on the same principle. Dickinson first hit upon such a contrivance by resorting to the system of pins so disposed and so operated as to produce relatively the in-and-out movement, and thus to engage the candy and lap or stretch or pull it. None of the other machines produced in the interference proceeding did more. Some of them, perhaps all of them, pulled candy more successfully; but they all resorted to the same principle for pulling candy as did Dickinson. The in-and-out or intervening movement of the pins operating relatively to each other was found common to all, and this, whether the pins consisted of three or more than three, or whether they were vertically or horizontally disposed; and the question of needed support for the candy, other than the pins afforded, while the machine was in operation, was treated as wholly irrelevant to the controversy. In the light of all this, the examiner of interferences defined the issue as relating to a pioneer invention, and of a generic nature broad enough to include the widely different types of machines shown in the several applications. The decision passed by appeal to the Board of Examiners in Chief, thence to the Commissioner of Patents in person, and then to the Court of Appeals for the District of Columbia, and by each of such tribunals was affirmed. The Commissioner of Patents in his decision says:

"Dickinson seems to have the elements of the machine called for by the issue, and those elements are mechanically operative. * * * The record furnishes no justification for the conclusion that Dickinson's machine was useless, whatever conclusion may be reached as to the comparative superiority of the various machines."

The effect of these decisions is certainly sufficient to render the patent prima facie proof of the operativeness and utility of the Dickinson machine, whatever may be the rule generally. But, being a pioneer patent, no one could expect the operative character of the device to respond to the highest test of perfection in the art. Judge Hough has stated the principle clearly in Engineer Co. v. Hotel Astor et al. (D. C.) 226 Fed. 779, as follows:

"A device need not be perfect in order to escape the charge of inoperativeness. * * * The test of operativeness is to ascertain whether the patented device does (even lamely and imperfectly) perform the acts claimed for it in the method described and (perhaps) for the reasons given."

The cases are numerous to the same purpose. See, among others, Telephone Cases, 126 U. S. 536, 8 Sup. Ct. 778, 31 L. Ed. 863; Mergenthaler Linotype Co. v. Press Pub. Co. (C. C.) 57 Fed. 502, 506; Thomson-Houston Electric Co. v. Lorain Steel Co. (C. C.) 103 Fed. 641, 644; Crown Cork & Seal Co. v. Aluminum Stopper Co., 108 Fed. 845, 48 C. C. A. 72.

The claim that the Dickinson machine will stir candy, but will not pull it, and therefore that it is inoperative to pull candy, is not sustained. I have not overlooked the case of Besser v. Merrilat Culvert Core Co., 243 Fed. 611, 156 C. C. A. 309.

Reference has been made also to the Igou patent; but it is of a type similar in construction to the Hildreth patent, and needs no further elucidation to show that it also falls within the same principle governing all, as it respects claim 1 of the Dickinson patent.

[6, 7] The fact that the Dickinson patent is a pioneer in the art entitles it to a broad construction. Of course, it could not be broader than the claim. But a reference to the claim shows it to be broad in character, and to comprise any candy-pulling machine having a plurality of oppositely disposed hooks or supports, a candy puller, and means for producing a relative in-and-out motion of the parts. "If," says the court in Miller v. Eagle Manufacturing Co., 151 U. S. 186, 207, 14 Sup. Ct. 310, 318 (38 L. Ed. 121), "the invention is broad or primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions." As we have seen, the principle sought to be applied is the relative in-and-out movement of the pins, so as to bring the same in contact with the candy and cause it to be lapped and pulled. The principle is basic, and dominates all machines constructed for pulling candy which seek to apply it in operation.

The defendant's machine has the relative in-and-out movement perfectly, and without it the machine would not pull candy. It is of a type, respecting the basic principle of its operation, not different from those machines considered in the interference proceeding. It

is a marked improvement on the Dickinson machine, but it cannot be operated without applying the basic principle for pulling candy by machinery which Dickinson invented; and this in itself is a demonstration that it infringes the Dickinson patent. That the defendant's machine has two stationary pins and one moving, as against two moving and one stationary in the Dickinson and Robinson patents, makes no difference. The principle of the relatively intervening or in-and-out movement of the pins is applied in each, and that is the essential thing.

It is true that, where two machines produce the same effect merely, no justification is afforded thereby for the assertion that they are substantially the same, or that the devices used by one are therefore mere equivalents for those of the other. This would reverse the logic in reasoning from cause to effect. But infringement, it is said, "is a copy of the thing described in the specification of the patentee, either without variation, or with such variations as are consistent with its being in substance the same thing. If the invention of the patentee be a machine, it will be infringed by a machine which incorporates in its structure and operation the substance of the invention; that is, by an arrangement of mechanism which performs the same service or produces the same effect in the same way, or substantially the same way." Burr v. Duryee, 1 Wall. 531, 573 (17 L. Ed. 650). The principle is restated in Morley Machine Co. v. Lancaster, 129 U. S. 263, 273, 9 Sup. Ct. 299, 302 (32 L. Ed. 715), as follows:

"Where an invention is one of a primary character, and the mechanical functions performed by the machine are, as a whole, entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

See, also, Westinghouse v. Boyden Power Brake Co., 170 U. S. 537, 569, 18 Sup. Ct. 707, 42 L. Ed. 1136.

Turning again to claim 1 of the Dickinson patent, its language and wording, it can be read directly upon the Langer patent, and, while the mechanism is different in arrangement and in the movement of its parts, it performs the same service in substantially the same way, and the appliances adopted by the Langer patent are but mere mechanical equivalents of those used in the Dickinson machine. It results that the Langer patent infringes that of Dickinson, as it respects claim 1 of the latter patent.

Nor is claim 1 functional merely, and therefore too broad to be sustained. The reasoning of Judge Rose, in Hildreth v. Lauer & Suter Co. (D. C.) 208 Fed. 1005, 1012, to my mind satisfactorily disposes of the proposition, and I need not repeat it here.

The complainant is entitled to an injunction, and the cause will be referred to the master in chancery to take the accounting.

## In re CRAWFORD PLUMMER CO.

(District Court, D. Massachusetts. July 10, 1918.)

No. 23559.

1. BANKRUPTCY ⟸255—USE OF LEASED PREMISES BY RECEIVER OR TRUSTEE—RENTAL.

A trustee or receiver has the right to use the premises occupied by bankrupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss, and such use is not an adoption of a lease to bankrupt, but the estate must pay reasonable compensation for such use.

2. BANKRUPTCY ⟸255—USE OF LEASED PREMISES BY RECEIVER OR TRUSTEE—RENTAL.

The rent reserved in a lease to bankrupt is, under ordinary conditions, the fair measure of what should be paid by a receiver or trustee.

In Bankruptcy. In the matter of the Crawford Plummer Company, bankrupt. On review of order of referee. Reversed.

Albert A. Gleason, of Boston, Mass. (Gleason & Higgins, of Boston, Mass., of counsel), for creditors.

Asa P. French, of Boston, Mass., for receivers.

MORTON, District Judge. The question presented by these petitions for review is how much rent shall be paid out of the estate to the landlords for the time during which the premises were occupied by the common-law assignee and by the receivers in bankruptcy. The period was from April 18 to August 1, 1916, inclusive, 3⅖ months. The premises were a store on Washington street, Boston, near the best retail district. They were leased by the landlords to a third person, and by it were orally sublet to the bankrupt, on the terms stated in the lease. In legal effect the bankrupt was only a tenant at will; but the lessee and its guarantor on the lease had close business relations with the brankrupt, the arrangement had continued for a number of years, and for the purposes of the present question I think the case substantially the same as if the bankrupt had held directly under the lease. The failure occurred in April, 1916; the lease ran till December 31, 1917. The total rent amounted to $26,420 per year; i. e., $2,201.66 per month.

The matter was heard by the referee and is here on his certificate, which states the facts. He finds:

"That the rental value of this store for the purposes of permanent occupancy at the time it was occupied by the receivers was greater than the rent reserved under the leases. * * * The rental value of the premises, used only for temporary occupancy, was perhaps as low as $100 a week. The receivers were tenants at sufferance, and it was understood that they were to vacate the premises whenever a satisfactory offer to rent by lease was received by the petitioners. * * * There was no agreement between the assignee and the owners, or between the receivers and the owners, or between the trustees and the owners, with reference to the amount of rent to be paid. A statement was made by one of the receivers to the representative of the owners, to

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the effect that usually the amount of rent reserved under the lease was the sum allowed."

The learned referee allowed the sum of $1,500 per month as being what he regarded as "equitable and just," and both parties (the landlords and the trustees) have taken review proceedings from his order.

[1] A trustee or receiver has the right to use the pemises occupied by the bankupt for a reasonable period, sufficient to enable him to dispose of the bankrupt's property without unnecessary loss, and to do so by selling it there, if that be the best way. In re Chambers, Calder & Co. (D. C. R. I.) 98 Fed. 865; Remington on Bankruptcy (2d Ed.) § 984. This court has several times stopped landlords from prematurely ousting receivers or trustees. Such use of real estate is not an adoption of a lease to the bankrupt. The liquidating officers are to pay therefor reasonable compensation for the use and occupancy of the premises. In this case neither the landlords nor the lessee made any effort to oust the assignee or receivers, and, if they had, they would not have been permitted to do so, without allowing a reasonable time in which to close out the business, which was one of some size. In re Chambers, Calder & Co., supra. It was understood by the parties that efforts were being made to find a permanent tenant, but no pressure to vacate was ever put upon the assignee or the receivers by the landlords or by the lessee. In view of these facts, the element of uncertainty in the assignee's and receiver's tenancy seems to me to have been overemphasized by the learned referee.

[2] It has generally been thought that the rent reserved in a lease to the bankrupt was, under ordinary conditions, the fair measure of what the use and occupancy by receivers or trustees was fairly worth, and it has been the sum usually awarded in this district. In re Adams Cloak, Suit & Fur House (D. C. Mass.) 199 Fed. 337. In the absence of an express agreement for a lower rental, there is a presumption in favor of that sum; and it will ordinarily be allowed, unless unusual circumstances appear making it plainly unreasonable. Fleming v. Noble, 250 Fed. 733 (C. C. A. 1st Cir.). There were no such circumstances in this case; and it seems to me that the ordinary practice ought to have been followed. It is true that this makes the rent large for the business done; but that was a matter with which the landlords were not concerned, and which ought not, I think, to diminish their rights.

The order of the referee is vacated, and an order may be entered in accordance with this opinion.

UNITED STATES v. DE BOLT et al.

(District Court, S. D. Ohio, E. D. July 3, 1918.)

No. 1105.

1. CRIMINAL LAW ⟸753(1)—DIRECTION OF VERDICT—CONSIDERATION OF EVIDENCE.
It is the duty of the court, in considering a motion to direct a verdict, to take that view of the evidence most favorable to the party against whom it is desired that the verdict should be directed, and determine the matter from that evidence and reasonable and justifiable inferences therefrom.

2. WAR ⟸4—SABOTAGE—DESTRUCTION OF WAR MATERIAL—ATTEMPT.
Under Sabotage Law April 20, 1918, § 3, providing that whoever, in times of war destroys war material, or whoever willfully attempts to make or causes to be made in a defective manner any war materials, a conviction can be had for an "attempt," where the evidence shows a willfull advising, soliciting, and attempt to influence another to commit the felony named in the act.

3. COURTS ⟸365—AUTHORITY OF STATE DECISIONS—CRIMINAL CASES.
Though there are no common-law offenses against the United States, and criminal cases are controlled by federal statutes, state statutes and decisions may be persuasive.

Homer De Bolt and another were indicted and tried for violating Sabotage Law, § 3. On motions for directed verdicts. Motions overruled.

Stuart R. Bolin, U. S. Atty., and F. F. Smith, Asst. U. S. Atty., both of Columbus, Ohio.

N. J. Weisend, of Columbus, Ohio, and J. M. Lewis, of Urbana, Ohio, for defendants.

SATER, District Judge. [1] The evidence having all been submitted, each of the defendants moves for a directed verdict on the grounds (1) that the indictment does not state a cause of action, and (2) that, if the indictment is good, the evidence does not warrant a conviction. It is the duty of a court, in considering such a motion, to take that view of the evidence most favorable to the party against whom it is desired that the verdict should be directed, and, from that evidence and the inferences reasonably and justifiably to be drawn therefrom, determine whether or not under the law a verdict might be found for that party (Nelson v. Ohio Cultivator Co., 188 Fed. 620, 629, 630, 112 C. C. A. 394 [C. C. A. 6]; Herman H. Hettler Lumber Co. v. Olds, 221 Fed. 612, 615, 137 C. C. A. 336 [C. C. A. 6]); or, to use the language of Judge Sanborn in the criminal case of Isbell v. United States, 227 Fed. 788, 790, 142 C. C. A. 312 (C. C. A. 8):

"At the close of the evidence in every trial by jury, the question of law, not whether the weight of the evidence sustains the claims of the plaintiff or the defendant, but whether or not there is any substantial evidence to sustain the claim of the plaintiff, necessarily and unavoidably arises, and the duty rests upon the trial court to direct a verdict for the defendant if there is no such evidence."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[2, 3] The Ralston Steel Car Company, located at Columbus, Ohio, has for some time past been engaged on its premises in manufacturing for the United States, for war purposes, about 4,400 steel cars. About 400 of them are to be used in trench warfare in France; the residue are to be employed on steam railways to aid in the prosecution of the present war with Germany. In early June an attempt was made to unionize the company's plant. Some 10 or 12 employés who had joined the union were discharged. Whether their discharge was due to their union proclivities or to other cause or causes is not material to the decision of the questions presented. One Ingraham, who worked at a nine-foot spindle lathe, which was used on the company's premises in the production of the heretofore mentioned war utilities, refused all solicitations to connect himself with the union and continued to work at his machine. On the evening of June 11th a meeting of the members of the union was held, which was attended by a number of those who had identified themselves with it, and also by one Fox, who had applied for admission to the union and had arranged to pay his dues on the day following. It was understood that Fox should remain in the company's employ for the purpose of furnishing information as to the new men that might be brought in to take the places of the discharged employés, as to the work that was being done, and as to where and by whom the dies for the company were made.

On account of the alleged occurrences at and following the meeting at which some, if not all, of the discharged workmen were present, an indictment was preferred against De Bolt and Kelso, which recites that on that date they unlawfully, maliciously, feloniously, and willfully, with reason to believe that their act might injure, interfere with, and obstruct the United States in preparing for and carrying on the war with Germany and its allies, attempted to cause to be made in a defective manner the steel railroad cars then in process of manufacture by the Ralston Company, by advising and attempting to influence Fox to procure a small bottle of vinegar and to pour its contents into the bearings of the lathe on which Ingraham was working, and also to loosen the tail stocks and screws of such machine, and to do such other things to such lathe as would spoil the material in it on which Ingraham was working. The indictment does not state what effect the vinegar would have on the bearings. There is evidence, however, that tends to show that the discharge of Ingraham was desired; that vinegar applied to the bearings of the lathe would thin and cut the lubricating oil, would cause the bearings to become hot, and would necessitate the removal of the shaft and delay in completion of the work in hand; and that, although loosening of the tail stock would ordinarily be detected by a workman, such loosening would permit the material in the lathe to drop from its place and cause the work done to be defective and untrue.

The indictment is based on section 3 of what is commonly known as the Sabotage Law, approved April 20, 1918, and entitled "An act to punish the willful injury or destruction of war material, or of war premises or utilities used in connection with war material, and for other purposes," which section is as follows:

"That when the United States is at war, whoever, with intent to injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war or whoever, with reason to believe that his act may injure, interfere with, or obstruct the United States or any associate nation in preparing for or carrying on the war, shall willfully make or cause to be made in a defective manner, or attempt to make or cause to be made in a defective manner, any war material, as herein defined, or any tool, implement, machine, utensil, or receptacle used or employed in making, producing, manufacturing, or repairing any such war material, as herein defined, shall, upon conviction thereof be fined not more than $10,000 or imprisoned not more than thirty years or both."

The government has offered substantial evidence, which the defendants have vigorously combated, to prove the charge laid in the indictment. Fox, if he ever assented to the pouring of vinegar in the bearings of Ingraham's lathe or to loosening its tail stock or screws (all of which is for the jury's determination), recanted, and, being suspected by his employer and kept under surveillance, disclosed, according to his evidence, when called to the office of his employer, the entire scheme which the government claims was concocted on the evening of June 11th. The defendants' position is that, to convict of an attempt to commit a crime, it is necessary to show that an overt act was done with the specific intent to commit that particular crime, and that merely to advise, solicit, or attempt to influence another to commit a crime is not an overt act, but that some additional step constituting such an overt act is necessary to constitute an offense. They therefore claim that the indictment is insufficient in law, and that, if the evidence offered by the government be accepted as true, no offense was committed, for the reason that the defendants did nothing more than to advise, solicit, and attempt to influence Fox to pour vinegar into the bearings of the lathe and to loosen its tail stock and screws.

The gravity of the situation produced by the present war is such that Congress in its wisdom was impelled to enact the wise, but somewhat drastic, law on which the indictment is based. It denounces as a felon (see section 335, Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1152 [Comp. St. 1916, § 10509]) not only the person who, with reason to believe that his act may injure, interfere with, or obstruct the United States in preparing for or carrying on the war, willfully makes or causes to be made in a defective manner any war material, such as the Ralston Steel Car Company was making, but also the person who under like conditions attempts to make or who attempts to cause to be made in a defective manner any such material. The language employed is comprehensive and unrestricted. It does not define the nature of the attempt which it condemns, but expressly makes the attempt itself a separate substantive crime, and covers any attempt to cause to be made in a defective manner war material coming within its terms. Another illustration of a law which makes it a penal offense to attempt a prohibitied act is found in section 2 of the Sherman Anti-Trust Act (Act July 2, 1890, c. 647, 26 Stat. 209 [Comp. St. 1916, § 8821]). In Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 107, 29 Sup. Ct. 220, 53 L. Ed. 417, it was said not to be uncommon in criminal law to punish, not only a completed act, but

also acts which attempt to bring about the prohibited result. The court had under consideration a Texas statute, but on page 110 it applied the same rule to the Sherman Act.

Whether the defendants attempted to commit a felony (assuming the government's evidence to be true) depends upon the answer to the question: Does the willful advising, soliciting, and attempting to influence another to commit the felony named in the statute constitute an attempt? In Bishop's New Crim. Law (Ed. 1892) vol. 1, §§ 728, 729, it is said:

"An attempt is an intent to do a particular criminal thing, with an act toward it falling short of the thing intended. Hence, the two elements of an evil intent and a simultaneous resulting act constitute, and yet only in combination, an indictable offense, the same as in any other crime."

Other definitions of attempt and of the elements of an attempt to commit a crime are found in 3 Am. & Eng. Ency. Law, 250, 251, 254, and Wooldridge v. U. S., 237 Fed. 775, 778, 779, 150 C. C. A. 529 (C. C. A. 9). Whether a mere solicitation to commit a crime—a mere advising and effort to influence its commission—is an act toward carrying the intent into execution, and is an endeavor to attempt to commit a crime, has been inferentially, but not expressly, decided by the Supreme Court. In United States v. Quincy, 6 Pet. 445, 465 (8 L. Ed. 458) it was ruled that:

"To attempt to do an act does not, either in law or in common parlance, imply a completion of the act, or any definite progress toward it; *any* effort or endeavor to effect it, will satisfy the terms of the law." (Italics mine.)

The language of the court is as broad as that of the Sabotage Act. By the great weight of authority it is an indictable offense at common law for one to counsel and solicit another to commit a felony or other aggravated offense, although the solicitation is of no effect and the crime counseled is not in fact committed. A citation of the many pertinent cases is impracticable, but reference is made to Commonwealth v. Flagg, 135 Mass. 545, 549; 12 Cyc. 182; Rex v. Higgins, 2 East, 5; Reg. v. Ransford, 13 Cox. Crim. Law Cas. 9, 15; United States v. Lyles, Fed. Cas. No. 15,646; United States v. Worrall, 2 Dall. 384, Fed. Cas. No. 16,766, in connection with which see State v. Butler, 8 Wash. 194, 35 Pac. 1093, 25 L. R. A. at page 439, 40 Am. St. Rep. 900; United States v. Craig (C. C.) 28 Fed. 795, 800; Commonwealth v. Tolman, 149 Mass. 229, 21 N. E. 377, 3 L. R. A. 747, 14 Am. St. Rep. 414 and notes; Commonwealth v. Harrington, 3 Pick. (Mass.) 26; Ohio v. Davis, Tappan (Ohio St.) 171; State v. Keyes, 8 Vt. 57, 30 Am. Dec. 450; State v. Avery, 7 Conn. 266, 18 Am. Dec. 105; Bishop's New Crim. Law, vol. 1, § 767 et seq.; Wharton, Crim. Law (11th Ed.) §§ 212, 218, and note to 213. Clark & Marshall's Law of Crimes, § 131, states that:

"The decided weight of authority, both in England and the United States, is in favor of the doctrine that it is a misdemeanor merely to solicit another to commit a crime, if the crime be a felony, though nothing further is done toward carrying out the unlawful purpose. The solicitation, without more, is regarded as a sufficient act to take the case out of the sphere of mere intent."

It is true there are no common-law offenses against the United States (United States v. Eaton, 144 U. S. 677, 687, 12 Sup. Ct. 764, 36 L. Ed. 591); but state statutes and decisions may be persuasive, although criminal cases in the national courts are controlled by federal statutes (Byrne, Fed. Crim. Proc. § 1). People v. Bush, 4 Hill (N. Y.) 133, is illuminating. A New York statute made arson a felony. Another statute—the one under which the indictment was brought—provided that every person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act toward the commission of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction shall be punished. The defendant was indicted for soliciting and inciting another to burn a barn. On the hearing the evidence showed that subsequent to the solicitation the defendant supplied the person solicited with a match with which to start the fire, but that such person never intended to commit the crime. The counts in the indictment charged the solicitation, but not the furnishing of the match, and were held sufficient. The case was decided without reference to the fact that the match was furnished. It was ruled that an attempt in any form to commit an offense was within the statute, a doctrine which coincides with that announced in United States v. Quincy, supra; that the defendant endeavored to make himself an accessory before the fact, as did the defendants in the instant case, if the government's evidence be true; that solicitation is a species of attempt; and that a mere solicitation to commit a felony is an offense, whether the felony is actually committed or not.

I am not unmindful that there are authorities which hold that a mere advising, solicitation, or incitement to commit a crime is not a step taken or an act done toward its commission. For the purposes of this case it is not necessary to analyze or distinguish them. The New York statute, which was aimed at attempts, and under which the Bush Case was decided, was general in its provisions. We have in the instant case the specific declaration of the Sabotage Act that the attempt therein named, being such as is recited in the indictment, constitutes a crime. To attempt to cause a thing to be done is an attempt to effect or bring about the doing of that thing. Advising and attempting to influence the doing of a thing is a means, and often a most potent means, of effecting or accomplishing the desired result. Mere words may constitute the offense of an attempt, when they solicit the commission of a crime. Wharton, Crim. Law (11th Ed.) note to section 213, and cases cited, and 3 Am. & Eng. Ency. Law, 264. There is substantial agreement among the authorities that words that are seditious, or provocative of breaches of the public peace, are subject to penal judicial action (Wharton, Crim. Law [11th Ed.] § 213); that solicitations which in any way attack the body politic, by way of treason, scandal, or nuisance, are indictable as independent offenses, and, if the solicitation involves the employment of illegal means to effect the illegal end, it may become substantively indictable (Wharton, § 213; Cox v. People, 82 Ill. 191); that all such acts or attempts as tend to the prejudice of the community are indictable (Rex v. Higgins, 2 East, 5, 21);

and that it is criminal to counsel, advise, or entice another to commit an offense of a high and aggravated character, whose commission will tend to breaches of the peace or other great disorder and violence (Commonwealth v. Willard, 22 Pick. [Mass.] 476, 12 Cyc. 182, note). In the highly instructive and much cited case of Rex v. Higgins it was held that an attempt to incite another to steal is prejudicial to the community. Lawrence, J., there said:

"The whole argument for the defendant turns upon a fallacy in assuming that no act is charged to have been done by him; for a solicitation is an act. The offense does not rest in mere intention; for in soliciting Dixon to commit the felony the defendant did an act toward carrying his intention into execution. It is an endeavor or attempt to commit a crime."

The indictment charges an aggravated offense much more prejudicial to the community than an incitement to steal—an incitement or solicitation to commit an offense which, if committed, would inevitably cripple the nation in the prosecution of the present war, prolong its duration, increase its cost, and multiply the number of killed and wounded Americans. The offense charged is such as tends to aid our country's enemies, and is an attack on our body politic; i. e., the whole body of people living under our organized political government, and, law-abiding as our citizenship is, is provocative of disorder and breaches of the peace.

The indictment is sufficient, and the evidence such as requires the submission of the case to the jury. The motions to direct a verdict are overruled, and an exception may be noted by each of the defendants.

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## GRANT LUMBER CO. v. NORTH RIVER INS. CO. OF NEW YORK.

(District Court, D. Idaho, N. D. July 11, 1918.)

1. INSURANCE ⟸230—FIRE INSURANCE—NEW YORK STANDARD POLICY—CANCELLATION—RETURN OF UNEARNED PREMIUM.
   The provision of the New York standard fire insurance policy relating to its cancellation by the insurer upon five day's notice requires that the insurer return or tender the unearned premium in order to effect a cancellation.

2. INSURANCE ⟸146(3)—POLICY—CONSTRUCTION FAVORABLE TO INSURED.
   Policies of fire insurance, if ambiguous or uncertain in terms, will be construed favorably to the insured.

3. COURTS ⟸366(15)—FEDERAL COURTS—CONSTRUCTION OF STATE STATUTE.
   Where form of fire policy is prescribed by state statute, meaning of policy calls for construction of statute, so that decision of highest court of state will control.

4. INSURANCE ⟸229(2)—FIRE INSURANCE—CANCELLATION OF POLICY—NOTICE.
   Under a standard New York fire insurance policy authorizing its cancellation upon five days' notice, no particular form of notice is required; but insured must have actual knowledge of insurer's intention to cancel, or such intention must be so expressed as to give notice to ordinary man in exercise of ordinary care.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

5. INSURANCE ⟸229(2)—FIRE INSURANCE—CANCELLATION OF POLICY—NOTICE.
Under a fire insurance policy in a New York standard form entitling the insurer to cancel it on five days' notice, the insurer's draft indorsed by the insured, and its "receipt" signed by the insured, though both stating that the policy was thereby canceled, were not equivalent to a notice of cancellation.

6. CONTRACTS ⟸93(2)—KNOWLEDGE OF CONTENTS—PRESUMPTION—SIGNATURE.
The general rule is that one signing a written instrument will not be heard to say that he did not read it, but will be conclusively presumed to have had knowledge of its contents.

7. CONTRACTS ⟸94(4)—FALSE REPRESENTATIONS—SIGNATURE TO WRITTEN INSTRUMENT—EFFECT.
One signing a written instrument without reading it, upon a false representation by the other party as to its contents or scope, is not bound thereby.

8. INSURANCE ⟸229(2)—FIRE INSURANCE—NOTICE OF CANCELLATION—DRAFT AND RECEIPT.
The manager of a company insured under a fire policy authorizing its cancellation on five days' notice, by accepting and indorsing the insurer's draft in settlement of a loss and by signing its receipt without reading them, was bound by their contents only in so far as they were in the nature of a draft or a receipt, and not by a stipulation as to extraneous matter, such as express statement therein that policy was thereby canceled, and such express statement was therefore insufficient as notice of cancellation.

At Law. Action by the Grant Lumber Company, a corporation, against the North River Insurance Company of New York, a corporation. Judgment for plaintiff.

C. H. Potts, of Cœur d'Alene, Idaho, for plaintiff.

J. F. Ailshie, of Cœur d'Alene, Idaho, and E. Eugene Davis, of Spokane, Wash., for defendant.

DIETRICH, District Judge. On April 1, 1917, through the agency of the Rossi Insurance & Investment Company of Wallace, Idaho, the defendant issued its fire insurance policy for $8,000, covering the plaintiff's lumber manufacturing plant at Harrison, Idaho. A few days later, on April 27th, there was a loss by fire, which, after adjustment, was settled by the payment of $3,572.13, on or soon after May 31st. On July 27th the insured property was entirely destroyed by fire whereupon adjusters, representing the defendant as well as other insurance companies, adjusted the loss; but defendant refused to make settlement, upon the ground that its policy had been canceled in connection with the settlement of the first loss; hence this suit. The amount of the loss being admitted, the controlling, and indeed the only, question is whether or not the policy in suit was in force at the time of the second fire, or had been canceled. Trial by jury has been waived.

In support of its claim of cancellation the defendant relies upon a draft accepted by plaintiff in settlement of the first loss, and a receipt signed by it at the same time. The contention is that the instruments constituted notice, under a clause of the policy (a New York standard form) authorizing cancellation upon five days' no-

tice, and also that they amounted to a mutual agreement of cancellation. When the first loss was adjusted, there was no suggestion that the policy would be canceled, and so far as appears such a consideration in no wise entered into the question of the amount for which settlement was to be made; nor, indeed, was there any reason why such a matter should have been considered, for admittedly either party had the right upon its own motion and without the consent of the other to cancel the policy at any time. Defendant consummated the settlement through its agent, the Rossi Company, and had no direct communication with the plaintiff. This agency also represented other companies carrying insurance upon the plant, the total amount of which was $50,000, and handled their settlements, as well as that of the defendant. Accordingly, of date June 7, 1917, it wrote the following letter to the plaintiff, inclosing therewith, among other papers, the draft and receipt in question:

"Wallace, Idaho, June 7, 1917.

"Grant Lumber Company, Harrison, Idaho—Gentlemen: We inclose herewith drafts in payment of your recent loss, as follows:

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| Norwich Union Fire Ins. Society | $1,116.29 |
| Western Assurance Co. | 669.78 |
| British America Assurance Co. | 669.77 |
| North River Ins. Co. | 3,572.13 |
| Northern Ins. Co. | 1,116.29 |
| Northwestern F. & M. Ins. Co. | 1,339.55 |

"We will forward the balance to you as soon as received. The Northwestern Fire & Marine Insurance Company have asked that we cancel their policy, which was issued just a day or two prior to the fire, and will therefore ask that the same be returned to us, and we will endeavor to place the insurance with another company, if desired.

"Very truly yours, Rossi Insurance & Investment Company,
"By R. S. Clough."

The item "North River Ins. Co. $3,572.13" refers to the loss under the policy in suit. It will be observed that the writer of the letter expressly calls the attention of the plaintiff to the decision of one of the companies to cancel its policy, but makes no suggestion that such was the desire of the defendant here. Manifestly, any one reading the letter would naturally draw the inference that all the companies named, other than the Northwestern, desired or were willing that their policies should continue in force. Presumably it was with such an impression that the manager of the plaintiff company turned to the inclosed draft and receipt covering the settlement, the amount of which had already been agreed upon. The draft is as follows:

"To the North River Insurance Company,

"374 Pine St., San Francisco, Cal.

"Claim, $3,572.13. Claim No. 2102
"Discount, $———. May 31, 1917.
"Draft, $3,572.13.

"Pay to the order of Grant Lumber Company the sum of three thousand five hundred seventy-two and 13/100 dollars, in full satisfaction, compromise, and discharge of all claims against the North River Insurance Company for loss and damage by fire which occurred on the 20th day of April, 1917, to property covered under policy No. 2031749 issued at Wallace, Idaho, agency, and in

consideration of said payment the said policy is hereby canceled and surrendered. W. W. Alverson, Manager Pacific Department.
"E. W. Williams, Counter Signature.
"Examined E. W. W."

It bore the following printed indorsement, which the plaintiff signed:

"Payee must sign this discharge with pen and ink.
"All claims and demands whatsoever against the North River Insurance Company connected with the within-mentioned loss, are released and discharged."

The receipt is as follows:

"Receipt.

"The North River Insurance Company
"374 Pine St., San Francisco, Cal.

"Claim, $3,572.13. Claim No. 2102.
"Discount, $———.
"Draft, $3,572.13. May 31, 191—.

"Grant Lumber Company hereby acknowledges the receipt of three thousand five hundred and seventy-two and 13/100 dollars, in full satisfaction, compromise, and discharge of all claims against the North River Insurance Company for loss and damage by fire which occurred on the 27th day of April, 191—, to property covered under policy No. 2031749 issued at Wallace, Idaho, agency, and in consideration of the said payment the said policy is hereby canceled and surrendered. Grant Lumber Co., by E. Grant, Prest.
"JAP"

The plaintiff's manager, who signed the instruments, testified that he did not read the draft or the receipt, at least did not read them carefully or in full, and did not know that they contained any provision relating to the cancellation of the policy, and no doubt is entertained that such is the fact. It is further true, I think, that if the plaintiff had known that defendant desired to cancel the policy it would have procured other insurance. Except such notice as is imported by the draft and receipt, no intimation was given to the plaintiff, until after the plant was destroyed by the second fire and an adjustment of the loss had been made upon behalf of the defendant as well as the other companies, that cancellation was desired or claimed. No request had ever been made that plaintiff deliver up the policy, nor had there ever been any offer to return any part of the unearned premium. True, the defendant now contends that it was under no obligation to make any demand or tender; but it is to be noted that, after the loss had occurred and it began to claim cancellation, it made a tender (of an insufficient amount) and requested return of the policy.

Was the policy canceled pursuant to the provision authorizing cancellation upon five days' notice? That provision is as follows:

"This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

I find as a fact that the full premium upon the policy was paid to the defendant. True, the payment was actually made by the Rossi Company, and by it credit extended to the plaintiff; but in extending the credit the Rossi Company did not act as the defendant's agent. In effect the plaintiff borrowed the money from the Rossi Company, and then paid it to the Rossi Company as agent, and it in turn paid it over to its principal, the defendant, the result being that plaintiff's debt to the defendant was extinguished, and it became the debtor of the Rossi Company.

[1-3] With much earnestness the defendant argues that notice of cancellation, if given, is not to be held ineffective because there was no return or tender of the unearned portion of the premium. The question has frequently been the subject of consideration in the courts, and further discussion would be profitless. Admittedly there is a sharp conflict in the decided cases; the preponderance being, as I think, with the plaintiff. Such was the conclusion reached by the New York Court of Appeals in Tisdell v. New Hampshire Fire Ins. Co., 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. Based largely upon a critical analysis of the language of the policy provision, the contrary view is presented in a dissenting opinion; but I am better content with the conclusion of the majority. When we consider the harshness of the view that a party whose contract obligations are unperformed can at will terminate the contract without making restitution to the party who has fully performed, the intent so to stipulate ought not to be found, unless it is clearly expressed in language which leaves no room for doubt. If defendant's construction of the policy be adopted, it could at any time terminate the responsibility it had been fully paid to assume, retain the unearned premium until demanded, and then draw the insured into a controversy touching a matter which might very well be too small to warrant the expense of litigation. In the present case defendant, having held the unearned premium for two months after the alleged cancellation, tendered a portion of it and raised an issue as to the balance. In support of the rule of the Tisdell Case the following, out of many decisions, may be cited: Buckley v. Citizens' Ins. Co., 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889; Southern Ins. Co. v. Williams, 62 Ark. 382, 35 S. W. 1101; Peterson v. Hartford Fire Ins. Co., 111 Ill. App. 466, reversed without reference to this question in 209 Ill. 112, 70 N. E. 757; Gosch v. Firemen's Ins. Co., 33 Pa. Super. Ct. 496; Phœnix Assur. Co. v. Munger, etc., Co., 92 Tex. 297, 49 S. W. 222; Chadbourne v. German-American Ins. Co. (C. C.) 31 Fed. 533; Ins. Co. v. Raden, 87 Ala. 311, 5 South. 876, 13 Am. St. Rep. 36; John R. Davis Lumber Co. v. Hartford F. Ins. Co., 95 Wis. 226, 70 N. W. 84, 37 L. R. A. 131. But see Straker v. Phenix Ins. Co., 101 Wis. 413, 77 N. W. 752; Manlove v. Commercial, etc., Co., 47 Kan. 309, 27 Pac. 979; Cassville Roller Milling Co. v. Ætna Ins. Co., 105 Mo. App. 146, 79 S. W. 720; Continental Ins. Co. v. Daniel (Ky.) 78 S. W. 866; Taylor v. Insurance Co. of North America, 25 Okl. 92-94, 105 Pac. 354, 138 Am. St. Rep. 906. The contrary view finds support in the following, as well as other, cases: Schwarzchild et al. v. Phœnix Ins. Co. (C. C. S. D. N. Y.), 115 Fed.

653; Id., 124 Fed. 52, 59 C. C. A. 572; El Paso Reduction Co. v. Hartford Ins. Co., (C. C.) 121 Fed. 939; Mangrum v. Law, Union & Rock Ins. Co. (Cal.) 157 Pac. 239; German Union Fire Ins. Co. v. Clark, 116 Md. 622, 82 Atl. 974, 39 L. R. A. (N. S.) 829, Ann. Cas. 1913D, 488.

While it is stated in the defendant's brief and in some of the cases cited that the federal courts have uniformly held that the return of the premium is unnecessary, only three federal cases have been called to my attention, and one of these, the Chadbourne Case, seems to hold with the plaintiff. It is pertinent to add that, notwithstanding the conflicting views of courts of last resort, of which the defendant doubtless has had knowledge, it persists in the use of this form of policy, ambiguous though it has been found to be. There is every reason, therefore, for applying the familiar rule that contracts of this character, if uncertain, will be construed favorably to the insured. If, as was suggested at the hearing, the form is prescribed by the statutes of New York, and the defendant is unauthorized to change it or use a different form, then in effect the inquiry is as to the meaning, not of the contract, but of the statute, of which the policy is merely a transcript, and the decision of the highest court of the state should control, under the well-known rule that the construction placed upon a local statute by the courts of the state is binding upon the federal courts.

[4, 5] It is also thought that defendant failed to give the requisite notice. Granted that no particular form of notice is required, still it must be shown either that the insured has actual knowledge of the insurer's intention to cancel, or that such intention has been so expressed as to give notice to the ordinary man, in the exercise of ordinary care. As already stated, the plaintiff did not have actual knowledge, and under the circumstances it cannot be charged with carelessness in failing to take notice. The carelessness was upon the part of the defendant in employing means better suited to conceal than to reveal its intent. It would have been a very simple thing for it to give a plain, unequivocal, direct notice of its desire to cancel. It had a form of "draft" and of a "receipt," and presumably it had a form of notice. Instead of giving such notice, what did it do? It first agreed with the plaintiff upon the amount of the loss, and, it is to be presumed, directly or indirectly promised to make settlement accordingly. So far as appears, there was no suggestion or intimation that it intended to cancel the policy. In due time it caused its agent to transmit, not a notice, but a draft and a receipt, inclosed with a letter expressly notifying the plaintiff of the cancellation of another policy, but with no suggestion of a purpose to cancel the policy in suit. With this letter before him, impliedly representing that but one policy was to be canceled, the plaintiff's manager turned to the formal papers, upon which the defendant now relies as constituting notice or contract. Upon its face he saw that one of the papers was labeled "draft," and generally it had that appearance. It was for the correct amount, appropriately referred to the loss, and named the plaintiff as payee. It is submitted that in the ordinary transaction of business, not once in a hundred times does the ordinary business man

carefully read a check or draft in full. It is sufficient that it appears to be a check or draft, and that he has knowledge of the amount and the names of the payee and maker. So it was not a want of care in this case for the plaintiff's manager to fail to observe a clause near the end of the draft, purporting to cancel the policy. When he turned the "draft" over to make the necessary and usual indorsement, he was confronted, not with a notice that the policy was to be canceled; but, in harmony with the implication of the letter of transmittal, he was advised that he "must sign this discharge," which reads:

"All claims and demands whatsoever against the North River Insurance Company connected with the within-mentioned loss are released and discharged."

This he could readily sign, because it was in accord with his understanding of the settlement. There was nothing to put him upon his guard or to suggest cancellation. He turned to the other paper, a printed form, conspicuously headed "Receipt." It was in the form of a receipt, and was apparently in substance the same as the indorsement upon the draft. Again, if to the plaintiff's conduct we apply the standard of ordinary business care and caution, its officers were not guilty of negligence in failing to read the instrument to the end and thus discovering the clause relating to cancellation.

[6-8] Defendant, of course, invokes the general rule that one who signs a written instrument will not be heard to say he did not read it, but will be conclusively presumed to have had knowledge of its contents. This rule, however, is not unqualified. There is the further familiar principle that where one signs an instrument without reading it, upon a false representation by the other party as to its contents or scope, he is not bound. Suppose that in this case, instead of writing the letter and using the forms labeled "draft" and "receipt," an agent of the Rossi Company had gone personally to the plaintiff's office to make settlement, and there made representations which were expressed or clearly implied by the letter and the printed forms. He would have said:

"I have come to make settlement of your recent fire loss upon six of the policies you hold [naming them]. One of these policies, and only one, the Northwestern, is to be canceled. Here is the draft of the North River Company for $3,572.13, the amount we agreed upon, bearing a printed release on its back, which you are to sign. Here is a formal printed receipt, which you are to sign."

Would any ordinarily prudent and cautious business man have stopped to read the draft in full, or the receipt, or have suspected that they were anything other than what they were represented to be? The defendant placed two papers before the plaintiff's officers, upon which it put its own construction by calling one of them a draft and the other a receipt. It so plainly labeled them, and the plaintiff had the right to rely upon such construction and representation. In accepting the draft and signing the receipt without reading them, its manager was bound by their contents, in so far, but in so far only, as such contents were in the nature of a draft or a receipt, and not by a stipulation upon a matter wholly outside the ordinary scope of

such instruments. Receipts and drafts are in daily use and their general tenor is well known. They may differ slightly in form, but in substance they are the same. They are signed and accepted with little attention to their precise phraseology. There is little more reason to require that they be read in full, than that one should read the printed matter upon a silver certificate or national bank note before accepting it. Such being the common practice, to hold that the plaintiff here is bound by an interpolated clause upon a subject wholly foreign to the nature of either a draft or a receipt, and touching which there had been no discussion between the parties, would be to sanction a fraud. I do not intimate that the defendant or its agents intended to deceive. It may very well be that the Rossi Company, as well as the plaintiff, was in ignorance of the defendant's desire to cancel the policy. The means employed by the defendant to give notice of its intention to cancel were so inappropriate that it would not be strange if the agent, as well as the insured, failed to take notice of its intention. But whether actual or only constructive fraud the result is the same. I am unwilling to give place to a rule which would write "caveat" upon every draft and receipt, and put a premium on suspicion and distrust. If what the defendant did was insufficient to charge the plaintiff with notice, by a parity of reasoning there could have been no mutual consent. Admittedly no consideration passed to the plaintiff.

Relief granted as prayed for in the complaint.

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Ex parte FUSTON.

(District Court, E. D. Tennessee, S. D. May 22, 1918.)

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—LOCAL BOARD—JURISDICTION.
   Under Selective Service Act, § 5, declaring that any person who shall willfully fail or refuse to register shall be guilty of a misdemeanor, and shall upon conviction be punished, and shall thereupon be duly registered, a local board, authorized to determine questions of exemption, has no jurisdiction to investigate on its own motion the question of the age of a person who had not registered and place him on the draft list, though he asserted he was not within the age limits prescribed.
2. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—AUTHORITY OF BOARDS.
   In view of the regulations thereunder, Selective Service Act, § 4, declaring that local boards shall have power to determine all questions including or discharging individuals, does not confer on such boards the power to determine whether an individual subject to the act failed to register.

In the matter of the petition of S. D. Fuston for writ of habeas corpus. Petition granted, and petitioner discharged.

J. H. Turner, of Nashville, Tenn., for petitioner.

Wm. Baxter Lee, Asst. U. S. Atty., of Knoxville, Tenn., for respondent.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Memorandum Opinion.

SANFORD, District Judge. The petitioner was arrested by the sheriff of Dekalb county, Tenn., under an order issued by the local board of said county, finding that he had failed to report for military duty, as ordered, with the willful intent to evade military service, and directing that he be delivered to the commanding officer at Fort Oglethorpe for further action by the military authorities.

The petition for the writ of habeas corpus alleged that the petitioner was more than 31 years of age at the time provided for registration under the Selective Service Act (Act May 18, 1917, c. 15, 40 Stat. 76); that the local board was without jurisdiction or authority over him; and that he was illegally arrested and restrained under its aforesaid order.

Without referring to minor matters in respect to which the regularity and validity of the proceedings before the local board are challenged by the petitioner, the underlying and undisputed facts are these: The petitioner did not register under the Selective Service Act on the registration day, June 5, 1917. Later the local board, receiving information that the petitioner was under 31 years of age and subject to registration, in effect demanded that he register. Being advised that he would be subject to criminal prosecution for failure to register, the petitioner thereupon in 1918, filed a registration card with the local board and also partially filled out and filed with the board answers to two questionnaires. Both his registration card and the questionnaire accompanying same were filed under protest, and both on the face of the registration card and in his answers to the questionnaires, he stated his age as 33 years. The petitioner also filed affidavits as to his age with the board, tending to support his contention that he was more than 31 years of age. The board considered these affidavits and other statements obtained by them, and determined that he was under 31 years of age. Then, being of opinion that having failed to register on June 5, 1917, he was, under section 65 of the Selective Service Regulations, to be treated as one "who has been convicted of failure to register" and had thereby lost the right to deferred classification, without passing upon his alternative application for deferred classification on account of having dependents, he was ordered to report immediately for military duty. This he did not do; and the board thereupon ordered his arrest, as above stated, for delivery to the commanding officer at Fort Oglethorpe as a deserter.

[1] On this state of facts, I am of opinion that the local board was entirely without jurisdiction in the premises. The Selective Service Act confers upon the local board merely jurisdiction to determine the questions of exemption and the like of persons within the registrable age who have been duly registered. It confers upon it no authority whatever over persons not within the registrable age, and none to investigate, of its own motion, the question of age of a person who has not registered and to place him upon the draft lists in the event it determines that he is in fact of registrable age. The registration card and the questionnaires filed by the petitioner showed on their face

that he was more than 31 years of age on June 5, 1917, and therefore not subject to registration. Regardless, therefore, of the fact that these papers were filed under protest, they conferred upon the board, on their face, no jurisdiction in the premises, and showed, on the contrary, on their face, that the petitioner was not within the jurisdiction or subject to the authority of the board.

The Selective Service Act contains only one provision for the involuntary registration of persons who have not registered, namely, that embraced in the provision of section 5 of the act, that

"any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: Provided, that in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this act."

It is entirely plain that the provision that such persons shall "thereupon" be duly registered relates only to persons who shall have been convicted in the court of the offense of willfully failing or refusing to register; the verdict of the jury and the judgment of the court determining the fact that they were subject to registration and resulting "thereupon" in their automatic registration. Aside from the plain and unmistakable meaning of the language itself, there is no provision for the investigation aliunde of the question of liability to registration by the local board or any other body; the sole provision being that when the fact of willful failure or refusal to register shall have been conclusively determined by conviction in the court, then, as stated, registration shall automatically follow, the liability to registration having thus been conclusively determined.

I am unable to agree with the opinion of the Acting Judge Advocate General that the phrase "shall thereupon be duly registered" is to be disassociated from the preceding reference to criminal conviction, but, on the contrary, entirely agree with the view of the assistant to the Attorney General, referred to in the opinion of the Judge Advocate General, that the enforced registration referred to in this section refers only to the registration which follows a prior conviction. The argument that as some persons subject to registration might be willing to take the chance of a criminal prosecution in order to avoid registration, this construction leaves the selective service law incomplete in such cases, cannot justify the court in supplying an omitted provision of the law, however desirable this may be; the function of the court extending merely to construction and not to legislation. However, the infrequency of cases of this character leads me to the conclusion that the unfortunate results of such construction which are apprehended, are not of the serious practical consequence attributed to them in argument.

This not only appears to be the construction of this clause given by the Department of Justice, but to be uniform construction given to the law in its administration up to this time; there being, so far as I am aware, no previous instance in which a local board has placed

upon the registration lists, as a result of its own investigation, and without a previous conviction, a person who asserted that he was in fact not subject to registration and whose registration card on its face conferred upon it no jurisdiction.

[2] I have, I may add, not overlooked the fact that section 4 of the Selective Service Act provides that the local boards

"shall have power within their respective jurisdictions, to hear and determine, subject to review as hereinafter provided, all questions of exemption under this act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President."

It is, however, unnecessary to determine the scope of this provision, since, whatever may be embraced under the broad power of "including" individuals in the selective draft, such authority is, under the plain terms of the act, only to be exercised under rules and regulations prescribed by the President, and none of the rules or regulations prescribed by the President authorize the local boards to investigate upon their own initiative the question of liability to registration of a person who has not voluntarily registered, or to register such persons involuntarily as a result of such investigation by it. Hence, in the absence of such rule or regulation and under the very terms of the act, the local boards are not invested—even if they can be without amendment of the act—with any authority to include in the draft a person who has not voluntarily registered, as being within the registrable age and subject to the provisions of the Selective Service Act, unless he shall have been indicted and convicted of willfully failing and refusing to register, and has been "thereupon" and as a consequence of such conviction, registered, and thereby brought within the jurisdiction of the board in the matter of claims for exemption, deferred classification and the like.

I hence conclude that, under the admitted facts, as the petitioner's registration card and answers to the questionnaires showed that he was more than 31 years of age on June 5, 1917, the local board acquired no jurisdiction over him whatever, and was without authority either to investigate, of its own motion, the question of his age, or to place him on the draft list, or to adjudge him a deserter and order his arrest and delivery to the military authorities. His petition is accordingly granted, and he is ordered discharged from restraint and custody by the sheriff pursuant to the order of the local board.

## In re BLOOMBERG.

(District Court, D. Massachusetts. July 10, 1918.)

No. 22615.

1. BANKRUPTCY ⇐58—ACTS OF BANKRUPTCY—PREFERENTIAL PAYMENTS.
Payment by an insolvent to certain creditors of 25 per cent. of their claims, pursuant to an arrangement made by a creditors' committee, approved by most of them, for settlement of all his indebtedness on that basis, where he had secured funds to complete the settlement, were not preferential, and did not constitute acts of bankruptcy.

2. BANKRUPTCY ⇐91(2)—COMPOSITION—BONA FIDES.
An insolvent debtor, who undertakes to raise funds and compound his indebtedness, should keep accurate accounts, showing what he received and disbursed, and his failure to do so will count heavily against his assertions of honesty and good faith towards his creditors.

In Bankruptcy. Involuntary proceedings in the matter of Hyman Bloomberg, alleged bankrupt. Petition dismissed.

John J. Cummings, of Boston, Mass., for petitioning creditors.
Asa P. French, of Boston, Mass., for alleged bankrupt.

MORTON, District Judge. On February 9, 1915, a meeting of the creditors of the respondent was held, at which a committee was appointed to consider his financial affairs. On February 23, 1915, before this committee had completed its work, an involuntary petition in bankruptcy was filed against him. The committee recommended a settlement with creditors on the basis of 25 per cent., which seems to have been satisfactory to the great proportion of them. Thereupon the respondent sold his store in Brockton, Mass., with its stock and fixtures, which constituted practically his entire assets, to one Sandler for $15,000, in order to obtain the money necessary to carry through said settlement. The date when this conveyance was made is in dispute—the respondent contending that it was on April 29th; the petitioners, that it was not until May 11th. The time is important, because the present petition was filed September 11th, and the only act of bankruptcy originally alleged in it was this transfer. If it took place at the time claimed by the respondent, it was more than four months old when the petition was filed, and was therefore unavailable as an act of bankruptcy. On June 8, 1915, the first involuntary petition was duly dismissed without objection, after notice to all creditors, including the present petitioners.

Following this dismissal the respondent began to carry out the proposed settlement by making payments to his creditors, either personally or through Mr. French, his attorney. Money was placed in the latter's hands for that purpose. Sandler himself, a brother-in-law of the respondent, was a large creditor by reason of his indorsements for the bankrupt. The referee explicitly finds that the arrangement proposed included all the creditors, that Sandler was not preferred by what was done, and that there was no intention to hinder, delay, and defraud creditors.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

There was delay in completing the payments of 25 per cent., and before all the creditors had received their money the present involuntary petition was filed, after which no further payments were made. On May 12, 1916, the respondent filed a voluntary petition in bankruptcy, action on which is suspended by reason of the present proceeding.

On October 7, 1915, the petitioners amended their petition, by setting out additional acts of bankruptcy consisting of certain payments of 25 per cent. made to creditors under the settlement arrangement, alleging them to be preferential transfers. On August 28, 1916, a motion to amend was filed by the petitioners, alleging a fraudulent and preferential transfer of a lease to Sandler on May 27, 1915. If objection had been made, this motion would not have been allowed. In re Forbes (D. C.) 235 Fed. 316, No. 19617, August 16, 1916. No objection being made, it was allowed as of course. The allegations of the original petition and of each of the amendments were answered by a formal denial by the respondent, and the issues thus made were referred to and heard by the referee, who has found in favor of the respondent.

The decisive points on which the case turns are the date of the conveyance of the store to Sandler, and the purpose and intent with which it and the subsequent payments and transfer set forth in the amendments were made.

[1] As to the date of the conveyance of the store: This was a question on which the evidence was conflicting. On the one side a conveyance in writing was produced by the respondent, dated April 29, 1915, and the testimony in his behalf was that it was a bona fide instrument, made on the date therein stated. Against this were apparently inconsistent statements and conduct by him and other parties interested. In this conflict of testimony, the learned referee, who saw and heard the witnesses, and was in a much better position to arrive at the truth than this court, which has only a transcript of the testimony, believed the respondent. The situation is one in which the referee's finding carries great weight. I have carefully examined the evidence, and am not prepared to say that it was clearly wrong. It follows that the acts of bankruptcy alleged in the petition as originally filed are not sustained. What was done amounted to an informal assignment for the benefit of creditors. It is argued for the petitioners with much force that the arrangement was for many reasons an unsafe and vicious one from the creditors' point of view. If so, the creditors should have seasonably broken it up, as they had the right to do, by bankruptcy proceedings, or by objecting to the dismissal of the first petition.

The payments by the respondent to several of his creditors, which constitute the acts of bankruptcy set up in the amendment of October 7th, were made by him in carrying out the plan of compromise and settlement on a 25 per cent. basis approved by his creditors. They were made with money procured by him for that purpose from the sale of his store. The transfer of the lease was made, as the learned referee finds, in pursuance of the same plan.

The principles by which it is to be determined whether such pay-

ments and transfer are preferences, or conveyances in fraud of creditors, seem fairly clear. A preference is defined by the Bankruptcy Act as a transfer, the effect of the enforcement of which "will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Act July 1, 1898, c. 541, § 60a, 30 Stat. 562 (Comp. St. 1916, § 9644). There must be an intent to prefer (section 3a [2] [Comp. St. 1916, § 9587]); but if the effect of the transfer is to give a preference, such intent is presumed on the familiar principle that one is presumed to intend the natural consequences of his acts (Collier, Bankruptcy [11th Ed.] p. 102). If one who is insolvent—and Bloomberg was insolvent—pays an outstanding unsecured claim in full, he obviously gives that creditor an advantage over other creditors in the same class. Not having money enough to pay all, he has paid one. A payment on account, which left the balance of the claim outstanding, would also operate as a preference. But if a debtor, who has property enough to pay all his creditors 25 per cent., pays one of them that percentage for a discharge of the entire debt, it is difficult to see how any preference results. That is what, on the findings of the learned referee, as I understand them, the respondent did; each of the payments alleged in this amendment was made for the discharge of a debt four times as great; there were assets enough to pay all creditors the same proportion, and the intention so to apply the assets; the mortgage of the lease was made in carrying out the settlement, as further protection to Sandler.

[2] If these findings were correct, there was no intention to prefer, and the payments under discussion were not preferences, and did not constitute acts of bankruptcy. The real question at the bottom of this, as of many bankruptcy cases, is whether there was an honest effort to straighten out the respondent's financial affairs, or whether there was not. As to creditors negotiated with and paid by Mr. French, the evidence fully supports the findings of the learned referee. As to the creditors, including Sandler, who were dealt with by the respondent, the evidence as it appears in the transcript is much less satisfactory. An insolvent debtor, who undertakes to raise funds and compound his indebtedness, should keep his accounts of what he realized for property sold, and what disposition he made of the proceeds in definite, clear shape, so that everything he did can be readily scrutinized. Failure to do so should count heavily against his assertions of good faith and equality in the treatment of his creditors. Bloomberg's accounts fall far short of this standing. Moreover, the constant evasions and assertions of ignorance in his testimony and that of Sandler seem to me suspicious, and coupled with their failure to produce satisfactory vouchers and accounts to support their statements would, I think, have led me to decline to give their testimony much weight. But, as has been said with reference to the first point, the learned referee had all this evidence before him, and also saw the witnesses, and got more into the atmosphere of the case than it is possible for an appellate court to do. With some hesitation, I must decline to hold that he was clearly wrong in his conclusions.

Report confirmed. Petition dismissed, but without costs.

Ex parte PROUT.

In re REZENDES et al.

(District Court, D. Massachusetts. June 26, 1916.)

No. 1468.

1. HABEAS CORPUS ⟸92(1)—PROCEEDINGS FOR DEPORTATION—REVIEW.
An order of exclusion and deportation unsupported by any evidence is invalid. Hence the question whether there was any evidence before the immigration tribunal in support of its findings may be raised in habeas corpus proceedings.

2. ALIENS ⟸50—EXCLUSION OF IMMIGRANTS—CONTRACT LABORERS—"OFFERS OR PROMISES OF EMPLOYMENT."
"Offers or promises of employment," to come within the contract labor clause of Immigration Act Feb. 20, 1907, § 2, as amended by Act March 26, 1910 (Comp. St. 1916, § 4244), must be made by or with the authority of the proposed employer, and a mere assurance or promise in general terms of employment after reaching this country, made to an alien by a foreign steamship agent, is not ground for exclusion.

3. ALIENS ⟸50—EXCLUSION OF IMMIGRANTS—CONTRACT LABORERS.
Nine Portuguese laborers, not shown to have acted in concert, bound to a point in this country where they were assured by steamship agents that they could find employment, but having no knowledge by whom or for what they would be employed, *held* not subject to exclusion as contract laborers.

Petition by William C. Prout for writ of habeas corpus on behalf of Francisco Rezendes and others. Writ granted.

William C. Prout, of Boston, Mass., pro se.
The United States Attorney, opposed.

MORTON, District Judge. This is a petition for habeas corpus brought against the Commissioner of Immigration for the District of New England to obtain the discharge of nine Portuguese immigrants who have been excluded and are now held at Boston for deportation. The case was heard as a single proceeding upon the petition, the answer, and the record of the proceedings and evidence before the immigration tribunals.

The provisions of law under which the exclusion was ordered (Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898, as amended by Act March 26, 1910, c. 128, 36 Stat. 263 [Comp. St. 1916, § 4244]), are those relating to contract laborers, and are as follows:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled."

The cases of these aliens were grouped and heard together by the immigration authorities. Act, § 13 (Comp. St. 1916, § 4260); Rule 2, subd. 2. I shall treat them in the same way.

The majority of the Board of Special Inquiry found that each alien had "been induced or solicited to migrate to this country by offers or

promises of employment" (Decision of Board), and on that ground alone excluded them. This decision was affirmed by the Secretary of Labor. The dissenting member of the Board of Special Inquiry was of the opinion that such finding was not warranted by the evidence.

The petitioners admit that a full hearing was accorded them by the immigration authorities, and that they were given an opportunity to present such evidence as they had to offer. Their principal contention is that, as a matter of law, the decision against them was wholly unsupported by evidence and is unreasonable and unfair.

[1] An order of exclusion and deportation unsupported by any evidence is invalid, and the question whether there was any evidence before the immigration tribunal in support of its findings may be raised on habeas corpus proceedings. Whitfield v. Hanges, 222 Fed. 745, 138 C. C. A. 199 (C. C. A. 8th Circuit); U. S. ex rel. Cline v. Williams, 189 Fed. 915 (C. C. D. Ct. N. Y.). It is therefore necessary to consider whether there was any evidence before the Board of Special Inquiry upon which the majority finding above referred to could reasonably be made.

With the possible exception of Joao Souza, whose case was not, however, differentiated from the others by the immigration authorities, there was no direct evidence against any of the petitioners. All the cases were dealt with together and disposed of by general findings of inducement and solicitation to migrate, based in the opinion of the board, as appears from its decision, on circumstantial evidence.

[2] It seems clear that "offers or promises of employment," in order to come within the statute, must be made by, or with the authority of, the person proposing to furnish the employment. A mere assurance or promise, in general terms, of employment after reaching this country, made to an alien by a foreign steamship or transportation agent, is not ground for exclusion.

[3] These nine aliens did not come from the same place in Portugal; they lived at five different places there. Those places were not, as I understand, very far apart; but there is no evidence that the immigrants were acquainted with each other, or acted in concert in coming to this country. Not more than two or three dealt with the same steamship agent for their passages. Some of them appear to be traveling alone, and there are groups of two or three together. They are all destined ultimately to Palmerton, Pa., where a large number of their countrymen reside. They follow different occupations, but are mostly laborers. They expect to go to work immediately; but with a few exceptions they have, so far as the evidence shows, no job in mind, and do not know what they will find to do. There is not a scintilla of evidence that any employer of labor in Palmerton had anything to do with their coming there. I am unable to discover any substantial evidence that the nine are in any way acting in concert or conspiracy in endeavoring to obtain admittance into this country, or that there is any combination or conspiracy for that purpose between the several groups. I have carefully considered the evidence in its relation to the individual aliens. The answers made by Joao Souza, which are specially relied on in support of the finding against him, must be considered in

connection with the rest of his testimony; and it must be borne in mind that he was testifying through an interpreter.

In no case does the evidence, in my opinion, show an offer or promise of employment by, or on behalf of, any person proposing to employ the alien here, or reasonably support the conclusion of the board that the alien was "induced or solicited to migrate to this country by offers or promises of employment." As my decision is based upon a lack of evidence, it is unnecessary to state in detail the special facts as to each applicant.

Upon the cases as a whole, the conclusion reached by the dissenting member of the Board of Special Inquiry seems to me to have been, not merely the right one, but the only one which could fairly be made upon the evidence.

The order will be that the writ issue.

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Ex parte McDONALD.

(District Court, E. D. Wisconsin. August 10, 1918.)

1. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—STATUS OF REGISTRANTS.
   Selective Draft Act does not give persons within the draft ages any military status solely by virtue of their being within such ages, but they retain their ordinary status as civilians and citizens until it is changed through the operation of the law by their selection for service.
2. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—POWERS OF BOARDS.
   The courts are bound to respect the determination of local and district draft boards on all matters within their respective jurisdictions, and have no power to revise their decisions, where their jurisdiction has been lawfully exercised; but the courts may determine to what effect the boards have acted.
3. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—POWERS OF BOARDS.
   Both the local and district draft boards, within their respective jurisdictions, retain their power to hear and determine matters pertaining to a registrant until the hour specified in the notice of the local board when he is required to report for service.
4. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—AUTHORITY OF DISTRICT BOARDS.
   Where after notice by a local board to a registrant to report for service, but before the time arrived, he was given deferred classification by the district board on industrial grounds, he could not lawfully be arrested and imprisoned by the local board for failure to report.

Habeas Corpus. Heard as an application for writ of habeas corpus by Bernard J. McDonald. Writ granted.

McGovern, Hannan & Reiss, of Milwaukee, Wis., for petitioner.

H. A. Sawyer, U. S. Atty., George Lines, and J. W. McMillan, all of Milwaukee, Wis., and John B. Sanborn, of Madison, Wis., for respondents.

GEIGER, District Judge. This matter is here upon a petition, the writ, the return upon ancillary writs of certiorari to draft boards, and returns thereto in habeas corpus.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The writs of certiorari, of course, were issued in discharge merely of the function of bringing up certain records which, it was conceded, might throw some light upon the questions otherwise raised by the petition for the writ of habeas corpus, and do not discharge the office of an original proceeding to inquire into or to correct the doings of the tribunals to whom addressed. The pertinent facts in this case are that the petitioner, a registrant under the selective service law (Act May 18, 1917, c. 15, 40 Stat. 76) and within the jurisdiction of one of the local draft boards in the city of Milwaukee, was called for service under the ordinary notice fixing the time to report for military duty. After the giving of that notice, or after the petitioner obtained knowledge of its issuance, he appeared before the district board and made application for deferred classification because of facts within its exclusive jurisdiction to consider. That board granted his application prior to the time when he was required by the notice issued to report for military duty. Notwithstanding that determination, the local board issued an order for his apprehension, consequent upon which the respondent, Janssen, chief of police of Milwaukee, and Bodenbach, an agent of the federal government, took him into custody and placed him in the county jail for Milwaukee county. He sues out this writ of habeas corpus, claiming that by virtue of the action of the district board he was entitled, at least temporarily, until it was changed by due process under the selective service law, to his freedom.

[1] Whatever other facts have appeared here in the records or statements of counsel showing the successive action taken or attempted to be taken by either of these boards prior to the final action, are of no pertinency in determining the ultimate question in the case. I said a moment ago that the selective service law had a purpose of enabling the raising of an army, and it defines certain persons who are liable to be called. It does not give them any status, as a military status, solely by virtue of their being within certain ages. They retain the ordinary status which they have as civilians and citizens unless and until it is changed through the operation of the law. In other words, the law defines those who are liable to selection, and that, by necessary implication, means that when they are selected as prescribed by the law, they enter the service. Unless and until they are selected, they are not in the service, and enjoy their ordinary civil rights and privileges; and, if this be true, it must be true of those who have never been called, and of those, who, having been called, are not selected, either because of deferment or rejection.

Now, the law is, of course, an exercise of one of the highest of congressional powers—power to compel persons to bear arms in defense of the country; and, in so far as it determines who, for the time being, is liable to be called for that purpose, it is the exercise of the sovereign congressional authority, which is unimpeachable. As a matter of fact, beyond making the declaration respecting such liability, and those subject thereto, the law contains little except broad administrative provisions, the carrying out of which has been dele-

gated almost wholly to the executive. True, there are guides given to the latter to govern his administration and which, probably, are binding upon him. But be that as it may, the executive has accepted the delegation of power and has proceeded to erect the machinery of the law—familiar to us all. And it consists in the main of the so-called local boards and of the district boards, reserving of course, as by the terms of the law it may be reserved, a superior revisory power in the President himself. Now, the law and the regulations established under this grant of power, define with considerable clearness the jurisdiction of these various tribunals or instrumentalities. The local boards are given a sort of original jurisdiction pertaining to one class of cases. With respect to those cases the district board is created, and it exists, as a revisory or an appellate tribunal for the express purpose of enabling reviews of the determinations of the local boards. The district board is created not only for that purpose, but, under the express terms of the law, there is wholly excluded from the jurisdiction of local boards the entertainment in certain matters, of original jurisdiction, of which, except for the revisory power of the President, is exclusive—those are the cases pertaining to deferment on industrial grounds.

Now, much of this has become familiar to us all in the past year, but it is well to bear in mind, primarily, in considering this case and others that arise, that it was the plain congressional intent, and it is certainly the plain executive intent, to have created under this law *a system* which, being established, certainly exists and must be respected for some purposes. Among such purposes for which the system is established is that of enabling orderly procedure; but there is the other equally great, if not greater, purpose, of enabling *just and effective determinations.* Therefore, being a system involving not only order, it must be held to have contemplated and to be given effect such as, upon the face of things, determinations by boards, either intermediate or final and exclusive, are entitled to receive. It would be absurd to say that a local board, being given original or initial jurisdiction of a certain matter, the determination of an appellate board of matters heard by it, by way of revision or correction, either in point of fact or of law, should be of no binding consequence. That sort of a principle, of course, is familiar to lawyers in respect of the successive relations of courts, but it is equally true, not only in executive situations, but in everyday life, that when a tribunal, as, for example, in the taxing department, having original jurisdiction, is subject to review, certainly (and the authority who establishes the reviewing tribunal should be held conclusively to contemplate that) the determination on review shall be effective and binding upon the subordinate tribunal. Now, that is the situation as it has developed under this law.

[2] Speaking plainly, if this is not a system under which the local board, having original jurisdiction, may have its findings nullified through revision, or superseded through the exertions of a higher tribunal, having original jurisdiction of matters not within the competency of the local board to determine, the law amounts to nothing

other than a piece of legislation fraught with unlimited possibilities for confusion. Wherefore, courts ought to take that view of the law, and it brings us directly to the question: What is the attitude of the courts upon the determinations made by these functionaries created under this selective-service law? What is the power of the courts by way of revision or correction? Now, the answer to that question is not at all difficult. In my judgment, either as of first impression or based upon the course the courts have followed since the enactment of the law, it is simply this: That the courts are bound to respect the determination of any of these tribunals upon all matters within their jurisdiction, and that limits the court, at the outset, to determine and ascertain whether there has been action under the law; secondly, what is the quality and effect of that action in so far as it affects rights appertaining to the individual?

The court here, as many of the District Courts, has had applications for writs of habeas corpus seeking to review the action of local or district boards, challenging the propriety of their decisions, claiming that upon testimony in the record, or proffered testimony, a different determination should have resulted. It has been said with some uniformity, that the courts are barred the moment it appears that the tribunals had acted upon a matter properly before them. In a case brought to this court, where the petitioner, instead of proceeding by habeas corpus, sought to sue out a writ of certiorari commanding the boards to certify the records to this court to the end that it determine whether, upon the proffered proofs, petitioner made out a case entitling him to deferred classification, the court declined to take jurisdiction because, as it appeared to me, the boards had jurisdiction to determine what the petitioner himself said was determined; and in connection with that, this language was used as responsive to a contention made, supported by some authority, that the courts should issue writs of certiorari. I will quote from what was said at that time:

"Manifestly, cases dealing with individuals who aver that by reason of the express provisions of the Selective Service Act they are not within, but are left without, the entire scope of the act as prescribing and imposing liability to military service, are not pertinent. It may readily be conceded that, where the law imposes no obligation upon an individual, the courts must be open to his resistance of any effort to impose its obligations upon him. But the present case deals with an individual whose status is admittedly within the reach of the law. Indeed, he professes his willingness to submit to its obligations, but seeks for the time being to assert a right resting solely upon an executive regulation fixing and establishing conditions or considerations for classifications, and hence order and priority of call. With this as the case, should the courts exercise jurisdiction by certiorari to correct the misapplication of the executive regulations and to enforce, as the petitioner's right, the regulations as they may be applicable to the facts presented by him in court?

"Undoubtedly Congress, by detailed enactment, or the executive, with or without detailed regulation, could have imposed the service obligation upon all individuals within the scope of the law without any attempt to establish order or priority based upon considerations pertaining to the individual or to the service or the needs of the Nation. In other words, this power, existing as it did in Congress, might have been exercised and exerted by detailed provisions of the law, or might have been, as it was, delegated practically in its entirety to the executive. It is my view that the character of the legislation is such that it never was intended, by conferring upon the Executive the full

power and discretion to determine the matters which are now comprehended within the executive regulations, to reserve to the individual who is within the scope of the law, as a matter of legal right subject to be enforced and vindicated in the courts, these very regulations which, in executive discretion, need not have been made at all, or, in like discretion, may be varied from day to day. The draft boards are purely executive agencies, and their error, committed against those who are within the draft law, is executive error in the enforcement of discretionary regulations; and I do not believe that it was or could be the congressional intent that these executive agencies constituted, as observed, to carry out an unlimited discretion, were or are to be considered in the light of quasi judicial tribunals discharging functions which pertain to everyday legal rights of a citizen. In re Kitzerow (U. S. D. C. E. D. Wis.) 252 Fed. 865.

That is broad language, and I am ready to say to-day that I will adhere to all of it. But it does not reach this case, nor foreclose the petitioner's contention. Where, for example, the regulations indicate to the boards order and priority of call of registrants, or the considerations upon which order and priority shall be determined, namely, dependency or the like, it will be readily conceded that when the boards have determined the facts the courts should not take up the case and rebalance it, because that would lead practically to a judicial selective service ultimately. Every one within the range of the law could at least attempt to invoke the jurisdiction of courts for that sort of review. So we get back to the proposition. What is the function of the courts when inquiry is made on behalf of a citizen who seeks to prosecute a remedy which, if granted, will lead to his liberty? Plainly, the court is limited to asking the question, Have these boards acted; and if so, how? To what effect has the law been applied to the individual?

In my judgment the error made on behalf of the respondents in the discussion of the case arises right at this point, in asserting that this is to be regarded as a "military question." The questions to which I have referred, such as whether exemption or deferment should or should not be granted, are plainly executive questions. In fact, it makes little difference what characterization they be given, for their determination is binding upon the courts. But the questions whether the boards have acted at all, and, secondly, to what effect have they acted, are questions of fact, always open to judicial determination. It is the question whose answer determines whether the individual is, or must go, in or out of the service, and likewise whether he can or cannot invoke the court's aid. Now, the present case presents an approach from an angle opposite to that presented in the Kitzerow Case. There, the moment it appeared that the boards had acted, the court, having judicially determined that the boards had acted against the petitioner, said to him:

"We are bound by that determination and you must accept it as placing you in the service."

The petitioner here says that the boards have acted, but they have acted the other way. Now, if the premise be correct that until a man has been selected as the law prescribes he shall be selected, he retains his functions as a civilian, surely there must be a tribunal in which one who claims that he has not been drawn can establish that fact and enforce the rights growing out of it.

These boards exist in the manner in which I have indicated. The local board, up to the time its action was attempted to be superseded by the district board, was plainly within its jurisdiction. And that raises the question, presented naturally and of necessity by the petitioner, Did the district board have jurisdiction to make a superseding determination? Obviously, if the respondents come into court with an order of arrest, based solely upon the action of the local board, if the possession of a document of that kind is a bar to the exercise of judicial power, the writ here must be discharged; but, if the premise which I announce is correct, the petitioner is not bound by an order made by a board, which, under the very plain terms of the regulations and the obvious intent of the system to which I have adverted, has been superseded in its effect by the action of the other board, the district board. Therefore he has the right to come into court to test out the ultimate quality of the warrant which is returned here by the respondents as justifying his imprisonment.

[3] That brings us to the question as to whether the district board did have jurisdiction in this matter. I am ready to hold that it did, upon two grounds, one of which is easy: First, the practical concession of all parties here that there is nothing in law which forbade the district board originally to hear and determine this application for deferred classification at the time it in fact heard and determined it; secondly, jurisdiction appears entirely clear under the regulations issued by the Provost Marshal General and by the President. Under such regulations induction into service contemplated by the law is the point whereat the jurisdiction of these two boards ends, and, as such, is the time and hour fixed in the notice given by the local board. That regulation, of course, is supportive of the very idea to which I have adverted, namely, order, harmony, and effectiveness. It may be an interesting question, not relevant here, whether from and after that time, and prior to taking the oath as a soldier, the registrant is in fact a full-fledged soldier. But it is entirely clear that at no time, prior to the actual induction defined in the regulations, is the power of these boards within their respective jurisdictions to hear and determine matters pertaining to the case of a registrant wholly cut off. There is no statutory or other bar. Indeed, the regulations, wisely and in the interest of justice, seek to preserve and retain that power until the last moment. So I am ready to determine, both upon the concession and upon the record returned here, that there is nothing whatever in the law or the regulations which cuts off the power of the district board to exercise its original jurisdiction at any time prior to the induction which is defined in the regulation, namely, the hour specified in the notice of the local board. Notwithstanding some little contention respecting the exercise of jurisdiction informally, thereby ignoring regulations prescribing time within which a thing shall be done as a matter of practice or procedure, I consider it of no moment here. Such regulations are directory. The mere fact that the district board entertained this application prior to the time specified in the notice and made its determination prior to that time operated, in my judgment, under the very express terms of the regulations wholly to supersede the determination

of the local board. That really disposes of this case. I say that the petitioner can come in here and for the purpose of having a judicial determination of the question as to what this board or these boards had determined and what the quality of their determination is; can present the facts here, bringing in the action of the district board as the final arbiter of the matter of his going into or staying out of the service—at least for the time being.

[4] Now, what can be meant, the concession being made on behalf of the respondents that this district board had jurisdiction, by the general suggestion that the court is still barred from giving relief because it is a "military question"? It is not a determination of a "military question," because the intended consequences of the application of the law through this exclusive instrumentality leave the registrant where he was as a civilian. The affirmative action of the tribunal is against induction into service. Upon questions propounded during argument, it is interesting to inquire what the quality of the determination of the district board is, whether it was binding; and if so, upon whom. And in response to those queries it was said that it was binding until overridden by "higher military authority." Well, that answer is not availing for a variety of reasons, the first one being that it creates—it brings forth in the administration of the law—a situation fraught with nothing but confusion. The President and the executive, under the promptings of this very law, have determined that the district board should decide the matter, and it would be rather anomalous to say that a system had been created whereby the higher board could determine the matter, but the lower board need not in the slightest degree respect the finding, thereby forcing the one in whose favor it had been made to appeal to higher authority. But let us pass that for a minute and test it out in another way. Let us assume that the matter be characterized in that indefinite sort of a way as a military question, beyond the power of courts to consider. Notwithstanding that, it is conceded that the petitioner here, being between the boards and suffering the loss of his liberty unjustly, must have some sort of a recourse. Well, the query arises, What may that recourse be? And if the answer be that he might appeal to the Provost Marshal or to the President, let us grant that that might be done, let us assume that the local board having received the determination of the President to affirm the district board, the local board still remains obdurate, and respondents here, upon promptings of the local board, still refuse to release the petitioner. It is interesting to inquire, What remedy is left open to the President of the United States or the Provost Marshal to enforce their concurrence with the district board? What means or method would avail to relieve the petitioner of the aggressions? Would not the President insist upon according to petitioner the very right he now asserts—a civilian right based upon the award of the tribunal constituted for that very purpose? And obviously the asserted right, if subject to vindication, enjoyment, and protection at all, is so not as a matter of whim or caprice, but upon the formal pronouncement of a duly constituted instrumentality that the individual is for the time being not selected.

It seems absurd to say that, though reclassification or deferred

classification have been committed to the district board (exclusively in industrial cases), and their determination is and must be corrective of a status previously had under local board jurisdiction, nevertheless the district board's determination—binding on everybody—need not be respected by anybody. In the present case the local board has not attempted to justify its acts except upon the hypothesis that it could, optionally, ignore the action of the district board in its change of petitioner's status. There is no contention that his custody is based upon the deferred status. In this conflict it surely does not aid in the solution of the problem to say that the exertion of the local board's power as against the district board's conceded power to exempt him involves a "military question." And with this as the situation some power must exist to determine whether, under the law, the petitioner has or has not been drafted so as to bring about a surrender of his freedom as a civilian.

If a conflict between tribunals created under this law, howsoever ended or solved, would leave the individual whom it concerned a member of the military establishment, then it might be called, properly, a military question. But when it is conceded that the determination of the district board is effective, or intended to be effective as an executive release, discharge, or exemption, then the question, what in truth has been determined, certainly need not be given any special characterization. The answer to such question determines whether any right, subject to guaranty in enjoyment, has been conferred upon or retained by the individual. As already indicated, where such determination is intended to operate as exemption, the registrant is left—until superseded by the orderly processes of the law—in possession of his ordinary freedom, and, as also indicated, he should have recourse to judicial tribunals to relieve against an aggression in contravention of such exemption. This, of course, all proceeds upon the premise that in creating the "system" under this law, determinations of the executive tribunals are to be effective alike in the instances where they operate to reject or release the individual as in those where he is selected or actually called. In the one as in the other, courts accept the determination, refuse review, but, manifestly, in the former, cannot refuse to the individual such protection and guaranty in enjoyment of the right, as by the express force of the determination, the law intends should follow. Obviously, upon such view of what the "system" is and what it intends, habeas corpus must be the available remedy—the remedy which, if applied, may lead to a judgment enforceable not only through the strength of judicial but also of the supreme executive will. The suggestion that courts keep their hands off, to the end that "higher military authority" vindicate the personal right of the petitioner brings with it the query respecting remedies over and manner of guarantying the enjoyment of a conceded ordinary civil right. It may be conceded that a higher military authority could in the present case wrest the petitioner from the operation of the local board's order, but the mode and manner of enforcing obedience to the superior decree has not been suggested or defined.

I am satisfied that petitioner makes out a case entitling him to judgment of discharge, and such may be entered.

## MARQUETTE CEMENT MINING CO. v. OGLESBY COAL CO.

(District Court, N. D. Illinois, E. D. September 7, 1918.)

1. DEEDS ⟸100—CONSTRUCTION—EXTRINSIC CIRCUMSTANCES.
To aid in the construction of deeds, evidence of all the surrounding circumstances is admissible to show the situation and relation of the parties and what they sought to materially accomplish.

2. MINES AND MINERALS ⟸55(6)—GRANTS OF MINING RIGHTS—CONSTRUCTION.
The right of support is vital to the owner of the surface and strata overlying a mine, and is not presumed to have been given up by a conveyance of mining rights unless expressly or by strong implication.

3. MINES AND MINERALS ⟸122—GRANTS OF MINING RIGHTS—CONSTRUCTION —"SURFACE."
The word "surface" in mining controversies means that part of the earth or geologic section lying over the minerals in question, unless the contract or conveyance otherwise defines it, and the owner of a higher stratum is entitled to the same right of support as the surface owner.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surface.]

4. MINES AND MINERALS ⟸55(6)—GRANTS OF MINING RIGHTS—CONSTRUCTION.
A provision in a conveyance of coal mining rights excepting coal under that portion of the surface occupied by buildings of the grantor did not, by implication, permit mining in such manner as to cause subsidence of the surface or overlying strata on other parts of the tract.

5. MINES AND MINERALS ⟸55(6)—GRANTS OF MINING RIGHTS—CONSTRUCTION.
A deed conveying the right to mine coal under a tract of land "without entering upon or injuring the surface thereof" requires the mine to be so worked as not to let down the surface.

6. COURTS ⟸367—GRANTS OF MINING RIGHTS—RULES OF PROPERTY.
Where mining rights are granted in view of a local rule of the state, such rule will be followed by the federal courts in construing the grant, whether or not it is to be considered strictly as a rule of property.

7. MINES AND MINERALS ⟸55(6)—SEVERANCE OF TITLE TO MINERAL—RIGHTS OF SURFACE OWNER.
Under the law of Illinois, as by the general common law, where the underlying minerals are severed by conveyance from the surface the owner of the surface has a clear right to its support.

8. NEGLIGENCE ⟸100—CONTRIBUTORY NEGLIGENCE—WHEN PROVABLE AS DEFENSE.
Contributory negligence is not a defense to an action for breach of an absolute legal duty.

9. MINES AND MINERALS ⟸125—INJURY FROM WORKING—INJUNCTION—REMEDY AT LAW.
Where the mining of coal by defendant causes subsidence which seriously interferes with complainant's mining in a higher stratum of limestone, causing damage, and will continue to do so to an extent which cannot be measured, the remedy at law is not adequate and does not exclude jurisdiction in equity.

10. INJUNCTION ⟸137(2)—PRELIMINARY INJUNCTION—BALANCING OF INJURY.
The rule as to balancing of injuries, to be considered in some cases upon application for preliminary injunction, does not apply where the right and its breach are clear.

11. EQUITY ⟸61—RIGHT TO RELIEF—LEGAL STATUS OF PARTIES.
When each party is pursuing his own right, and collision results, the one without legal culpability of any kind must prevail if the other occupies legally indefensible ground.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the Marquette Cement Mining Company against the Oglesby Coal Company. Decree for complainant.

Tenney, Harding & Sherman, of Chicago, Ill., and Duncan & O'Connor, of Ottawa, Ill., for plaintiff.

Adams, Crews, Bobb & Wescott, of Chicago, Ill., for defendant.

SANBORN, District Judge. This is a bill for an injunction by the owner of a limestone cement mine to restrain the defendant from so operating its mine situated directly beneath the former as to remove the subjacent support. It is conceded, and shown by the evidence of both parties, that there is an actual subsidence of 20 to 25 inches. The defendant, while admitting subsidence, contended on the trial, and gave evidence tending to show, that it was so gradual that the damage occurring in plaintiff's mine was not caused by such subsidence, but resulted from a careless and improper manner of mining the cement rock. It was decided at the trial, however, that certain of the damage was caused by the subsidence, particularly on account of the uneven or differential lowering of the strata of rock and shale underlying the limestone stratum in which the cement mine is operated. Certain other injuries in the cement mine have been due to the plaintiff's method of mining, in not leaving pillars of sufficient size to support the overburden, or by mining shale underneath the pillars, and thus leaving insufficient support. It remains only to recite enough of the facts to aptly apply the governing rules of law, after an examination of the legal principles properly applicable.

Defendant's position is that the suit for injunction cannot be maintained because the remedy at law is adequate, and it is therefore entitled to a trial of the facts by a jury, under the third amendment to the federal Constitution and section 120 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1132 [Comp. St. 1916, § 1112]). It further contends that subsidence was authorized by the dealings of the parties, it being understood that the coal could not otherwise be taken out, and that the correspondence and contract leading up to the conveyances passing between the parties, by which the cement mine and the coal seam were severed, as well as those conveyances themselves, recognized the right of subsidence by the defendant. A further claim, that all the injuries to the cement mine were caused by negligent and improper mining methods pursued by plaintiff, was decided at the trial in respect to portions of the mine in plaintiff's favor, as already referred to.

The property in question is at Oglesby, Ill., in the La Salle geological region, and the strata of limestone, coal, shale, etc., are sedimentary deposits. The plaintiff's mine is about 100 feet below the surface, and the coal seam now being mined by defendant is about 500 feet below the other. From the surface down to the cement mine the geologic section is glacial drift and various sorts of shale and clay. Then comes the limestone bed, about 40 feet thick, composed irregularly of nodular limestone (hubbly limestone and shale), fine-grained limestone, and crystalline limestone, with two thin horizontal shale partings. The mine floor is shaly limestone or soapstone under-

laid with shale, supported by a thin layer of hard thin-bedded black shale or slate. This floor is of varying thickness, from 4 to 15 feet; and below it, down to the coal seam in question, are conglomerate rock, soft clay shales, some silty or sandy, hard shales, coal seams seven and five, green and grey shales, some very hard shale, a thin layer of limestone, and some 20 feet of tough, hard, shale composing the roof of the coal mine. The various layers are quite generally horizontally disposed to each other, and seams and partings abound. During the slow process of settlement due to subsidence, it is supposed that the shales, rock, and other kinds of earth move or slide on each other, finding their final adjustment in much the same form as before, though in a more blocky condition. Upon this the geologists, mining engineers, and miners who testified for defendant based their opinion that the subsidence caused no damage to the plaintiff's mine.

Plaintiff's mining is carried on by the room-and-pillar or pillar-and-stall system, by the advancing and not the retreating plan, the final step being to get as much material as possible by robbing the pillars and roof coming back. Defendant uses the long-wall system. The former consists in beginning at the mine opening, cutting tunnels or entries in the limestone ledge, and taking off rooms from them, leaving a limestone roof of varying thickness, theoretically sufficient to sustain the hundred-foot overburden when pillars of sufficient size are allowed to remain. When the boundary is reached such part of the pillars and roof is taken as is practicable as the work recedes. The work commenced in a small way some 30 years since, and for a long time the rooms were made larger than the best mining practice required. Within the last two or three years the entries and rooms have been made smaller and the pillars larger. Since the making of cement requires a certain amount of silica, found in the shales, the floor of the rooms was mined in certain parts for this purpose, and in places the pillars settled, causing floor heaving and cracking, roof-cracks, roof-falls, spawling, and some cave-ins. These occurred mainly in parts where there was no coal mining near enough to have any influence, and are not claimed to have been caused by it. Others are claimed to be wholly or partly due to the subsidence, and these, particularly the Hand cave and the Calumet Entry cave, will be mentioned presently.

*The Title to the Two Mines.*—That part of the cement mine which is now being worked consists of a tract about 7,000 feet long, roughly estimated at 200 acres. A part was originally owned by plaintiff and a part by defendant, and they arranged to sever the ownership by having the coal rights in plaintiff's land conveyed to defendant, plaintiff retaining all the rest, and, where defendant was owner, by having the fee conveyed to plaintiff, reserving the coal and the right of removal.

In the negotiations and writings leading up to these conveyances, as well as in the deeds themselves, it is claimed by defendant that there is an implied understanding that defendant might remove the coal even though subsidence was caused. These negotiations were

begun by a letter of August 3, 1904, from defendant to Mr. N. W. Duncan, an officer of the plaintiff. In this letter it was proposed that the parties sever their respective ownership in the following manner: Defendant proposed to convey the cement rock and clay lying within 75 feet of the surface, with the right to mine them without entering upon the surface, and in the process of mining pillars of a specified size should be left, but no covenant not to injure the surface should be required. Mr. Duncan, it was proposed by this letter, should convey to defendant the coal and other minerals, not including cement rock and clay lying within 75 feet of the surface, with the right to mine the coal without entering upon or injuring the surface, Duncan to reserve such part of the coal and other minerals as might underlie the cement plant.

After negotiations covering some time, conveyances were made to and from each party. Deeds from plaintiff or its grantors to the defendant described the No. 2 coal seam, and so much of the rock, clay, and other minerals just above and just below the vein of coal as might be required in connection with the mining and removing of the coal, together with the right to mine and remove the same, and the adjacent rock, clay, and other minerals, "without entering upon or injuring the surface thereof," excepting the coal under a tract 200 feet wide by 600 feet long under plaintiff's manufacturing plant. Deeds made by defendant to plaintiff excepted the coal and minerals just above and below, with the same right to mine and remove it "without entering upon or injuring the surface thereof." Most of the deeds back and forth contain like provisions, but those which do not seem to be unimportant on the questions of construction and are not particularly stated.

*Effect of Subsidence from Coal Mining.*—After mining cement rock for many years, and having practically no trouble in the mine, in 1910 roof-falls, pillar-cracks, and floor-heaves commenced to appear, followed in some cases by cave-ins to the surface. The first cave-in was the Garage cave, May 15, 1910, followed by the Riley cave, September 18, 1910, a small cave on the south boundary in 1912, and two caves nearby in 1913. All these were caused by shale mining and not by coal mining. On September 10, 1913, occurred the Hand cave, the largest of all. At this time the coal face was approaching, but did not reach the immediate vicinity until February, 1914. The pillars left in this area were quite small, and the testimony leaves it uncertain whether the trouble was caused wholly by subsidence, but it was probably due both to that and the methods of mining. Early in 1914 an entry about 700 feet long and 35 feet wide, known as the Calumet entry, was driven in the solid rock in the western part of the mine immediately under the advancing coal mining face, and in December, 1914, the whole tunnel fell, in the course of a few days. The testimony leaves no doubt that this was caused by subsidence.

There were other distinct cave-ins in the region of the advancing coal face which were caused in part by subsidence, and in part by small pillars, shale mining, or both.

The most clear evidence of injury caused by subsidence is in the northwestern part of the mine, from the Hand cave region to the northeast corner. After the Calumet entry disaster plaintiff employed engineers to endeavor to locate the cause or causes of the injury. Surveyors' monuments were set upon the surface, and in the mine, in considerable numbers. Readings were taken of their position at frequent intervals, and in this way subsidence was detected and measured. In the region of subsidence there were constant and continuous roof-falls, many of a serious character, and much damage to pillars and floor. All these have continued to the present time, and were going on in the same way down to the close of the trial. The evidence of these injuries, and their connection with subsidence, are numerous. They are in the area above the advancing coal face, and are absent in other parts of the mine; such injuries as there occur are due to local causes. There is also observed the absence of any important injury where subsidence has become complete and the earth has reached its final settlement. The injuries referred to as caused by subsidence cannot be attributed to floor weakness, excessive overburden, the presence of water, the character of the limestone, blasting with dynamite, or a "squeeze" or "creep" from the Hand cave. The mine is an exceptionally dry one, and the evidence shows that, while loose shale is quickly disintegrated by water, it is not so when under pressure. Added to all this is the fact, clearly demonstrated by the evidence, that the subsidence is a differential one. It is hardly possible to think of an uneven sinking of the support of a series of rooms and pillars without the necessity of serious damage. How can one pillar sink while another 50 feet away is stationary without the twisting, straining, and cracking described in the testimony? It is indeed possible to conceive that such a differential subsidence might occur in an untouched area in its natural state which would not cause much injury; but it must be otherwise in a ledge from which three-fifths of the rock has been taken out, the remainder having been left in the form of roof, pillars, and floor.

[1] *The Construction of the Deeds.*—Evidence of all the surrounding circumstances was properly submitted to show the situation and relation of the parties, and what they sought to materially accomplish. Butterley Co., Ltd., v. New Hucknall Colliery Co., Ltd., 99 L. T. 818 (A. D. 1908), 102 L. T. 609 (A. D. 1910); Beard v. Moira Colliery Co., Ltd., 112 L. T. 227 (A. D. 1914); Jones v. Consolidated Anthracite Collieries, Ltd., 114 L. T. 288 (A. D. 1915).

[2] The right of support is vital to the owner of the overlying surface and strata. Therefore it is not presumed to have been given up unless expressly or by strong implication. Wilms v. Jess, 94 Ill. 464, 34 Am. Dec. 242; Kansas City N. W. R. Co. v. Schwake, 68 L. R. A. 675, note 1; Catron v. South Butte Min. Co., 181 Fed. 941, 104 C. C. A. 405.

[3] The word "surface" in mining controversies means that part of the earth or geologic section lying over the minerals in question, unless the contract or conveyance otherwise defines it. It is not merely the top of the glacial drift, soil, or the agricultural surface. Humphries

v. Brogden, 12 Q. B. 739. The owner of the higher stratum is entitled to the same rights as the actual surface owner. Yandes v. Wright, 66 Ind. 319, 32 Am. Rep. 109. See 68 L. R. A. 679; Robertson v. Youghiogheny River Coal Co., 172 Pa. 566, 33 Atl. 706; Mundy v. Rutland, L. T. 23 Ch. Div. 81.

[4] There is nothing in the letters, negotiations, or deeds which gives a different meaning to the word "surface," or, either expressly or by implication, secures to the defendant the right to subside the overlying cement mine. On the whole, the implication is to the contrary by reason of the deeds giving the right to mine and remove coal "without entering upon or injuring the surface." All the restrictions are upon defendant's right to mine and not upon the plaintiff. Nor do the preliminary negotiations indicate an intention to waive the right of support. It is highly improbable that the plaintiff would intentionally agree that the relatively unimportant agricultural surface should be preserved, while assenting to the letting down of its enormously valuable rock ledge and mine. That it was careful to protect its manufacturing plant beyond all question is not a clear implication of its consent to subside its mine. As the court said in Wilms v. Jess, supra:

"But, it is contended, appellant and his codefendant were exonerated from protecting the surface, because the lease here stipulates that 'no pillars shall be withdrawn within six hundred feet of the shaft,' upon the principle that, 'having expressed *some* the parties have expressed *all* the conditions by which they intend to be bound under that instrument.'

"By looking to the lease, we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner, that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of the lease, shall be turned over, etc., in good condition, etc.—all for the obvious purpose of preserving the shaft and access to coal not mined.

"No attempt is made to regulate the rights and obligations of the parties, in respect of the superincumbent soil, further than to confer the right of way thereover and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law."

In the English cases cited it was ruled that the parties, by their agreements in the leases or conveyances by which their ownerships were severed or secured, had agreed that the lower owner might remove the right of support, the provisions for this purpose giving rise to a clear implication. Thus, in the Butterly Case, plaintiffs owned the top seam of hard coal, and defendants the deep, soft seam, 150 yards below. It was common knowledge at the time the interests were created (as in this present case) that the lower seam could not be worked without causing subsidence. The lease of the upper seam contained a provision that the lessor might lease the lower or soft coal seam to others, and should in such leases indemnify against any physical damage caused by the working of such lower mine. Later the lessor leased the soft seam to defendants, who worked the mine and caused damage to the plaintiff by subsidence, for which it rendered bills to the lessor, which were paid. It also appears from the various reports of the decision that the defendants claimed the

right, under the leases, to subside the surface, including the upper seam, on paying plaintiff for the damage caused. It was held that the plaintiff had no right to an injunction, but only to such compensation for subsidence as had been agreed upon. It was also assumed in the opinions in the Butterly Case that the subsidence would only make the working of the upper mine more expensive without stopping the mining altogether, but I find this would not be the result in the case at bar. There was also a provision in defendants' lease that they would work the mine in the most approved manner, which was held inconsistent with the right of the plaintiff to have an injunction against their working it at all.

In the Beard Case cited the landowner conveyed certain real estate, reserving all minerals, with the power to mine them "in as full and ample a way and manner as if these presents had not been made and executed." It was also provided in the deed that the grantor should pay at the rate of $20 a year per acre of land undermined. The former decisions were followed, and the right to continue mining affirmed. The following statement of the law by Lord Loreburn in Butterknowle Colliery Co., Ltd., v. Bishop Auckland, etc., 94 L. T. 793, was approved:

"Whenever the minerals belong to one person and the surface to another, the law presumes that the surface owner has a right to support, unless the language of the instrument regulating their rights, or other evidence, clearly shows the contrary. In order to exclude a right of support, the language used must unequivocally convey that intention, either by express words or by necessary implication. For the same presumption in favour of a right of support which regulates the rights of parties in the absence of an instrument defining them will apply also in construing the instrument when it is produced. If the introduction of a clause to the effect that the mines must be worked so as not to let down the surface would not create an inconsistency with the actual clauses of the instrument, then it means that the surface cannot be let down."

[5] In the case now under consideration the provision in the deeds that Oglesby Company shall not enter upon or injure the surface amounts to a clause that the coal mine shall not be worked so as to "let down the surface," and such provision does not create any inconsistency with the one giving it the right to mine and carry away.

The Jones Case, also cited, related to damage to buildings on the surface, and there was the same provision as to compensation, to the effect that reasonable compensation should be made, for injury "whether by letting down the surface or otherwise."

The result of an examination of the English authorities cited on the argument seems to be that the rules are similar to those adopted in this country, yet there is here a stronger tendency in favor of the right of subjacent support than in the High Court of Judicature in England.

[6] *The Governing Rule of Law is that of Illinois.*—In 1880, long before the conveyances of severance between the parties here were made, the rule as to subjacent support was settled in Illinois by the case of Wilms v. Jess, 94 Ill. 464, 34 Am. Dec. 242, substantially reaffirmed by Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. The former decision is commented on in other parts of this opinion. Since

the conveyances were made in view of the local rule the federal courts will follow it, whether or not it is to be considered strictly as a rule of property. Any other rule would be intolerable, as applied to the ownership and enjoyment of property. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228; Id., 179 Fed. 191, 102 C. C. A. 457, 66 W. Va. 711.

[7] The Illinois rule, as so established, is that the right of support is absolute, a substantive part of the mass of rights constituting ownership of land. It is not an incident of ownership nor an easement. In Wilms v. Jess a lease was made of the exclusive right of boring and digging for coal, and for "taking out and working the said coal, together with the right of way and surface of so much of the track [sic] as may be necessary for the economical use of the same." "It is further understood and agreed that the said party of the second part shall mine the coal in a workmanlike manner, no pillars to be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined at the termination of this lease shall be turned over to the party of the first part in as good condition as the nature of the mine will admit." The court say:

"The lease under which appellant claims, confers the right to work the mine and take out the coal, and, as incident thereto, the use of usual and appropriate means therefor; and it also gives a right of way and surface use of so much of the superincumbent soil as is necessary for the economical and efficient working of the mine. It does not, however, assume to confer any right to destroy or injure or further burden the superincumbent soil.

"Where the surface of land belongs to one and the minerals to another, no evidence of title appearing to regulate or qualify their rights of enjoyment, the owner of the minerals cannot remove them without leaving support sufficient to maintain the surface in its natural state. Humphries v. Brogden, 12 Queen's Bench, 743 (1 Eng. Law & Equity, 241); Harris v. Ryding, 5 Meeson & Welsby, 59; Smart v. Morton, 5 Ellis & Blackburn, 30.

"But, it is contended, appellant and his codefendant were exonerated from protecting the surface, because the lease here stipulates that 'no pillars shall be withdrawn within six hundred feet of the shaft,' upon the principle that, 'having expressed *some* the parties have expressed *all* the conditions by which they intend to be bound under that instrument.'

"By looking to the lease we think it quite clear this stipulation has relation to the mine only, and no reference whatever to the superincumbent soil. The whole clause relates to the manner of working the mine and the condition in which it shall be left. It requires that the mining shall be done in a workmanlike manner, that no pillars shall be withdrawn within six hundred feet of the shaft, and that the entries giving access to the coal not mined, at the termination of the lease, shall be turned over, etc., in good condition, etc. —all for the obvious purpose of preserving the shaft and access to coal not mined.

"No attempt is made to regulate the rights and obligations of the parties in respect of the superincumbent soil, further than to confer the right of way thereover, and the surface use to the extent necessary to an efficient and economical working of the mine, leaving them to be governed in other respects in reference thereto by the common law.

"The rule is well settled, when one owning the whole fee grants the minerals, reserving the surface to himself, his grantee is entitled only to so much of the minerals as he can get without injury to the superincumbent soil. Coleman v. Chadwick, 8 Pa. St. 81 [21 Am. St. Rep. 93]; Horner v. Watson, 29 P. F. Smith [Pa.] 251 [21 Am. Rep. 55]; Jones v. Wagner, 10 [16] Id. 429 [5

Am. Rep. 385]; Harris v. Ryding, supra; Zinc Co. v. Franklinite Co., 13 N. J. (2 Beasely's Ch.) 342; Smart v. Morton, supra.

"And it is held, where a landowner sells the surface, reserving to himself the minerals with power to get them, he must, if he intends to have power to get them in a way which will destroy the surface, frame the reservation in such a way as to show clearly that he is intended to have that power. Hext v. Gill, 7 Law Reports, Chancery Appeal Cases, 699.

"But, it is contended, this obligation to protect the superincumbent soil only extends to the soil in its natural state, and that no obligation rests on the owner of the subjacent strata to support additional buildings, in the absence of express stipulation to that effect. This is, doubtless, true; but 'the mere presence of a building or other structure upon the surface does not prevent a recovery for injuries to the surface, unless it is shown that the subsidence would not have occurred except for the presence of the buildings. Where the injury would have resulted from the act if no buildings existed upon the surface, the act creating the subsidence is wrongful, and renders the owners of the mines liable for all damages that result therefrom, as well to the buildings as to the land itself.' Wood on Nuisance, § 201; Brown v. Robins, 4 Hurlstone & Norman, 185; Hamer v. Knowles and another, 6 Hurlstone & Norman, 459.

"The act of removing all support from the superincumbent soil is, prima facie, the cause of its subsequently subsiding; but if the subsiding is, in fact, caused by the weight of buildings erected subsequent to the execution of the lease of the mine, this is in the nature of contributive negligence, and may be proved in defense. The authorities do not require that plaintiff's proof shall exclude that hypothesis in the first instance."

This is the law of the state where the mines are situated and that law the court should follow. The case also conforms, I think, to the trend of authority in other states as well as in the British Empire. Where the underlying minerals are severed by conveyance from the surface, the owner of the latter has a clear right to the support of the surface. Seitz v. Coal Valley Coal Mining Co., 149 Ill. App. 85; Noonan v. Pardee, 200 Pa. 474, 50 Atl. 255, 55 L. R. A. 410, 86 Am. St. Rep. 722; Donk Bros. Coal & Coke Co. v. Novero, 135 Ill. App. 633; Penman v. Jones, 256 Pa. 416, 100 Atl. 1043; Jones v. Wagner, 66 Pa. 429, 5 Am. Rep. 385; Humphries v. Brogden, 12 Q. B. 739, 64 E. C. L. 739, 17 Eng. Ruling Cas. 416; 18 Am. & Eng. Ency. Law, § 556; 1 R. C. L. § 34, p. 395; Wood, Nuisances, 194; 3 Lindley, Mines (3d Ed.) §§ 818, 819; White, Mines & Mining Injuries, §§ 212, 215; Costigan, Mining Law, pp. 504–506; 2 Snyder on Mines, §§ 1020–1025; MacSwinney on Mines, 291; Williams v. Gibson, 84 Ala. 228, 4 South. 350, 5 Am. St. Rep. 368; Marvin v. Brewster Iron Min. Co., 55 N. Y. 538, 14 Am. Rep. 322; Lord v. Carbon Iron Mfg. Co., 42 N. J. Eq. 157, 6 Atl. 812; Erickson v. Michigan Land & Iron Co., 50 Mich. 604, 16 N. W. 161; Carlin v. Chappell, 101 Pa. 348, 47 Am. Rep. 722; Williams v. Hay, 120 Pa. 485, 14 Atl. 379, 6 Am. St. Rep. 719.

*Effect of Plaintiff's Mining Methods.*—Defendant in its answer admits that plaintiff has suffered serious damages in its mining operations, but alleges that this is due to "its notoriously reckless, unworkmanlike, and unscientific methods of mining, in violation of well-established mining practice and sound engineering judgment." The proof shows that in some parts of the mine the pillars are too small, and that shale has been mined so as to further weaken them, and that

this has been followed by injury in no way caused by subsidence. In other places this method of mining has contributed to such injury. In still others, particularly in the western, southwestern, and northwestern part of the east portion of the mine the injury is wholly due to subsidence. Plaintiff started its operations many years ago, when the science was not so advanced as at present. It has employed skilled workmen, its foreman and superintendent, Spurr and Moyle, being men of exceptional character and experience. Since troubles from subsidence commenced it has employed as mining engineer Mr. Shultz, most able and well equipped for his work, and who has much improved on the mining practice. I find as a matter of fact that the injuries on the southwest entry and haulage, with the exception of the extreme southerly ends, the Calumet entry, and the northwest part of the east portion of the mine, were due alone to the subsidence, and that most serious injury will follow the advancing coal face to the east and southeast; also that the method of plaintiff's mining did not contribute to the injuries in these parts, although the contrary is true as to the portion northwest, north, and northeast of the main entry to the mine, and that in this region the mining methods were not such as would at this day be approved.

[8] As to the effect of such negligence it is not necessary to decide, since I find that the continuance of coal mining will vitally injure territory in which the mine practice is good and sufficient. However, no charge of negligence is made against defendant, simply the breach of an absolute legal duty. In such a case the only defense, aside from laches or release of such duty, or some other defense not alleged (such as estoppel), is that the subsidence caused no injury. Contributory negligence (as the term implies) is a defense only when a party omits something in his operations which common prudence requires—a breach of negative duty. The rule seems never to have been applied to cases of absolute duties, like the statutory obligation of railroads to fence their right of way against domestic animals, except when the owner, seeing them on the track before an approaching train, deliberately refuses to remove them. Donovan v. Hannibal, etc., R. Co., 89 Mo. 147, 1 S. W. 232; Zimmerman v. H. & St. J. R. Co., 71 Mo. 476. To this extent only is the rule of "the last clear chance" applied to the negligent breach of absolute legal duty. The inapplicability of these rules to the present case seems obvious. In a general sense, it is true, defendant may be said to be negligent in not propping up its mine so as to prevent subsidence. Defendant might possibly leave pillars of coal sufficient to support the surface, but I assume that would be entirely impracticable under a prohibitive expense.

I think the objection or argument that the law of support applies only to land in its natural state, and not to a weakened structure like the cement mine, rendered more susceptible to injury by having more than half of the rock removed, has no application to the case. I find as a fact that the injuries would have occurred even if the mining methods had been the same as those now in use, which are above criticism. The subsidence was the wrongful cause of the injuries,

the sole proximate cause. The rule of law held in the Wilms Case, 94 Ill. 464, 34 Am. Dec. 242, herein quoted, should be followed.

[9] *Is the Remedy at Law Adequate.*—By the Seventh Amendment to the Constitution, the right of jury trial in cases at common law is preserved, and, if the present case should properly be a legal one, defendant has a settled right to a jury trial upon the question whether the conceded subsidence actually causes injury, as well as upon all other facts. The same rule was adopted by the Judiciary Act of 1789, now found in section 723, R. S., and section 267 of the Judicial Code (Comp. St. 1916, § 1244). Later legislation provides that a suit brought in the wrong forum shall be transferred to the proper side. Sections 274a, b, c, Judicial Code and Equity Rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv).

It is the settled rule that the remedy at law, to be an adequate one, must be as certain, prompt, complete, and efficient to the ends of justice and its prompt administration as the remedy in equity. Texas Co. v. Central Fuel Oil Co., 194 Fed. 1, 114 C. C. A. 21, and cases cited. This was specific performance of a contract for the delivery of crude petroleum at the rate of not more than 20,000 barrels a day, and the alleged breach was a refusal by the Central Company to perform. An injunction was prayed to prevent violation. Equity jurisdiction was sustained, because plaintiff could not recover all the damages it might sustain, and because they were impossible of proof, the amount of oil which the defendant could produce being uncertain. So in this present case no one can tell what damage the cement company may sustain by future subsidence. Future actions at law would be necessary as the injury progressed. Recurring suits for damages would be more vexatious and expensive than effective. United States Freehold Co. v. Gallegos, 89 Fed. 769, 32 C. C. A. 470, where there was a continuous diversion of water; Northern Pac. Ry. Co. v. Cunningham (C. C.) 103 Fed. 708, a continuing trespass by the pasturing of sheep. One person cannot be permitted to continuously damage another and compel the owner to accept money in satisfaction. "The rule applies with special force when the threatened trespass would result in depriving the complainant of the enjoyment of a property right." West Virginia Pulp & Paper Co. v. Cheat Mountain Club, 212 Fed. 373, 129 C. C. A. 49. The removal of granite from a quarry was restrained pending a decision by the land department, for the reason that the injury might be irreparable. Northern Pac. Ry. Co. v. Soderburg (C. C.) 86 Fed. 51; Wallula Pac. Ry. Co. v. Portland & S. Ry. Co. (C. C.) 154 Fed. 902. In the present case the testimony establishes the fact that the injury already sustained and to result from continued coal mining is an irreparable one.

A decision relied on by defendant is Berkey v. Berwind-White Coal Mining Co., 220 Pa. 65, 69 Atl. 329, 16 L. R. A. (N. S.) 851. A conveyance had been made of a coal stratum, with the right to mine and remove it. An injunction was sought to restrain the coal owner from so mining as to subside the surface. The jurisdiction was denied on the ground that the anticipated injury was not ir-

reparable. The court said that if the act to be committed was in the nature of a trespass, or tort, or nuisance, which by reason of the persistency with which it is repeated threatens to become permanent, courts of equity will interfere by injunction; citing Pennsylvania cases. Then the court continues:

"The present case does not come within the reason or spirit of the rule announced in these cases. Under the facts of the case at bar it cannot be successfully contended that the injury is irreparable, at least in the sense that it cannot be adequately compensated in damages; and certainly the mining and removing of coal by the party who owns it and has the right to remove it, and whose operations are conducted by the most approved methods known in mining operations, cannot be said to be a trespass, or tort, or nuisance, within the meaning of the rule of the above-cited cases in which equitable relief has been granted. In the above cases the respondents were trespassers, without any right of property in the thing injured, while in the present case appellants are the owners or lessees of the coal with the right to remove it."

"It is often difficult to determine whether the remedy at law is adequate, and in passing upon this question equity jurisdiction has been extended from time to time by our courts. A court of equity, in passing upon the question whether the remedy at law is adequate, should have due regard to the situation of the parties. The case at bar is an illustration. The appellee sold and conveyed all of his coal to one of the appellants, which leased it to the other, and has been paid the consideration in full. By his express covenant the mining company is given the right to mine and remove all the coal, so that when, in the prosecution of its mining operations, it undertakes to mine and remove the entire stratum, it is only doing what the appellee, in the express language of his covenants, said could be done. A rule of law, as old as the commonwealth, comes to his aid by charging upon the underlying mineral estate the servitude of surface support, in the absence of the waiver of this right in the grant. The law has thus done for him what he has not done for himself. Of course, he is entitled to have his rights protected, no matter how they arise; but his vendee and its lessee, the appellants here, on the other hand, must also be protected in the enjoyment of the rights acquired under the deed of conveyance. This was the situation of the parties at the time of the filing of the present bill. The appellants have the title to all the coal, with the right to mine and remove it. The appellee, under the rule of law above referred to, had no title to the coal or any part of it, but only the right to have his surface sufficiently supported. In a sense, both parties are standing upon their legal rights. It was not for the appellee to say how much coal should be mined and removed, because the coal did not belong to him. He can insist upon his right to have the surface reasonably supported, and if this is not done, and injury results by failure in this respect, he can recover damages to the full extent of the injury done. None of our cases have gone further than this up to the present time. We are now asked to take a step in advance by recognizing the right of the owner of the surface to proceed in a court of equity to restrain the owner of the coal from mining and removing it in such a manner as may cause subsidence or breaking of the surface. In other words the court is asked to restrain a mining company from mining its own coal because it may reasonably be anticipated that the removing of the coal will cause a subsidence or breaking in the surface. Such a remedy would be a proper one if the facts of a particular case warranted such intervention. If the threatened injury is of an irreparable character, which could not be compensated in damages by an action at law; or if buildings or other permanent improvements would be endangered; or if overlying strata of coal, or other mineral estate, would be seriously and permanently disturbed or displaced by the mining of all the coal—it is clear equity would in proper case intervene to restrain such acts, even before the injury had been done. But none of these conditions are shown to exist in the present case. The coal has already been mined from the lower and more level parts of the tract, and the coal yet to be mined is overlaid with a hilly surface furnishing a covering from 200 to

250 feet thick. The vein of coal varies from 3 feet 6 inches to 4 feet in thickness, and the evidence produced at the hearing, as well as the experience of all those familiar with mining operations, shows that very little, if any, damage will be done that part of the surface by mining and removing the coal. The loss of springs of water is principally relied on by complainant to show damage to his surface, but the evidence is not sufficient, in our opinion, to establish the fact that the springs were affected by failure to furnish surface support. Springs of water are frequently affected by the mining of coal even when the surface is properly supported, and under the facts of the present case the weight of the evidence would seem to show that failure to provide surface support was not the cause of the springs drying up. As to the buildings, the evidence is clear that the coal has not been mined from under the same, and therefore it cannot be said that any damage has been done to them from this cause. If at any time the appellants should undertake to mine the coal from under the buildings or other permanent improvements in the tract, the owner could prevent the same by injunction. The appellants deny that they have mined the coal from under the buildings, and aver that it is not their intention to do so, and under these facts a case for equitable relief is not made out in this respect."

It seems to me that the foregoing discussion clearly shows that in case of irreparable injury equity has jurisdiction. Other cases sustaining the jurisdiction are El Doro Oil Co. v. United States, 229 Fed. 946, 144 C. C. A. 228; Archer v. Greenville Gravel Co., 233 U. S. 60, 34 Sup. Ct. 567, 58 L. Ed. 850; Big Six Development Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; Eastern Oregon Land Co. v. Willow River L. & T. Co., 201 Fed. 203, 119 C. C. A. 437; Oolagah Coal Co. v. McCaleb, 68 Fed. 86, 15 C. C. A. 270; United States v. Midway & N. Oil Co. (D. C.) 232 Fed. 619, 624; Peck v. Ayres & Lord Tie Co., 116 Fed. 275, 53 C. C. A. 551; Lembeck v. Nye, 47 Ohio St. 336, 24 N. E. 686, 8 L. R. A. 578, 21 Am. St. Rep. 828.

Manifestly an injunction of such grave import as that here sought should not be granted except in a clear case. Lloyd v. Catlin Coal Co., 210 Ill. 460, 71 N. E. 335. But when it is clear that subsidence will seriously impair the mining use, the injury is irreparable, and should be restrained. Bibby v. Bunch, 176 Ala. 585, 58 So. 916, Ann. Cas. 1918, ——.

[10] *Rule as to Balancing Injury.*—Defendant relies on the rule sometimes applied that courts will refuse an injunction when it will damage defendant more than it will benefit plaintiff, or more than plaintiff would be injured by its refusal. The principle is often applied in applications for temporary injunctions in suits to enjoin and account, especially where the right is in some doubt. Where the right and its breach are clear, the principle of balancing injuries does not apply. Loomis v. Collins, 272 Ill. 221, 111 N. E. 999; Wente v. Commonwealth Fuel Co., 232 Ill. 526, 532, 83 N. E. 1049. The rule is sometimes applied, also, when the benefit to plaintiff would be small and defendant's injury great. St. Louis Union Trust Co. v. Galloway Coal Co. (C. C.) 193 Fed. 106, 120; Stewart Wire Co. v. Lehigh Coal & Nav. Co., 203 Pa. 474, 53 Atl. 352. And in all cases, of course, the court will consider the comparative injury to the parties. Loomis v. Collins, 272 Ill. 221, 235, 111 N. E. 999. Other decisions illustrating the rule are Walters v. McElroy, 151 Pa. 549, 25

Atl. 125; Sullivan v. Jones & Laughlin Steel Co., 208 Pa. 540, 57 Atl. 1065, 66 L. R. A. 712; Harrington v. McCarthy, 169 Mass. 492, 48 N. E. 278, 61 Am. St. Rep. 298; Hodgkins v. Farrington, 150 Mass. 19, 22 N. E. 73, 5 L. R. A. 209, 15 Am. St. Rep. 168; and Kershishian v. Johnson, 210 Mass. 135, 96 N. E. 56, 36 L. R. A. (N. S.) 402.

The result of this suit may involve the abandonment of a valuable business on either side. Defendant will apparently be obliged to cease mining for many years if the decree goes against it. So, if there is no remedy by injunction, plaintiff may be compelled to cease mining forever in all parts of its territory north of the Vermillion river. That plaintiff is doing only what it is absolutely authorized by law to do cannot be denied. In a sense, also, defendant is proceeding lawfully. Its mining methods are correct and careful, and the deeds expressly authorize it to mine the coal if it can do so without injury to what lies above. This distinction, I think, makes the measure of the rights of the parties. It cannot so mine without letting down the earth above, and most seriously injuring the cement mine. In other words, plaintiff is acting strictly within its rights, while defendant, although doing the best it can, is unlawfully injuring the plaintiff in such a way as to preclude the probability of the future damage being capable of measurement. By analogy to the equitable maxim that where the equities are equal the law prevails, it may be said, in a general way, that while the right to injunction is not absolute, but in a sense discretionary, and whatever the decree the loser is bound to be greatly injured, perhaps equally injured, yet where plaintiff is strictly within its right, but defendant is not, equity should give effect to defendant's breach of plaintiff's legal right by letting down the rock ledge, and restrain such breach until the coal mining can proceed without injury.

[11] When each party is pursuing his own right, and collision results, the one without legal culpability of any kind must prevail, if the other occupies legally indefensible ground.

The form of decree submitted by plaintiff's counsel contains some provisions not here discussed, and is therefore appended.

*Decree.*—This cause came on to be heard by the court at this term upon the pleadings and the evidence, oral and documentary, offered in open court, and was argued by counsel, and thereupon, and upon consideration thereof, it was ordered, adjudged and decreed as follows:

1. That the complainant is a corporation organized under the laws of the state of Illinois and a citizen of that state; that the defendant is a corporation organized under the laws of the state of Wisconsin and a citizen of that state; that the amount in controversy in this case, exclusive of interest and costs, exceeds the sum and value of $3,000, and that this court has jurisdiction of the cause.

2. That the complainant is the owner in fee of the property referred to in the bill, and more particularly described in Exhibit A thereof, as follows: * * *; and that the source and date of its title thereto and of the interest of the defendant therein are correct-

ly stated in said Exhibit A; that the defendant owns the coal located in said premises, and known as geological seams Nos. 7, 5, and 2, and also known as the first, second, and third veins, and is entitled to mine and remove said coal only to the extent that this can be done without impairing the natural support which the coal in each of said veins furnished for complainant's property located above the same, and without causing the said property of complainant to subside; that the defendant has no right to impair the support furnished to the complainant by the said coal which the defendant owns, or to conduct any mining or other operations in either vein which will impair said support or cause the property of the complainant to subside; that no written agreement between the parties hereto or contained in any of the contracts or deeds in the chain of title of either party to any part of said property gave to the defendant the right to impair the natural support of the complainant's property, or to cause or to allow the property of the complainant, or any part thereof, to subside by reason of any operation of the defendant in connection with the mining of its said coal; that the defendant has the right to remove only so much of said coal as can be removed and leave complete and adequate support for the complainant's property, and such support as will prevent any subsidence of the complainant's property by reason of the defendant's mining operations; and that no agreement, oral or written, was made between the parties which gave to the defendant any other or greater right.

3. That the facts with reference to the character, value, and extent of the complainant's machinery, plant, outfit, and improvements upon said property, the extent and nature of its business, the character and value of its property for the purpose of conducting the manufacture of cement, the extent and nature of its mining operations, the necessary connection between its manufacturing plant and its cement mine, the value of the land for the purpose of such manufacture, and the consequences of any injury, either to the plant or to the mine caused by a subsidence of any part of the property, are correctly stated in the bill.

4. That the defendant has for some years been engaged in mining the coal in geological seam No. 2 (known also as the third vein), under a portion of the complainant's property, and in doing so has extracted all of the coal and a portion of the rock and other material above and below the coal in that vein, but has not supported the roof of the defendant's mine, or the complainant's property situated above said mine, nor prevented the subsidence of the complainant's property caused by the removal of said coal and other materials, either by the building of walls which gave such support or otherwise, but, on the contrary, has caused the property of the complainant to subside. During the trial of the case it was conceded on behalf of the defendant that its mining operations have caused such subsidence of some parts of the complainant's property to the extent of at least 20 inches.

5. That the subsidence of the complainant's property so caused by the defendant's mining operations, and the withdrawal of the natural

support furnished to the complainant's property by the said coal, extends continuously into the complainant's property as the mining operations of the defendant continue, is uneven and unequal in its action and effect; that it has caused, continues and will continue to cause, the roof, floor, and pillars in the complainant's said mine to crack, seams in the floor, roof and pillars to open, the roof of the rooms and passageways, from which limestone is being extracted in the complainant's said mine, to fall, and to place in great danger not only the lives of the complainant's workmen and its mining machinery used in conducting its business, but also the mine structure itself; that the effect of this subsidence will, if continued, not only greatly increase the expense of continuing the complainant's business, and reduce the amount of limestone and other materials which it could otherwise reasonably obtain from its said mine, but will destroy the ability of the complainant to obtain from the mine a large amount of limestone and cement material which otherwise could be obtained, and will practically wreck a large and valuable portion of the complainant's property and greatly depreciate it in value; that such subsidence, if continued, will also greatly endanger complainant's manufacturing plant located upon its said property, for the safe and successful operation of which it is necessary that there be no disturbance of the soil underneath the foundations of the plant or any change in the level of the foundations thereof.

6. That the effect of this subsidence of the complainant's property thus caused by the defendant's mining operations has been and will continue to be injurious to the complainant, entailing upon it a very serious loss and the hazard of the destruction of its business and of the most valuable element of value in its property; but that it is impossible accurately to ascertain from time to time the exact amount of the damage so suffered, or for the complainant to enforce any remedy at law which will be adequate for the protection of its rights and interests as against the wrongful act of the defendant in causing the property of the complainant so to subside, and that the only remedy in any way adequate for the enforcement and protection of the complainant's rights is by an injunction as granted by this decree.

It is therefore ordered, adjudged, and decreed that the defendant, its agents, servants, and attorneys, be, and they are hereby perpetually enjoined from continuing to mine the coal or other materials underlying any part of the complainant's property described in the bill in such a manner as to cause or allow any part of the said property of the complainant to subside by reason of the withdrawal of the coal, and also from extracting said coal and other material without leaving and providing adequate support which will at all times prevent the soil and property of the complainant above said coal from subsiding, and also from impairing the natural support which said coal furnishes to the said land and property of the complainant.

It is further ordered, adjudged, and decreed that a writ of injunction issue restraining the defendant as herein provided, and that the complainant recover its costs against the defendant, to be taxed by the clerk, and that execution issue therefor in the usual manner.

## ST. LOUIS-SAN FRANCISCO RY. CO. v. McELVAIN.

(District Court, E. D. Missouri. June 28, 1918.)

No. 4858.

1. COURTS ⟸264(1)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUITS.
A federal court has jurisdiction, regardless of citizenship of parties or amount involved, of an ancillary suit to prevent relitigation in other courts of issues it has heard and determined in the original suit, and to protect the titles and rights of purchasers under its decree.

2. COURTS ⟸264(1)—JURISDICTION—ANCILLARY SUIT—ENFORCEMENT OF DECREE.
A dependent suit may be maintained by a party to the original suit, or by one who claims under the adjudication and decree therein, against one who assails that adjudication or decree in a subsequent suit in a court without appellate jurisdiction, on the ground that it is illegal or ineffectual, although the latter was not a party to the original suit, the adjudication, or decree.

3. JUDGMENT ⟸672—PERSONS CONCLUDED—CREDITORS' SUIT.
A general creditor, who proves his claim under an interlocutory decree in a suit brought by another general creditor in behalf of all, becomes a party, and is bound by the final decree therein.

4. MORTGAGES ⟸532—FORECLOSURE SALE—TITLE AND RIGHTS OF PURCHASER.
A foreclosure sale of the property of a mortgagor, in a suit by the mortgagee against the mortgagor, to which his unsecured creditors are not parties, by name or by service of process upon them, conveys the property mortgaged to the purchaser free from all claims of such creditors, either against the property or against the person of the purchaser.

5. JUDGMENT ⟸678(5)—PERSONS CONCLUDED—UNSECURED CREDITORS.
Unsecured creditors of a mortgagor are represented in a suit for foreclosure by their debtor, the mortgagor, and a decree and sale which bars the mortgagor, in the absence of fraud, bars them.

6. COURTS ⟸508(1)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.
Where a federal court first obtains jurisdiction of the subject-matter in controversy, it may enjoin all proceedings in a state court, commenced afterward, which would have the effect of defeating or impairing its jurisdiction, or the lawful effect of its orders or decrees, or titles which it has made in the exercise of that jurisdiction.

7. COURTS ⟸508(1)—FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.
It is no defense to a dependent injunction suit to prevent the nullification or impairment of the just legal effect of the adjudication, decree, or sale made by order of a federal court, or the title to property granted thereunder, that the defendant proposes to do so by means of a subsequent action at law and the trial by a jury of the issues already adjudged by such court.

8. RAILROADS ⟸195(2)—MORTGAGE FORECLOSURES—SALE TO REORGANIZED COMPANY—RIGHTS OF UNSECURED CREDITORS.
There is no moral turpitude nor illegality in an agreement between bondholders, secured by mortgages, stockholders, and the unsecured creditors of an insolvent railroad company that there shall be a foreclosure and sale of the mortgaged property to a new corporation, in which all the members of the three classes shall be permitted, at the option of each, to receive bonds or stock in substantial proportion to the respective ranks and equities of the classes.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

9. COURTS ⊜262(2)—EQUITY JURISDICTION—"ADEQUATE REMEDY AT LAW."
The "adequate remedy at law," which will prevent the maintenance of a suit in equity in a federal court, is a remedy as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity, and which would prevent a suit in equity in a federal court.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adequate Remedy.]

In Equity. Suit by the St. Louis-San Francisco Railway Company against J. M. McElvain. On motion for preliminary injunction. Granted.

Cravath & Henderson, of New York City, and William F. Evans, of St. Louis, Mo. (Robert T. Swaine, of New York City, of counsel), for complainant.

C. G. Shepard, R. L. Ward, and Everett Reeves, all of Caruthersville, Mo., for defendant.

SANBORN, Circuit Judge. This is an application for a preliminary injunction to prevent J. M. McElvain from further prosecuting an action he has brought in the circuit court of Pemiscot county, Mo., against the complainant, St. Louis-San Francisco Railway Company, a corporation, and the purchaser at the foreclosure sale under the final decree of this court in North American Co. v. St. Louis & San Francisco Railroad Co. (in Equity, No. 4174, Consolidated Cause Final) 246 Fed. 260, and other cases, of all the property of that railroad company. McElvain's alleged cause of action is that the railroad company was indebted to him before the receivers of its property were appointed on May 27, 1913; that the final decree of foreclosure of the mortgages on its property and the sale thereof under that decree were made under a pre-conceived plan and agreement of the bondholders and stockholders of that corporation, whereby for their stock those stockholders received stock and bonds of the railway company which in effect bought at the sale under the decree and now holds the property of the railroad company. In its complaint the complainant has alleged the pertinent proceedings in the consolidated cause and in its constituent causes, and the nature of McElvain's action, including these facts:

The receivers of all the property of the railroad company were appointed on a general creditor's administrative bill in May, 1913, for the benefit of all the creditors of that corporation as their respective interests might appear. The bill in that suit was a class bill, brought by North American Company, a general creditor secured by none of the mortgages that have been foreclosed, a creditor of the same class as McElvain, for the benefit of itself and all others of that class. On April 3, 1914, Rail Joint Company, a corporation, and an unsecured creditor of the railroad company, filed its complaint in this court against the railroad company in behalf of itself and all other creditors of that company, alleged the insolvency of the railroad company, and prayed for the appointment of receivers of its proprty, the administration thereof, and the enforcement of the liens, rights, and claims of all its creditors. The railroad company answered, and on the complaint

and answer this suit was, by order of this court, made on April 3, 1914, consolidated with the suit of the North American Company, and the appointments of receivers and all other orders in that suit were extended over the second suit and the consolidated cause, and the latter cause was named "North American Co., Complainant, v. St. Louis & San Francisco Railroad Co., Defendant, in Equity, No. 4174, Consolidated Cause." On May 29, 1914, this court rendered an interlocutory decree in this consolidated cause No. 4174, to the effect that all the property of the railroad company was thereby sequestered and set apart to pay the debts and obligations of or against the railway company, that all the holders of claims or demands against the railroad company, and all persons who claimed any interest in or lien upon any of the funds or property in the hands of the receivers as creditors of the railroad company, should file verified statements of their claims with the special master, Hon. Thomas T. Fauntleroy, at St. Louis, Mo., on or before October 1, 1914, and that each of them who failed so to do should thereby be barred from any share in the distribution of any of said funds or property, or the proceeds thereof. McElvain filed his claim against the railroad company with the master under this interlocutory decree, and it was allowed by the master and this court as a general unsecured creditor's claim.

On May 22, 1914, the trustees under the general lien mortgage of the railroad company, dated August 27, 1907, filed their complaint in this court against the railroad company for the administration of the trusts created by that mortgage, its foreclosure, the appointment of receivers, and a sale of the property of the mortgagor covered by it to satisfy the debt which it secured. On July 9, 1914, the trustee of the refunding mortgage of the railroad company, dated June 20, 1901, filed its complaint in this court against the railroad company for the foreclosure of that mortgage, the appointment of receivers, and the sale of the property of the railroad company to satisfy the debt secured by that incumbrance. By an order of this court made on January 21, 1916, and by prior orders, all the suits hereinbefore mentioned were consolidated into the suit entitled "North American Co., Complainant, v. St. Louis & San Francisco Railroad Co., Defendant, in Equity, No. 4174, Consolidated Cause, Final," and the final decree was rendered in this consolidated cause, and also in each of the cases brought by North American Company, Rail Joint Company, the trustees under the general lien mortgage, and the trustee under the refunding mortgage, respectively.

That decree adjudged the respective rights of all the creditors of the railroad company in the mortgaged property and in the property free from mortgages, and in the distribution of the proceeds thereof, excepting only such rights and claims as by the decree were expressly reserved for the exclusive subsequent determination of this court. It adjudged the foreclosure of each of the mortgages, the sale of all the property of the railroad company, the application of the proceeds of its mortgaged property to the payment of the debts secured thereon and to the payment of the claims prior in right or superior in equity to those of the bondholders, and the application of the proceeds of

the sale of the property that was free from mortgages to the payment of the creditors who had established their claims under the interlocutory decree according to their respective equities. Practically all the available property of the railroad company was covered by the mortgages, and the final decree rendered on March 31, 1916, provided that after the sale under the decree and the confirmation thereof the master should convey all the property to the purchaser, and that after such conveyance the purchaser should hold, possess, and enjoy that property free from the liens of the mortgages mentioned, and free from all claims, rights, interests, or equities of redemption of the railroad company, of its creditors and stockholders, and of all persons claiming through or under them.

The decree, however, in effect provided that, if the sale should be made to any purchaser for the benefit of any corporation organized, or to be organized, pursuant to any plan or agreement whereby any stockholder or stockholders of the railroad company should receive any stock, bonds, or other beneficial interest in such corporation on account of their stock in the railroad company, the sale would not be confirmed, unless there had been made to creditors of the railroad company who had presented their claims to the master or the court, in accordance with the orders of this court, a fair and timely offer of participation in such corporation through stocks, bonds, or otherwise. The sale under the final decree was made to or for the benefit of the complainant on July 19, 1916, pursuant to a plan and agreement made by the bondholders secured by the two mortgages and the stockholders of the railroad company, dated November 1, 1915, whereby the stockholders of the railroad company, upon the payment of certain specified amounts in cash, were entitled to receive certain amounts of bonds and stock of the complainant in proportion to the rank and amounts of the stock of the railroad company which they held and either assigned or surrendered. Before the sale under the final decree an offer was made to McElvain and to the other unsecured creditors, who had proved their claims before the master, of $50 par value of the 6 per cent. noncumulative preferred stock, and $50 par value of the common stock of the railway company for each $100 of their duly presented claims, and this offer to McElvain has since been repeated, the last time on March 1, 1918, but he has always rejected it.

After the sale under the decree notice was given to the railroad company and its attorneys in the consolidated cause final, No. 4174, that a motion would be made to confirm the sale on August 29, 1916. Louis Houck and seven other unsecured creditors of the railroad company filed objections to the confirmation of the sale, which raised for determination by the court all the issues sought to be raised by McElvain by his action in the circuit court of Pemiscot county, Mo.; that is to say, that, because the railway company was organized for the purchase of the property at the sale under the decree pursuant to the plan and agreement whereby the stockholders of the railroad company were offered bonds and stock of the railway company upon the payment of certain amounts in cash and the surrender or assignment of their stock in the railroad company, a fraud was perpetrated on the unsecured

creditors of the railroad company; that the railway company would not pay the full value of the property formerly owned by the railroad company, and would not pay for that property under the decree; that that property was, and after the sale still would be, subject to the payment of the claims of the unsecured creditors; and that the railway company would still be legally liable to pay them the amounts of their claims against the old company. Houck and his associates made still other objections to the confirmation of the sale.

Evidence was given on the issues thus presented, there was a final hearing on the motion, the objections, and the evidence, and upon arguments of counsel the court found that the objections were not tenable, and made an order of confirmation of the sale, wherein it adjudged and decreed that under and pursuant to and in connection with the plan and agreement of November 1, 1915, for the reorganization of the St. Louis & San Francisco Railroad Company, a fair and timely offer of cash, or a fair and timely offer of participation in St. Louis-San Francisco Railway Company, a corporation, organized for the purpose of becoming the owner, through a sale under the final decree, of the property of the railroad company, had been made to all the creditors who had presented their claims as ordered by the court, that the special master should convey the property of the railroad company to the railway company upon payment to him of the purchase price thereof bid at the sale, and that the railway company thereafter should hold the same free from the claims of the railroad company, of its creditors, and of all parties claiming under them or either of them. The special master made and delivered the conveyance to the railway company as directed. He subsequently reported to the court that the purchase price had been paid, his reports were approved and confirmed by the orders of this court, and he was directed to pay to the unsecured creditors whose claims had been allowed their pro rata shares of the proceeds of the sale, and he has paid or tendered to McElvain his share pursuant to that direction.

After the confirmation of the sale, and the conveyance of the property to the railway company, it mortgaged it to secure its bonds to the amount of more than $194,000,000, and it issued its stock, of the par value of $57,000,000, and these bonds and this stock was now in the hands of numerous holders, who have purchased them for value without notice of McElvain's claim. This issue of bonds and stock, and the taking and purchase thereof by the holders, has been done in reliance upon the final decree and the order of confirmation of this court, and in the belief that thereunder the railway company and the property it holds were exempt from all claims of the creditors of the railroad company not expressly reserved in the final decree for the exclusive determination of this court.

After all this had been done, and on June 13, 1917, McElvain brought an action against the railway company in the circuit court of Pemiscot county, Mo., to recover of it the amount of his old claim against the railroad company for damages to a carload of mules inflicted by the negligence of that company in February, 1913, a claim which he had subsequently reduced to a judgment against the railroad company, ren-

dered by the circuit court of Pemiscot county on April 5, 1916. The railway company has demurred to his petition in that action in the state court, and that action is still pending, but has proceeded no farther. That petition of McElvain alleges no ground or reason for imposing upon the railway company, or upon the property formerly of the railroad company conveyed to the railway company under the decree and sale, liability for his claim and judgment against the railroad company, other than that the railway company was organized, and the final decree and sale were made and executed, pursuant to the plan and agreement whereby the stockholders of the railroad company were offered the participation in the railway company heretofore stated.

The facts which have now been stated are drawn from the allegations of the complaint admitted by the demurrer. The railway company asks that McElvain be enjoined from further prosecuting his action in the state court on the grounds that he can succeed in that action only by annulling the decree, the order of confirmation of the sale, the adjudication of this court embodied therein, the contract of sale made by this court with the purchaser at the foreclosure sale, and the title to the property granted to the railway company by the court's master's deed.

[1] Counsel for Mr. McElvain challenge the jurisdiction of this court to entertain this suit in equity, or to grant the injunction sought, on the ground that there is no federal question involved, no diversity of citizenship, and that the amount in question is less than the jurisdictional amount. But neither a federal question, nor diversity of citizenship, nor the jurisdictional amount necessary to sustain an original suit is requisite to the maintenance of a suit dependent upon or supplementary to an original suit, like the creditors' and foreclosure suits against the St. Louis & San Francisco Railroad Company, which have been described, of which this court had full jurisdiction. Brun v. Mann, 151 Fed. 145, 150, 80 C. C. A. 513, 518; Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; White v. Ewing, 159 U. S. 36, 15 Sup. Ct. 1018, 40 L. Ed. 67; Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179; Shinney v. North American Savings, Loan & Bldg. Co. (C. C.) 97 Fed. 9, 12. Such a dependent suit is but a continuation, in a court of equity, of the original suit, to the end that more complete justice may be done.

A suit in equity, dependent upon an original suit or action of which the federal court had jurisdiction, may be maintained in that court (1) to aid, enjoin, or regulate the original suit; (2) to restrain, avoid, explain, or enforce the judgment or decree therein; (3) to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit; and (4) to enforce its decree or judgment in the original suit, to prevent the relitigation in other courts of the issues it has heard and adjudged in the original suit, and to protect the titles and rights acquired by purchasers under its decree, or judgment from attacks by suit or otherwise, based on the theory that its adjudications in the original suit were illegal and ineffective, and to accomplish these ends the court has the jurisdiction and authority to use its writs of in-

junction and its writs of assistance. Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Carey v. Houston & Texas Ry. Co., 161 U. S. 115, 126, 127, 132, 16 Sup. Ct. 537, 40 L. Ed. 638; Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633, 17 L. Ed. 886; Riverdale Cotton Mills v. Mfg. Co., 198 U. S. 188, 195, 25 Sup. Ct. 629, 49 L. Ed. 1008; Freeman v. Howe, 24 How. 450, 460, 16 L. Ed. 749. Campbell v. Golden Cycle Min. Co., 141 Fed. 610, 612, 613, 73 C. C. A. 260, 262, 263; Lang v. Choctaw, Oklahoma & Gulf R. Co., 160 Fed. 355, 360, 361, 87 C. C. A. 307, 312, 313; Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 6, 51 C. C. A. 21.

Counsel for Mr. McElvain argue that this suit cannot be maintained as a dependent suit, because a dependent suit can be maintained only between those who were parties to the original suit, either in person or by representation, and they insist that McElvain was not such a party. There are two answers to this contention:

[2] First. A dependent suit may be maintained by the party to the original suit, or by one who claims under the adjudication and decree therein against one who assails that adjudication or decree in a subsequent suit in a court without appellate jurisdiction, on the ground that it is illegal and ineffectual, although the latter was not a party to the original suit, the adjudication, or the decree. Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Virginia-Carolina Chemical Co. v. Home Ins. Co., 113 Fed. 1, 6, 51 C. C. A. 21. In the leading case of Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629, a decree of foreclosure and a sale of the property of the Western North Carolina Railroad Company, the mortgagor, were made at the suit of the trust company, the trustee for the bondholders in the federal court. The sale and delivery of the master's deed were made in August, 1894, to the Southern Company, which immediately took possession thereof, and thereafter operated it.

In the course of its operation the Southern Company caused, by its negligence, the death of Mr. James, one of its employés. Mrs. James, the administratrix of his estate, sued the Western North Carolina Railroad Company in one of the state courts of North Carolina for damages for his death, on the ground that for numerous specious reasons the decree of foreclosure, the sale, and the deed thereunder were ineffectual, the railroad and property were still that of the Western North Carolina Company, and it was liable for the negligent operation of its railroad by the Southern Company. The state court so held, and rendered a judgment against that company, which was affirmed by the Supreme Court of the state. Thereupon Mrs. James caused an execution to be issued upon that judgment and delivered it to Julian, the sheriff, who levied it on the railroad property as that of the Western North Carolina Company and advertised it for sale. Thereupon the Southern Company and the Central Trust Company brought a dependent suit in the federal court, which rendered the original decree, to enjoin the sale of the property by the sheriff, to enforce the adjudications and decree in the foreclosure suit and to protect the rights and title of the Southern Company thereunder, and the Supreme Court sustained that suit, the decree and the adjudications in the original suit,

the rights and title of the Southern Company thereunder, and the injunction against the sale by the sheriff of any of the property levied upon under the execution from the state court. But neither Mr. James nor Mrs. James was a party to the original suit, either in person or by representation. If the purchaser at the foreclosure sale under the decree of the federal court in the Julian case could maintain a dependent bill against such strangers as Mrs. James, so much the more may the purchaser at the sale of the property of the Frisco Company under the original suits maintain a dependent suit against McElvain, who was a creditor of that company before and at the time of the foreclosure suit and sale.

[3, 4] Second. McElvain was a party by representation to the creditors' suits and the foreclosure suits in which the final decree and sale were made; to the creditors' suits because he was one of the class of general unsecured creditors in whose behalf those suits were brought, and he filed and proved his claim as such under the interlocutory decree therein, and he was a party to the foreclosure suits because he was represented therein by his debtor, the mortgagor. The unsecured creditors of an insolvent mortgagor have no claim or interest, except against and through the title of the mortgagor. A foreclosure and sale of the property of the mortgagor, in a suit by the mortgagee against the mortgagor to which the unsecured creditors are not parties by name, or by service of process upon them, conveys the property mortgaged to the purchaser free from all claims of such creditors of the mortgagor either against the property conveyed or against the person of the purchaser.

[5] The reason why such a decree and sale estops the unsecured creditors of the mortgagor from asserting any personal liability of the purchaser for their debts against the mortgagor, and from any claim upon the property sold, is that they are represented in the foreclosure suit by their debtor, the mortgagor, and a decree and sale which bars the mortgagor, in the absence of fraud, bars its unsecured creditors. In the same way and for the same reason stockholders of the mortgagor are barred by a decree and sale which bars the mortgagor, their representative. Because stockholders and unsecured creditors of the mortgagor are parties by representation to a suit to foreclose a mortgage to which the mortgagor is a party, they may maintain a suit dependent upon the original foreclosure suit against the purchaser at the foreclosure sale, and the purchaser may maintain such a dependent suit against them. Carey v. Houston & Texas Ry. Co., 161 U. S. 115, 116, 121, 122, 131, 132, 16 Sup. Ct. 537, 40 L. Ed. 638. This dependent suit, therefore, may not be defeated by the claim that McElvain was not a party to the original suits.

[6] Counsel maintain that this court may not lawfully issue its injunction to prevent Mr. McElvain from further proceeding in his action in the state court, because section 720 of the United States Revised Statutes, which is now section 265 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1242]), declared that:

"The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such

injunction may be authorized by any law relating to proceedings in bankruptcy."

But in a case in which a federal court first obtains jurisdiction of the subject-matter in controversy, as this court did, by the commencement and prosecution to decree and sale of the original suits, and where it acts in aid of its own jurisdiction to enforce or protect its orders or decrees, or the title or disposition under them of the property within that jurisdiction, it may, notwithstanding the section cited, enjoin or restrain all proceedings in the state court commenced after it obtained jurisdiction, which would have the effect of defeating or impairing its jurisdiction or the lawful effect of its orders, decrees, adjudications, or titles which it has made, or is making, in the exercise of that jurisdiction. Sharon v. Terry (C. C.) 36 Fed. 337; French, Trustee, v. Hay, 22 Wall. 250, note, 22 L. Ed. 857; Lang v. Choctaw, Oklahoma & Gulf R. Co., 160 Fed. 355, 359, 360, 87 C. C. A. 307, 311, 312; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 22, 156 C. C. A. 448, and cases there cited.

[7] Counsel insist that Mr. McElvain's action is a simple action at law, that he is entitled to a jury trial of it, and that for this reason he may not be enjoined from prosecuting it. The action of Mrs. James in Julian v. Central Trust Co. was a simple action at law based on the claim that the foreclosure and sale decreed by the federal court in that case were illegal and void, and although her claim was sustained by the courts of her state, the Supreme Court affirmed the injunction of the federal court against her and the sheriff, an injunction which perpetually prohibited them from proceeding further to nullify or impair the legal effect of the adjudications of the federal court in its foreclosure suit, its decree and sale, or the title of the Southern Company, the purchaser thereunder. It is no defense to a dependent suit to prevent the nullification or impairment of the just legal effect of the adjudications, decree, or sale made by order of a federal court, or the title to property granted thereunder, that the defendant proposes to do so by means of a subsequent action at law and the trial by a jury of the issues already adjudged by such court.

Finally, counsel for Mr. McElvain argue that he does not seek by his action to again litigate any question heard and decided by this court in the original suits, or to nullify or impair the legal effect of any adjudications made, the final decree rendered, the sale made, or the title granted thereunder in the creditors' and mortgagees' original suits in this court. Let us see. His action is grounded on the contention that the final decree, sale, and conveyance of the property formerly of the railroad company to the complainant were, as against him, an unsecured creditor, fraudulent in law and void, and did not have the effect to convey the title to the property to the complainant free from his claim against that property, or free from his claim of a personal liability of the complainant for the debt of the railroad company to him, although the contrary was adjudged by this court by its decree and orders, but that the decree and those orders leave that property still the property of the railroad company and charge the complainant with personal liability for his claim. And this Mr. McElvain

maintains because: First, the agreed plan and scheme of the bondholders and stockholders of the railroad company, under which the decree and sale were made, offered, and by its performance gave, to the stockholders of the railroad company, for their stock, a beneficial interest in the railway company, for their stock, a beneficial interest in the railway company consisting of bonds and stocks thereof, and this brought the decree and sale and the title thereunder beneath the ban of the decisions in such cases as Northern Pacific Ry. Co. v. Boyd, 177 Fed. 804, 101 C. C. A. 18; Id., 228 U. S. 482, 502, 504, 33 Sup. Ct. 554, 57 L. Ed. 931; Louisville Trust Co. v. Louisville, etc., Ry. Co., 174 U. S. 674, 682, 684, 19 Sup. Ct. 827, 43 L. Ed. 1130; Central Improvement Co. v. Cambria Steel Co., 210 Fed. 696, 701, 702, 127 C. C. A. 184, 189, 190; Kansas City Southern Ry. Co. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; and because, second, the upset price for the sale of the property and the price at which it was sold was so far below its real value that a just and reasonable price was not paid for it by the railway company, although by the decree the upset price was adjudged fair, and by the order of confirmation of the sale and the orders accepting and disposing of the purchase price this court adjudged that the price bid at the sale was just and reasonable and that the railway company had paid that price in full.

Now were not these claims of Mr. McElvain, the maintenance of which is indispensable to his success in his action in the state court, tried and adjudged against him in the original suits which the mortgagees brought in this court? When those suits were brought the St. Louis & San Francisco Railroad Company was hopelessly insolvent, all its property was thereupon lawfully sequestered and placed in the hands of the receivers appointed by this court, to be sold and distributed to its creditors and stockholders in accordance with their respective rights and equities. There were numerous mortgages for large amounts upon the various portions of the property of the railroad company underlying the mortgages that were foreclosed. The holders of the bonds secured by the mortgages that were foreclosed had the indisputable right to a foreclosure of these mortgages, and a sale of the mortgaged property to themselves for the full amount of those mortgages, to be paid by a simple surrender of their bonds, unless some one would bid and pay a larger amount in cash. They had the equitable and legal right by foreclosure to acquire the indisputable title to the mortgaged property, and to prevent the unsecured creditors and the stockholders of the railroad company from receiving anything whatever on their claims and stock, unless they raised and bid money sufficient to discharge the mortgages in foreclosure which it was practically impossible for them to do. At that time, in order to enable the property in the hands of the railroad company to earn a reasonable income, it was necessary to raise a large amount of money to purchase equipment, to improve the railroad, and to pay other necessary expenses, and it was desirable to retain the good will and the aid of the stockholders and the unsecured creditors of the railroad company.

[8] To this end the bondholders proposed the plan and agreement

between themselves and the stockholders and the unsecured creditors of the mortgagor, which was finally accepted and performed by the holders of more than 90 per cent. of the amount of the bonds and more than 90 per cent. of the amount of the unsecured claims and of more than ninety per cent. of the amount of the stock. There is no moral turpitude, nor is there any illegality in the making and performance of an agreement between the bondholders secured by mortgages, the stockholders, and the unsecured creditors of an insolvent mortgagor, that there shall be a foreclosure and sale of the mortgaged property to or for the benefit of a new corporation in which all the members of the three classes shall be permitted at the option of each of them to take the bonds or stock of the new corporation in substantial proportion to the respective ranks and equities of the classes. Indeed, a foreclosure and sale under such an agreement is the most practicable, equitable, and beneficial method of foreclosure and sale of vast railroad or other properties that has yet been devised. For, as Mr. Justice Brewer said in delivering the opinion of the Supreme Court in Louisville Trust Co. v. Louisville, etc., Ry. Co., 174 U. S. 674, 683, 19 Sup. Ct. 827, 830 (43 L. Ed. 1130):

"We may not shut our eyes to any facts of common knowledge. * * * We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor or mortgagor."

No court, so far as the briefs and citations of counsel and the investigation of the court have informed it, has ever held that a foreclosure decree and sale under such an agreement is either fraudulent in law or fraudulent in fact, or illegal as against either unsecured creditors or stockholders. In Northern Pacific Ry. Co. v. Boyd, 228 U. S. at page 503, 33 Sup. Ct. at page 560, 57 L. Ed. 931, the Supreme Court said:

"But it is now settled that such reorganizations are not necessarily illegal, and, as proceedings to subject the property must usually be in a court where those who ask equity must do equity, such reorganizations may even have an effect more extensive than those made without judicial sale, and bind creditors who do not accept fair terms offered."

The foreclosure decrees and sales which have been held fraudulent in law and voidable as against unsecured creditors in the Boyd Case, and the other cases cited above, were those that had been made under agreements between the secured bondholders and the stockholders of the mortgagor, whereby the stockholders received beneficial interests, by means of stock, bonds, or otherwise, in the purchasing corporation, without giving or offering any such beneficial interest whatever to the unsecured creditors, in violation of the trust under which an insolvent corporation holds its property, for, first, its secured creditors; second, its unsecured creditors; and, third and last, its stockholders. The plan and agreement under which the foreclosure decree and sale in this case was made was no secret, it was pre-

sented to this court in the original suits, and this court adjudged in the final decree that the sale under it would not be confirmed unless nor until a fair and timely offer of beneficial participation in the purchasing company was made to the unsecured creditors. Before the hearing upon that confirmation was had, such an offer, an offer much more beneficial than the provision in the agreement for the stockholders, had been made to the unsecured creditors; most of them had accepted it; a few, and among them Mr. McElvain, had not. Mr. Houck and several other unsecured creditors, who had not done so, challenged the confirmation on the ground that the offer to the unsecured creditors was not fair and just, that the plan, agreement, and offer were, and the foreclosure and sale would be, fraudulent in law as against unsecured creditors under the decisions upon this subject in the Boyd Case and others which have been cited.

Upon this subject evidence was introduced, extensive arguments were heard, and this court found and adjudged that the offer was just, timely, and fair; that the plan and agreement and offer, and the foreclosure and sale thereunder, perpetrated no fraud upon any of the unsecured creditors and violated no trust in their favor; but that they were just and equitable—and upon that finding and adjudication it ordered the foreclosure sale confirmed and the property conveyed and delivered to the railway company, free from any legal or equitable claims of the unsecured creditors of the mortgagor against that property, or against the purchaser at the sale, except those claims which were reserved in the decree for the exclusive determination of this court.

Nor was this finding, adjudication, and order made until after the objections that the upset price and the price bid at the sale were much less than the value of the property, and that the property was sold so low that the sale at that price would be unjust, inequitable, and unlawful, were made, argued, and decided. The facts then established, however, were that every bondholder, every stockholder, every unsecured creditor, had received an offer to permit him to participate in the benefits of the purchase on the equitable basis on which others of his class were permitted to participate therein under the plan and agreement that, if the purchase price was low, each bondholder, creditor, and stockholder had the opportunity to participate in the profits of the purchase of the property at that low price; that every unsecured creditor had the opportunity to participate by simply assigning or surrendering his claim against the railroad company and accepting the par value of his claim in the stock of the railway company without contributing any money; that the purchase price of the property was in reality, not only the amount bid at the sale, but that amount, plus the value, whatever that was, of all that part of the bonds, unsecured claims, and stock above the amount paid thereon out of the amount bid, which was exchanged for the stock and bonds in the new railway.

In view of these facts, and the existing situation, this court then found and adjudged that the upset price and the bid were just, fair, and equitable; that the sale and delivery of the deed and property

would pass the title to the purchaser, the railway company, would leave that company free from liability for the claims against the railroad company not reserved in the decree for the exclusive determination of this court, and would leave the property free from any liens of the mortgagees in the foreclosure suits of the stockholders of the old company and of its unsecured creditors; and that the sale ought to be confirmed. Thereupon it was confirmed, the master conveyed the property to the railway company, collected and distributed the purchase price, reported his action to this court, which by its orders approved his reports, and adjudged that the railway company had paid for the property in full. So it is that in the original suits brought by the unsecured creditors, and in the original suits brought by the bondholders secured by the mortgages foreclosed, this court considered, decided, and adjudged that the claims now made by McElvain in his action in the state court, the maintenance of which is indispensable to his success in that action, are unfounded. He now seeks by that action to try again by a jury in the state court the issues thus decided, and by means of that trial and the resulting judgment he seeks to strike down the final decree, the sale, and the conveyance of the property formerly of the railroad company, and thus to deprive the complainant, the purchaser at the sale, of the benefit of the title conveyed to him and of the adjudications of this court that the complainant took and holds the property so conveyed free from all liens and claims upon it and free from all claims of personal liability on account of the debts of the old railroad company, except such claims as this court reserved by the decree for its exclusive determination.

The jurisdiction and authority have been conferred, and the duty has been imposed, upon the federal courts, as has been demonstrated in the earlier part of this opinion, to sustain dependent suits to prevent the relitigation by subsequent suits in other courts of the issues heard and adjudged by the federal courts in original suits, to protect the rights and titles acquired under their decrees in such suits from attacks, by suits or otherwise, by those bound by such decrees, when such suits are founded on the theory that the adjudications of the federal courts were illegal or ineffective, and to use their injunctions and writs of assistance to effect this prevention and protection, and they may not lawfully renounce this jurisdiction or disregard this duty.

[9] Counsel object to this suit, and to the issue of the injunction, upon the grounds that no irreparable injury will result from the action of McElvain, and that the complainant has an adequate remedy at law. But useless and baseless litigation by subsequent suits in courts, with no appellate jurisdiction to relitigate issues decided in a federal court, to nullify or disregard its decrees and orders, and to avoid the titles and rights adjudged and granted thereunder, on the ground that its adjudications were unlawful or inequitable, inflict ample injury to sustain a suit in equity. And the adequate remedy at law, which will prevent the maintenance of a suit in equity in a federal court, is a remedy "as practicable and efficient to the ends of justice and its prompt administration as the remedy in equity." Boyce v. Grundy 3 Pet. 210, 215, 7 L. Ed. 655; Oelrichs v. Spain, 15 Wall. 211, 228, 21 L. Ed. 43;

Hayden v. Thompson, 71 Fed. 60, 63, 17 C. C. A. 592; Springfield Milling Co. v. Barnard & Leas Mfg. Co., 81 Fed. 261, 265, 26 C. C. A. 389; Rogers v. Penobscot Mining Co., 154 Fed. 606, 613, 83 C. C. A. 380.

Moreover, it is such a remedy in a federal court only that will prevent the maintenance of a suit in equity in a national court. The fact that there may be such a remedy in a state court is not material. Smyth v. Ames, 169 U. S. 466, 516, 18 Sup. Ct. 418, 42 L. Ed. 819; Arrowsmith v. Gleason, 129 U. S. 86, 98, 9 Sup. Ct. 237, 32 L. Ed. 630; National Surety Co. v. State Bank of Humboldt, 120 Fed. 593, 602, 56 C. C. A. 657, 61 L. R. A. 394. The complainant has no such remedy and there is no logical or lawful escape from the issue of the injunction sought. Let a preliminary injunction, such as the complainant prays for in his complaint, effective until the final judgment in this case, or the further order of this court, issue upon the filing of a bond by or on behalf of the complainant in the sum of $1,000, approved by the clerk of this court, conditioned to pay to the defendant McElvain, his heirs or assigns, such costs and damages as may be incurred or suffered by him in case he shall be found to have been wrongfully enjoined or restrained by the injunction.

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## In re ROSEBOOM.

(District Court, N. D. New York. September 3, 1918.)

1. BANKRUPTCY ⊜184(3)—LIENS—CHATTEL MORTGAGE.
A chattel mortgage for purchase money on the stock in a retail store contemplated that the mortgagor should continue the business, goods sold to be replaced by others which it was provided should be subject to the mortgage. The mortgagor afterward sold the store to bankrupt, who assumed payment of the mortgage with full knowledge of its terms. *Held*, that the mortgage created an equitable lien on goods substituted by the mortgagor and sold to bankrupt, good as against the mortgagor and as against bankrupt and his creditors as to such goods as were removed by the mortgagee before the bankruptcy.

2. BANKRUPTCY ⊜151—TITLE OF TRUSTEE—LIENS.
In the absence of fraud, a trustee takes the property in the same plight and condition, and subject to the same liens and equities, as when the bankrupt held it.

In Bankruptcy. In the matter of George W. Roseboom, bankrupt. Application by receiver for an order requiring delivery to him of certain personal property by G. G. McNamara. Referred.

This is a proceeding in the nature of an application by the receiver appointed by this court in bankruptcy for the delivery to him by G. G. McNamara of certain personal property which he claims belongs to the bankrupt estate, and which McNamara claims he is entitled to hold under and by virtue of a chattel mortgage thereon executed and delivered to him by one Willard Teetsel, and an equitable lien created thereby, who was then the owner of certain of the property, and who became the owner of other of the property thereafter, and who subsequently sold this property, with other personal property he had purchased, to George W. Roseboom, the bankrupt, subject to such mortgage, and

which mortgage Roseboom assumed and agreed to pay. As to certain personal property it is, in effect, an application by said McNamara for the delivery to him of such property as is not now in his possession under the said mortgage.

Alexander Neish, of Walton, N. Y., for McNamara.
Vere H. Multer, of Binghamton, N. Y., for receiver.
R. F. Bieber, of Binghamton, N. Y., for Roseboom.

RAY, District Judge (after stating the facts as above). [1] April 29, 1916, one Willard Teetsel, of Walton, N. Y., was justly indebted to one Galusha G. McNamara in the sum of $3,199.40, the purchase price of certain goods and chattels described in the mortgage hereafter referred to, and on which day McNamara sold Teetsel the said personal property, consisting of goods and fixtures in a store, a horse and delivery wagon, a harness, and a pair of sleighs. The schedule of mortgaged property included the following:

"Together with any and all other property that may be substituted for the above-named property, and at any and all times hereafter, in said store, precisely the same as if the property there in the store at any time hereafter was specifically mentioned and described herein, and it is treated and regarded the goods subsequently hereto placed in the store as a substitute for the goods now therein are to be treated the same as if specifically described herein, first party to keep the goods insured for three thousand dollars, as interest of parties appear."

The interest and $500 of the principal was to be paid annually. If default was made and continued for 60 days, then the entire sum, at McNamara's election, was to become due. The mortgage contained a power on default to take and sell the property to satisfy the debt, or any balance, and also a clause authorizing McNamara to take the property if at any time he deemed himself unsafe. The mortgage in form sold and transferred the property to McNamara, but it was a security for such indebtedness. This mortgage was kept good by filing and refiling under the chattel mortgage law of the state of New York. This was a retail store, and Teetsel took possession and continued the business, selling from and replenishing the stock in the usual manner customary in such stores and in such a business, and as contemplated by the mortgage.

June 9, 1917, Teetsel, by written bill of sale, sold the business and all the property in the store, and the other property, to the now bankrupt, George W. Roseboom, who agreed to pay therefor $7,073. This bill of sale contained the following:

"And whereas, there is a mortgage upon said property now held by Galusha G. McNamara upon which there is unpaid twenty-six hundred ninety-nine dollars and forty cents, with interest thereon from April 29th, 1917, which amount has been deducted from the aforesaid purchase price, and the second party hereby covenants and agrees to pay the same as a part of the purchase price according to the terms of said mortgage, which is $500 of principal and interest annually with right to pay faster if the mortgagee so desires. And I further covenant that the goods are free and clear from all liens or incumbrances except as aforesaid and that the title is perfect in me and I have good right and full power to sell the same."

Roseboom took possession and continued the business, selling and replacing to some extent, but made default in his payments. Teetsel

had and has no creditors. Roseboom has creditors and is a bankrupt. Roseboom had full knowledge of the mortgage and of its terms and conditions.

Some days before the filing of the petition in bankruptcy McNamara, deeming himself insecure and unsafe, with the consent of Roseboom, took possession of and took away from the store a large quantity of this mortgaged property, as much as he deemed necessary to satisfy the balance due on his mortgage, which was about $2,600 or $2,700. Roseboom claimed he was solvent, and an attempt was made to effect an arrangement by which the property should be returned to the store, and some of it was returned; but it almost immediately developed that Roseboom had, at least, largely underestimated his indebtedness, and in fact had largely misrepresented it. Thereupon the attempted arrangement was repudiated by McNamara, as he had the right to do, and he repossessed himself of some, and perhaps most, of the property so taken by him.

Then, in June, 1918, a petition in bankruptcy was filed, and application to this court made for the appointment of a receiver. The facts not fully or properly appearing, this court not only appointed a receiver, but directed McNamara to return to the receiver the property so taken by him on his mortgage, which he did. The receiver was authorized to continue the business. Further facts having been brought to the attention of this court, an order was made enjoining further action by such receiver, and requiring the said receiver and bankrupt to show cause why the property actually taken by the mortgagee prior to the filing of such petition in bankruptcy should not be returned to him for disposition under the mortgage and lien of McNamara.

It is clear from the terms of the mortgage given by Teetsel to McNamara, and later assumed by Roseboom, with full knowledge of all its terms, that it was contemplated Teetsel should sell goods in the usual course of business, and purchase other goods and replace those so sold, and that the lien of such mortgage should attach to such goods so subsequently acquired by Teetsel for replacement. This mortgage and lien was perfectly good as between the parties, and, while Teetsel could not mortgage goods he did not then own, the agreement was good in equity, and created an equitable lien on the subsequently acquired property, good as against Teetsel and Roseboom when the latter purchased the property and assumed the mortgage. Even if void as to the creditors of Teetsel, he had none. The lien was not void as to Roseboom or his creditors. Roseboom was not and is not an innocent purchaser in good faith and for value. He knowingly took the property subject to the lien, and the equitable lien of McNamara was perfected by actual possession taken by him prior to the bankruptcy proceedings. There was no fraud in the transaction. Plainly and unquestionably this was an agreement between Teetsel and McNamara, and later an understanding between Roseboom and McNamara that goods sold should be replaced, and that McNamara should have a lien on all the goods for the balance of his mortgage debt.

This was not valid so as to bind property purchased by Roseboom after he took possession, as against his creditors (Kribbs v. Alford, 120 N. Y. 519, 525, 24 N. E. 811), but was valid to bind, as against Roseboom and his creditors, the property actually owned by Teetsel when he gave the mortgage, and create a lien on that which Teetsel subsequently purchased and put in the store in replacement of those sold by him, so far as reduced to the possession of the mortgagee prior to the bankruptcy. Kribbs v. Alford, supra; McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Wisner v. Ocumpaugh, 71 N. Y. 113; Coats v. Donnell, 94 N. Y. 168–177; Titusville Iron Co. v. The City of New York, 207 N. Y. 203, 100 N. E. 806. In this last case it is held:

"Mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreements to give liens, and also as against purchasers with notice. But it is settled law in this state [N. Y.] that they will not be enforced as against creditors."

The bankruptcy court is a court of equity, and proceeds on equitable principles.

[2] The trustee of a bankrupt, in the absence of fraud, takes the property in the same plight and condition, and subject to the same liens and equities, as when the bankrupt held it. Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577; Zartman as Trustee v. First National Bank, etc., 216 U. S. 134, 138, 30 Sup. Ct. 368, 369 (54 L. Ed. 418), where the court said:

"The trustee claims that he takes the same kind of title as a bona fide purchaser for value, but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens, and equities. * * * The trustee took the bankrupt's property in the same condition, and subject to the same liens, as the bankrupt himself held it. The trustee is in no sense a bona fide purchaser for value and entitled to protection as such."

In the instant case the lien was more than four months old. The mortgagee had reduced certain of the property to his actual possession, with the assent of Roseboom, before the bankruptcy, and, unless this equitable lien created by the mortgage was and is void as to the creditors of Roseboom, McNamara can and should hold it, excepting of course such property as Roseboom purchased and put in the store after he purchased of Teetsel.

In Sexton, Trustee in Bankruptcy, v. Kessler & Co., 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, certain securities were set apart by a New York house in its own vaults as security to an English house for drafts thereon. The New York house retained and exercised the power, from time to time, to change the securities, and even withdraw some of those remaining if the securities had increased sufficiently in value to keep the security good. The English house had knowledge of all this. Some little time prior to the bankruptcy of the New York house the securities were taken into possession by the English house. It was held that it had the right so to do and

hold same and the proceeds as against the trustee in bankruptcy. The court said:

"When the English firm took the securities it only exercised a right that had been created long before the bankruptcy and in good faith. Such we understand to be the law of New York, and, in the absence of any controlling statute to the contrary, such we understand to be what the law should be."

In the instant case the agreement was not that the mortgagor should deal with the property as his own, but, by fair construction, that when he sold he should replace that sold and keep the security good. There is a long line of cases holding that where the agreement is that the mortgagor is to or may sell and dispose of the property as his own and use the proceeds as his own, or replace or not as he pleases, the transaction is fraudulent as to creditors of the mortgagor on its face. But in Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885, this subject is quite fully discussed, and it is pointed out in deciding the case that there was an express agreement that the mortgagor might sell, "and apply the proceeds to the payment of the debt, 'excepting such portion thereof as is necessary for the expenses of the business, or as he * * * (the mortgagor) may need to replenish or increase the said stock of goods.'" The mortgage was held void as to the creditors of the mortgagor for the reason that "the mortgage does not require all the proceeds of the mortgaged chattels to be applied either on the mortgage debt or to the acquisition of new property, but only the surplus, after deducting the expenses of carrying on the business." In the instant case we have no such agreement, express or implied. There is no presumption of an illegal agreement or understanding.

In 1 Jones on Liens (Ed. 1914) § 36, it is said:

"*Lien on Changing Stock of Goods.*—An equitable lien may be imposed upon a changing stock of goods by agreement of the parties, * * * and such lien may be enforced as against the general assignee of the firm for the benefit of their creditors. The fact that it was agreed that the owners of the stock of goods should keep it replenished up to its value at that time, and the further fact that, without knowledge or consent of the obligors (in the security), the owners disposed of parts of the stock and put in other stock to supply its place, do not affect the lien, but this will attach to the mingled goods in the condition they are in at the time the lien is enforced." Citing Arnold v. Morris, 7 Daly (N. Y.) 498.

And in section 42 the same author says:

"*Equitable Lien on Future Property.*—There may be an equitable lien on future property. Whenever a positive lien or charge is intended to be created upon real or personal property not in existence, or not owned by the person who grants the lien, the contract attaches in equity as a lien or charge upon the particular property as soon as he acquires title and possession of the same." Citing Wismer v. Ocumpaugh, 71 N. Y. 113; Barnard v. Norwich, etc., 4 Cliff. 351, Fed. Cas. No. 1007; Coates v. Donnell, 48 N. Y. Super. Ct. 46.

In Griffin and Curtis on Chattel Mortgages (2d Ed., 1916) 27, 28, and 29, it is said:

"But a mortgagor may agree to mortgage property not then owned [by him], or to give a lien upon it as soon as he gets it, and equity will enforce the agreement and establish the lien. * * *

"(c) *After-Acquired Property.*—A mortgage of property to be subsequently acquired is not effective in passing the title of such property to the mortgagee. Such a mortgage may, however, be construed as an agreement to give a mortgage on such property when acquired and may thus operate as an equitable lien thereon. At law the mortgagee has no title to the property, but has a license to seize the property when it is acquired by the mortgagor. Upon such seizure title passes to the mortgagee." Citing McCaffrey v. Woodin, 65 N. Y. 459, 22 Am. Rep. 644; Perkins v. Batterson, 66 Hun, 583, 21 N. Y. Supp. 815; Kennedy v. National Union Bank of Watertown, 23 Hun, 494.

Also:

"A mortgage upon a retail stock of goods, which purports to cover goods to be purchased in the future, is effective only as an equitable lien." Citing Ludwig v. Kipp, 20 Hun, 265; Stewart v. Fidelity, etc., 19 Misc. Rep. 49, 42 N. Y. Supp. 705; Levy v. Welsh, 2 Edw. Ch. (N. Y.) 438.

Also:

"But such a mortgage, if otherwise valid, is not void because it professes to cover after-acquired property; it may be good as to the previously acquired property." Gardner v. McEwen, 19 N. Y. 123; Yates v. Olmstead, 52 N. Y. 632; Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790, 113 Am. St. Rep. 885.

From the foregoing we deduce the following:

1. This mortgage was given for a full and fair consideration by Teetsel to McNamara.

2. There was no agreement, express or implied, that the mortgagee might sell and dispose of the property and dispose of it or the proceeds as his own property.

3. It was and is good, as between mortgagor and mortgagee, as a valid chattel mortgage on all property then owned by Teetsel, as it was duly filed and renewed.

4. The mortgage or instrument may be and is construed as an agreement to give a lien, and as one creating an equitable lien on all the property subsequently acquired by Teetsel, the mortgagor, and turned over to Roseboom, his vendee.

5. Roseboom not only knew of the mortgage and lien, but assumed, agreed to pay, same when he purchased.

6. This mortgage and lien were good and valid as against Teetsel, and Roseboom, his vendee; and to all goods in the store transferred to Roseboom, and on hand when McNamara took possession, he (McNamara) acquired legal title by virtue of the mortgage and equitable lien at that time.

7. McNamara acquired possession and title to most of the property prior to the bankruptcy of Roseboom with Roseboom's knowledge and consent.

8. The right and title of McNamara to such property was and is superior to the rights of the creditors of Roseboom and this receiver and that of the trustee when one shall be appointed.

9. McNamara cannot hold any of the property purchased by Roseboom and put in the store after he purchased of Teetsel.

However, the receiver alleges in his answer that he can prove (1) that there was an oral agreement between Teetsel, the mortgagor, and McNamara, the mortgagee, at the time of the execution of the mortgagee, by which Teetsel was to retain the property, and sell

and dispose of same as his own, and use the proceeds, or such part as he saw fit, as his own, and that this made the mortgage and lien void as to the creditors of Teetsel, and also as to the creditors of Roseboom, his vendee; and (2) that after Roseboom became the owner there was an oral agreement entered into between him and McNamara that Roseboom should or might retain the possession of the mortgaged property, and sell and dispose of same as his own, and use the proceeds, or such part thereof as he saw fit, as his own, and that this agreement made the mortgage and lien void as to the creditors of Roseboom. The effect of such oral agreements, or either of them, if made, I will not now pass upon. If no such agreements were made, it will not be necessary to pass on the questions of law. The matter will be referred to Hon. A. H. Sewell as special master to take evidence whether or not such agreements, or either of them, were made, and report the evidence to this court, with his findings of fact and conclusions of law.

The claimant, McNamara, will be permitted to select and set apart the property which he can identify, or claims to identify, as property owned by Teetsel when he executed the mortgage, and also that which Teetsel purchased and put on the premises by way of replacement and taken into possession prior to the filing of the petition in bankruptcy; also that answering to such description not taken into actual possession prior to the filing of such petition. If there is a dispute as to identity, the special master will take evidence and determine and report the facts and his conclusions of law. Until title is determined on the coming in of the report of the special master, McNamara and the receiver and trustee, when appointed, will be enjoined and restrained from disposing of any of such property.

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## THE MIDDLESEX.

(District Court, D. Massachusetts. June 13, 1916.)

Nos. 1043, 1336, 1335, 1432.

1. COLLISION ⊂⊃82(2)—FAULT—EXCESSIVE SPEED IN FOG.
   A speed of four knots through the water, by a long and heavily laden schooner at night in a fog, *held* not excessive, such speed being necessary to give her steerageway.
2. COLLISION ⊂⊃81—SCHOONER AND STEAMSHIP—WARNING SIGNALS IN FOG.
   That a schooner at sea did not sound her whistle or exhibit a flare at night in a dense fog *held* not a fault contributing to a collision with meeting steamship, where she was sailing free and her fog horn was sounded at proper intervals.
3. DEATH ⊂⊃13—WRONGFUL DEATH ON HIGH SEAS.
   State statutes in force at the home ports of the vessels, giving a right of action for wrongful death, do not authorize a recovery for death due to collision on the high seas.
4. DEATH ⊂⊃23—CONTRIBUTORY NEGLIGENCE.
   The captain of a schooner drowned when his vessel was sunk in a collision at sea *held* on the evidence not chargeable with negligence for failing to get into a boat when requested to do so by the mate.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Admiralty. Suit by the Russell Company against the steamer Middlesex. Intervening petition of Edmund Winfield and Edward Lawrence, and libels by Mary E. Thomas, administratrix of the estate of John Thomas, by Frederick Foster, administrator of the estate of John W. Cook, and by James H. Dooley, administrator of the estate of Arthur Carberry, against the Coastwise Transportation Company. Decree for interveners Winfield and Lawrence, and dismissing libels in the other suits.

Case No. 1043:

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for claimant.

Lewis, Adler & Laws, of Philadelphia, Pa., and Frederick Foster and Warner, Stackpole & Bradlee, all of Boston, Mass., for libelant and petitioners Winfield and another.

Case No. 1336:

Lewis, Adler & Laws, of Philadelphia, Pa., and Frederick Foster, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

Case No. 1335:

Lewis, Adler & Laws, of Philadelphia, Pa., and Frederick Foster, of Boston, Mass., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

Case No. 1432:

Frederick Foster and Sawyer, Hardy, Stone & Morrison, all of Boston, Mass., and Lewis, Adler & Laws, of Philadelphia, Pa., for libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondent.

MORTON, District Judge. These cases grow out of a collision between the steamer Middlesex, owned by the Coastwise Transportation Company, and the five-masted schooner George P. Hudson, which occurred on 11th July, 1914, at about 10:20 p. m., on the high seas, at a point about six miles eastward of Pollock Rip Slue lightship. There was a dense fog at the time. The Hudson sank almost immediately; her captain and two of her crew were drowned. The proceedings now before the court are to recover damages for their deaths, and damages for personal injuries received in the collision by two surviving members of the Hudson's crew. The death claims are presented by three separate libels in personam against the owner of the Middlesex; the claims for personal injuries by an intervening petition in the orignal libel in rem brought against the steamer by the owners of the schooner and her cargo. No claims for loss of property of any sort are now before the court. No fault is charged against either vessel in respect to lights. It is conceded by the claimant that the steamer's speed, which was six or seven knots an

hour at least, was excessive, and that she was at fault in respect thereto.

The principal questions are: First, whether the schooner was at fault for excessive speed and failure to give proper warnings of her presence; and, if so, second, whether such fault on the part of the schooner diminishes the damages if otherwise allowable; and, third, in the death cases only, whether damages can be recovered against the steamer for loss of life.

[1] As to the schooner's speed: She was bound north, running free with the wind over her port quarter. All her lower sails and most of her topsails and jibs were set. She was a long vessel, heavily loaded, and deep in the water. It is difficult to form a satisfactory conclusion as to her speed at the time of the accident. Her crew all testify, in substance, that she had little more than good steerageway—perhaps three or four miles an hour through the water—and this is to some extent corroborated by the nearly unanimous testimony that the wind was light, and by the fact that tackles had been fastened to some of the booms to keep them from swinging in. On the other hand, it is clear that in the two and a half hours preceding the collision the schooner had come a distance of about twelve nautical miles—an average speed of about five knots. About one knot an hour was due to the favoring tide, so that her speed through the water averaged about four knots. It is contended by the claimant—the argument being based on a reading of the log and an estimate of the time when the reading was made, testified to by Williams, the mate of the schooner—that within the hour preceding the collision she had covered about seven miles. If so, her speed was certainly immoderate. The argument assumes that the distance from the whistling buoy to the point where the reading was made was as indicated by the log. In fact it was that distance, plus the drift of the tide, which would not show on the log. Williams did not take the time when he read the log, and there is the possibility of substantial error on that important point. There is nothing to show any freshening of the wind after that time or any other reason for increased speed in the last hour before the collision.

I am not satisfied, on the evidence, that the schooner was making at the time of the collision more than her average speed for the two and a half hours immediately preceding, i. e., about four knots per hour through the water, and about five knots over the ground; and the question is whether this was excessive. Of course, a sailing vessel cannot stop and reverse like a steamer. Her only method of avoiding obstacles ahead is by a change of course. Below a certain speed, a long, heavily laden vessel like the Hudson loses almost completely her ability to maneuver. She must maintain such speed—and, under the circumstances here shown, such speed only—as will enable her to change course effectively if danger arises. The point at which that rate is exceeded by any particular vessel at any given time is a matter of judgment, depending on many things. Even with steamers it is not uniform; much greater differences must be allowed for in sailing vessels. It devolves upon the respondent

to establish that the Hudson's speed was immoderate and in my opinion it has failed to do so. In The Chattahoochee, 173 U. S. 540, 19 Sup. Ct. 491, 43 L. Ed. 801, s. c. 74 Fed. 899, 21 C. C. A. 162, relied on by the respondent, the speed through the water, on which ability to maneuver depends, was at least two or three knots greater, and the schooner was smaller and presumably quicker in action.

[2] It is also urged that the Hudson should have shown a flare-light as the steamer approached, or have blown danger signals on her own steam whistle, in order to give additional warning of her presence and location. As to blowing the whistle, I think that would have tended rather to confuse and mislead than to assist the approaching vessel. The schooner was certainly not at fault for failing to do it. As to the flare, while I think that an unusually careful master would perhaps have displayed one, I cannot say that the course and distance of the on-coming steamer were so apparent to the men on the schooner that they were required to do so in the exercise of prudent seamanship. Additional warnings of this character are intended to be used either to attract the attention of an approaching vessel which apparently has overlooked the vessel resorting to them, or to warn an approaching vessel when she cannot otherwise be expected to locate accurately the place of the vessel showing the flare. In this case the schooner had a fog horn which, upon the great weight of the testimony, was a suitable one, and was being sounded at frequent intervals after the steamer's whistle was heard. The steamer was approaching from ahead and the schooner's horn was pointed in that direction. It was not evident on the schooner that the horn would not afford to the steamer adequate information of her presence and location. To hold her at fault for not showing a flare would practically amount to establishing a rule that sailing vessels were bound to do so whenever they became aware of danger from a steamer approaching in a fog at night. I do not think that the failure of the schooner to display a flare was a fault on her part.

Various other faults are alleged against the schooner, none of which seem to me to be established nor to require discussion. On all the evidence I find that the Hudson was free from fault in respect to the collision, and that it was due solely to the fault of the Middlesex.

It follows that on the intervening petition of Winfield and Lawrence for personal injuries each petitioner is entitled to a decree for full damages, and the petition must be referred to an assessor to state the damages.

[3] There remains the question whether damages can be recovered for the deaths of Captain Thomas and the two men who were drowned. In this connection certain additional facts must be stated. The Middlesex was owned by a New Jersey corporation; her home port was Boston. The Hudson was owned by a Maine corporation. The laws of New Jersey (Compiled Statutes, vol. 2, pp. 1907, 1908) allow the recovery of damages for death. The laws of Maine also permit recovery for death. (Maine Rev. Statutes 1903, c. 89, §§ 9, 10). The New Jersey statute allows a recovery based upon the loss sustained by the

person entitled to the damages. Under the Maine statute the damages are assessed upon the same principle, but are limited to an amount not exceeding $5,000. There is no such limitation in the New Jersey statute. The two statutes, therefore, differ in a substantial provision. The Massachusetts statutes (Acts of 1907, c. 375, as amended) allow recovery for damages for death caused by negligence, but are based upon an entirely different principle; the damages being awarded not as compensation for loss, but as a penalty assessed with reference to the degree of culpability. No case has gone so far as to allow damages for death on the high seas under the circumstances here disclosed, and I rule that they are not recoverable. The principles involved have been so well and fully considered in the following cases and articles that an extended discussion of them is unnecessary: The Scotland, 105 U. S. 24, 29, 30, 26 L. Ed. 1001; The Belgenland, 114 U. S. 355, 369, 5 Sup. Ct. 860, 29 L. Ed. 152; The Hamilton, 207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; La Bourgogne, 210 U. S. 95, 28 Sup. Ct. 664, 52 L. Ed. 973; Thomassen v. Whitwell, 9 Ben. 403, Fed. Cas. No. 13,929; "The Remedy for Death at Sea," by Judge Harrington Putnam, Case and Comment, July, 1915; "An Attempt by Lawyers to Remedy the Law," by FitzHenry Smith, Jr., Case and Comment, July, 1915; "Extra Territorial Marine Torts," by George Whitelock, Esq., 22 Harvard Law Review, pp. 413–418; Benedict, Admiralty Jurisdiction and Practice (4th Ed.) p. 183.

[4] As to the conduct of Capt. Thomas, a further question is raised which, in view of the possibility of an appeal, ought perhaps to be decided. It is contended by the respondent that he was negligent in not getting into the boat when he had the opportunity to do so; that this negligence on his part was the proximate cause of his death; and that for this reason his representative would not be entitled to recover for the death. It seems clear that Capt. Thomas intended to get into the boat later. He was somewhat incapacitated physically, and might well want the boat in such a position as to make it as easy as possible for him to get into it. It was a very great emergency; some members of the crew who were saved were still rushing aft towards the boat when he refused to get into it; the schooner sank with very unusual rapidity, which he probably did not foresee. Considering all the circumstances, I do not think that he was negligent in failing to get into the boat when requested to do so by the mate, although had he taken that advice he would not have been drowned.

Decrees may be entered dismissing the libel in each of the death cases.

## THE CHEPSTOW CASTLE.

UNION-CASTLE MAIL S. S. CO., Limited, v. PENDLETON SHIPBUILDING & NAV. CO. et al.

(District Court, D. Massachusetts. August 9, 1916.)

Nos. 1469, 1476.

1. COLLISION ⊂⊃49—FAILURE TO CHANGE COURSE—EVIDENCE OF FAULT—SUFFICIENCY.
   In suit for collision between steamer and schooner, evidence *held* to show that latter was not at fault for holding its course after steamer had made sudden change of course toward it.
2. COLLISION ⊂⊃49—SCHOONER'S LIGHTS—SUFFICIENCY OF EVIDENCE.
   In suit for collision between steamer and schooner, evidence *held* to show that latter's lights were properly set and burning and were not obscured by her sails.
3. COLLISION ⊂⊃48—SCHOONER AND STEAMER—BURDEN OF PROOF.
   Where a sailing vessel carrying proper lights was run down at sea by a steamer on a night when the seeing was good, the latter has a heavy burden to show itself not at fault.
4. COLLISION ⊂⊃45—SCHOONER AND STEAMER—SHOWING OF FLARE.
   Where steamer changed her course so as to head more toward a schooner, making it appear to master of latter that it was being overlooked, the latter was not at fault in showing flare light.
5. COLLISION ⊂⊃49—SCHOONER AND STEAMER—SUFFICIENCY OF EVIDENCE.
   In suit for collision between schooner and steamer, evidence *held* to show that latter was at fault for failing to slow or stop seasonably and for failing to discover and keep clear of former.

In Admiralty. Libel by the Pendleton Shipbuilding & Navigation Company against the steamship Chepstow Castle, with cross-libel by the Union-Castle Mail Steamship Company, Limited, against the Pendleton Shipbuilding & Navigation Company and others. Decree adjudging the Chepstow Castle solely at fault, and referring the case to an assessor to state damages, and cross-libel dismissed.

Case No. 1469:

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Kirlin, Woolsey & Hickox, of New York City, and FitzHenry Smith, Jr., of Boston, Mass., for claimant.

Case No. 1476:

Kirlin, Woolsey & Hickox, of New York City, and FitzHenry Smith, Jr., of Boston, Mass., for cross-libelant.

Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for respondents.

MORTON, District Judge. These two cases arise out of a collision on the high seas, about 15 miles southwest of Winter Quarter Shoal lightship, off the Virginia coast, between the three-masted schooner Emma F. Angell and the steamer Chepstow Castle. The collision occurred about 2:25 a. m. on the morning of April 8, 1916.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The schooner sank almost immediately. Her crew were saved. The first case is a libel by her owners to recover damages for her loss. There is a cross-libel by the owners of the Chepstow Castle to recover for the damage to her.

The night was overcast and dark, with occasional squalls, but no fog or mist. The seeing was good. The wind was moderate to fresh, about southeast. The schooner was headed about south southwest, on the wind, but not quite closehauled. She was bound to Norfolk. She was carrying substantially all sail, including four head sails.

The Chepstow Castle is about 425 feet long and of about 5,000 net tons. She was proceeding in a northeasterly direction at full speed, about 10 knots per hour. There was a difference of about two points from a straight line in the courses of the vessels as they approached each other, the schooner having the steamer on her starboard bow and their courses intersecting.

The steamer was first seen from the schooner when about three miles distant. Shortly afterwards she was observed to change her course slightly towards the schooner, plainly showing her red light against the schooner's green. The master of the schooner inferred from this maneuver on the part of the steamer, and from her failure to make any further change of course to avoid his vessel, that the schooner was being overlooked by the steamer. In order to attract her attention he showed a bright flare light aft on his starboard rail. The steamer held her course, which was one involving danger of collision. The master of the schooner then swung an ordinary white lantern on the schooner's starboard quarter. As the steamer still made no change in direction or speed, he ordered the whistle of the donkey engine to be sounded.

About this time the steamer was observed to swing sharply to starboard and head almost directly across the schooner's bow. The vessels were then pretty close together. The schooner held her course for a short time until it became evident that a collision was unavoidable. Then her helm was put down and an effort made to bring her into the wind, which would be towards the southeast. Almost immediately after this was done the steamer, then heading approximately east, struck the schooner about opposite the spanker rigging and cut almost through her. Her crew got into the boat, and the schooner sank within a very few minutes.

The navigation of the steamer was, at the time, in charge of her second officer. She had one man on lookout, who was stationed in the crow's nest; the officer was on the bridge, and with him there was the helmsman. There were two other men in the watch who were not assigned to special duty. Her captain came on the bridge after the emergency had arisen and before the vessels came together. The testimony of the witnesses for the steamer is not entirely harmonious, but the account of the accident given by them may be summarized as follows:

The steamer's course was laid for the Winter Quarter Shoal lightship, and the officer on watch was looking out for that light. About 15 minutes before the collision he saw what he took to be a gleam

of it below the horizon. He took a cross-bearing of another light on shore, which was about on his port beam, and then went to the chart-room to put the steamer's position on the chart. He reported the lightship to the captain as dead ahead, and received orders to keep it slightly on the port bow. The steamer thereupon changed her course about half a point to starboard. This was the change which, as above mentioned, was observed on the schooner shortly after the steamer was sighted. When the officer returned to the bridge the gleam of the lightship was no longer visible. He was somewhat puzzled by its disappearance, and began sharply to look for it, using field glasses and scanning that part of the horizon. Some minutes later his attention was attracted by a bright light about on the range where the light vessel had been. It was, however, much closer at hand than the light vessel would have been if his location of his vessel were correct. He testified that he recognized the light as being a flare light, that he thought he had overrun his course and was close to the lightship, and that he supposed the lights on the lightship had given out and she was showing a flare to warn him to keep off. What he did, as he says, was to put his helm hard aport, swinging the steamer towards the east. According to the testimony of the helmsman on the steamer this change of course was not made until some time after the flare had disappeared. It was observed on the schooner, as above stated. The danger whistles from the schooner were heard on the steamer—a succession of short blasts on the steam whistle. There was, however, no reduction in the steamer's speed. The lookout very soon reported a sailing vessel dead ahead, and the green sidelight of the schooner was for the first time observed on the steamer. At this juncture the captain of the steamer came on the bridge. He says that the schooner was then 300 or 400 yards distant; other witnesses on the steamer put it much less—as short as half her length, i. e., about 215 feet. He at once ordered the engines reversed. No change was made in the helm, which was hard aport. The steamer slid forward, still swinging, and collided with the schooner, as above described.

The steamer asserts that the collision occurred wholly because of the fault of the schooner, and alleges three principal faults: (1) That the schooner's green light was not brightly burning or was obscured by her headsails; (2) that the display of the flare light by the schooner was a fault which misled the steamer and contributed to the accident; and (3) that the schooner negligently held her course when by changing it she could have avoided the collision.

[1] As to the last alleged fault, I am of opinion, for reasons which I stated orally at the conclusion of the arguments, that it is not established. The situation in which the schooner found herself after the steamer's last and sudden change of course towards her was a desperate and confusing one. The steamer was both swinging and slowing. Even after the event, gentlemen equally well qualified to form an opinion disagree as to what the schooner should have done, certain expert witnesses saying that she should have luffed, and the steamer's counsel that she should have kept off. The lookout on the

steamer says there was not time for the schooner to change her course after she was seen from the steamer. The master of the schooner was, in my opinion, entirely right in holding his course as long as he did. If he had done otherwise, his action would certainly have been charged against his vessel as a grave fault if a collision had occurred.

[2] The questions as to lights are more difficult. The steamer contends that the schooner's side light was either dim or obscured, and that it did not meet the requirements of law. This contention is founded upon the testimony of the lookout, the officer on watch, and the helmsman of the steamer, who being, as they say, attentively watching the sea ahead, entirely failed to discover the green light until it was too close at hand for them to avoid a collision. And this testimony is further strengthened by that of other persons on the steamer who happened to be on deck and to look ahead during the time when the schooner's light ought to have been visible and who did not see it. On the other hand, some of these same witnesses, among them the lookout, also testified that when they noticed the schooner's light, just before the collision, it appeared to be all right and to be burning brightly.

The evidence for the schooner satisfies me that she was being navigated with more than ordinary care. Her master became apprehensive about the steamer while the latter was still a considerable distance away. He testified that he directed the man on lookout to inspect the schooner's lights, and that the lookout reported them all right. The lookout, who was called as a witness, corroborates this testimony. It is certain that a flare light was shown, and that by her master's order the steam whistle on the schooner was blown in further efforts to attract the steamer's attention. The whole evidence for the schooner, which at various points is corroborated by witnesses on the steamer, indicates that considerable uneasiness in regard to the steamer's conduct was felt by those on board the schooner, and that a high degree of vigilance was being exercised. Under such circumstances, it seems wholly natural that her lights would be inspected. I therefore attach more importance than I might under different circumstances to the testimony of her officer and crew as to the condition of her lights. Just before the collision her green light was properly burning and was seen from the steamer. There is not a suggestion in the testimony that anything was done to it while the vessels were approaching each other. As to the testimony of the second officer of the steamer and his failure to see the schooner's lights, in another case recently tried before me, an officer using glasses in an effort to pick up a light vessel just beyond the horizon overlooked, as I thought, a sailing vessel close at hand. The Surf, 230 Fed. 485, 488. It is by no means impossible that that occurred in this case also. The helmsman's attention was on his course and compass. His failure to see the schooner's light affords no strong evidence that the light was not visible. The lookout's testimony is significant, but is outweighed by the other evidence in the case. I find that the schooner's lights were properly set and burning.

It is further suggested on behalf of the steamer that the green light, although properly burning, may have been obscured by the head sails. This is an easy suggestion to make, and one not infrequently offered on

behalf of a vessel which has overlooked the lights of another vessel approaching nearly head-on. In this case it is repelled by the unanimous testimony of the men on the schooner, and also, as I think, by the circumstances of the case. The vessels were not approaching head to head, but at an angle, the steamer being pointed ahead of the schooner and across her bow. She never did cross the schooner's bow. The schooner's head sails would have had to be far out to obscure her lights under such conditions. The schooner's course, with reference to the wind, was such as to make it wholly unlikely that her head sails would be slacked way off. I find that her green light was not obscured by her sails.

[3] We have then the case of a sailing vessel, carrying proper lights, run down at sea by a steamer on a night when the seeing was good. The mere statement of the accident obviously throws a heavy burden of explanation upon the steamer to exculpate herself. The final contention made on her behalf is that the schooner was at fault for showing the flare. The flare burned with an intense white light lasting about two minutes. While it was burning I have no doubt that it was impossible on the steamer to make out the schooner's green light. The vessels were coming together at the rate of about 15 knots an hour. It is evident that for a considerable distance the steamer was, by reason of the schooner's conduct in showing the flare, left without information as to the schooner's direction.

I see no sufficient reason to doubt the correctness of the statement of the law as to flare lights recently made by me in Russell v. S. S. Middlesex, 253 Fed. 142 (District Court Mass. June 13, 1916), in which it was said that—

"Additional warnings of this character are intended to be used either to attract the attention of an approaching vessel which has apparently overlooked the vessel resorting to it, or to warn an approaching vessel when she cannot otherwise be expected to locate accurately the place of the vessel showing the flare."

[4] There is no doubt that the flare was not shown until after the steamer had changed her course so as to head more towards the schooner. The master of the schooner then displayed the flare, which was seen on the steamer; he then swung the lantern, which was not seen on the steamer; he then blew his steam whistle, which was heard on the steamer. His supposition that he was being overlooked when the flare was shown was correct. If it was not displayed until the vessels were fairly near together, as would be inferred from the testimony of some witnesses on the steamer, there is no sufficient explanation for her previous failure to see the green light, and the showing of the flare was, I think, justified. If, on the other hand, the flare was shown fairly early in the approach of the two vessels, as would be inferred from the testimony of the master of the schooner and some witnesses on the steamer, there remained ample time, after the effect of it had disappeared, for the steamer to have seen the schooner and to have avoided her. Some latitude must certainly be given to the judgment and action of a shipmaster in matters of this sort, and I am not prepared to say that the schooner was at fault for having shown the flare.

Another point, although not necessary to the decision of the case, perhaps ought to be referred to. Before the schooner was seen from the steamer repeated short blasts of the former's steam whistle, plainly saying danger, were heard on the steamer, and yet the engines were not even slowed. She was kept at full speed until the captain reached the bridge, and his first act on getting there was to order them hard astern. This delay was not unimportant, because, if the steamer had been slowed down a short time sooner than she was, and other things had remained the same, the schooner would have crossed the steamer's bow and got clear.

[5] The steamer was at fault for failing to slow or stop seasonably, as well as for failing to discover and keep clear of the schooner. The schooner was free from fault.

There must be a decree in the first case adjudging the Chepstow Castle solely at fault for the collision and referring the case to an assessor to state the damages, and in the cross-libel a decree dismissing the libel.

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## AGENCY OF CANADIAN CAR & FOUNDRY CO., Limited, et al., v. AMERICAN CAN CO.

(District Court, S. D. New York. August 5, 1918.)

1. CONSTITUTIONAL LAW ⟸68(1)—DISTRIBUTION OF GOVERNMENTAL POWERS—EXECUTIVE DEPARTMENT.
   The question of the sovereignty of a foreign government is a political question determination of which by the executive or legislative department of the United States government binds the judicial department.

2. EVIDENCE ⟸334(1)—LAW OF FOREIGN COUNTRY—CERTIFICATE OF AMBASSADOR.
   The certificate of the ambassador of a foreign country to the United States as to the law of his country or the personnel and authority of officials of his government is admissible in the courts of the United States.

3. INTERNATIONAL LAW ⟸9—EFFECT OF CHANGE OF SOVEREIGNTY.
   The principle is firmly established in our courts that the rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise.

4. TRIAL ⟸55—RECEPTION OF EVIDENCE—DISCRETION OF COURT—WAR CONDITIONS.
   The trier of facts may determine whether as matter of fact a cable dispatch purporting to be sent by authority of a foreign government is genuine and was sent as indicated, war exigencies requiring that court shall deal with such situations in a sensible way, not too much fettered by inelastic rules while safeguarding against reception in evidence of fabricated communications.

In Equity. Suit by the Agency of the Canadian Car & Foundry Company, Limited, and the Recording & Computing Machines Company, against the American Can Company. Decree for complainants.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

T. Ludlow Chrystie, of New York City, Arnold Wainwright, of Montreal, Canada, and Francis K. Raynor, of New York City, for plaintiff Agency of Canadian Car & Foundry Co., Limited.

Walter C. Noyes, of New York City, and H. A. Toulmin and H. A. Toulmin, Jr., both of Dayton, Ohio, for plaintiff Recording & Computing Machines Co.

Philip G. Bartlett, Julius F. Workum, and Graham Sumner, all of New York City, for defendant.

The parties will be referred to as "Agency Co.," "Recording Co.," and "Can Co."

MAYER, District Judge. The suit is to recover $1,500,000 with interest. Defendant concedes, and always has conceded, that it owes $1,500,000 to somebody; but, because of certain transactions and documents, defendant's position is that it cannot safely pay the money to plaintiffs, and that it may hereafter be subject to a judgment or decree in some suit or action which may be brought by some "Russian government."

Two principal propositions are relied upon by plaintiffs:

(1) That under the documents and transactions in the case the Russian government has not any beneficial interest in the money due from defendant, and therefore that plaintiffs alone are entitled thereto.

(2) That if any beneficial interest in the $1,500,000 existed in favor of the Russian government, a release and assignment executed by authorized representatives of the Russian government disposed of and discharged such beneficial interest. If the plaintiffs prevail, there arises the question of what interest, if any, is due to the respective plaintiffs, i. e., the date from which interest should run and the rate. There is also a minor subsidiary controversy between Can Co. and Recording Co. which was referred to a special master. The master has submitted a clear and concise report in respect of the matter before him. His report is confirmed, and further reference thereto is unnecessary.

1. The basis of the indebtedness owing by Can Co. is the manufacture and delivery of fuses by Recording Co. The liability of Can Co. to pay for fuses manufactured by Recording Co. arose under two agreements dated, respectively, August 23, 1916, and November 21, 1916, the details of which need not be recited. The net result was that Recording Co. manufactured 1,500,000 time fuses which were delivered and accepted. Recording Co., however, was indebted to Agency Co., and Agency Co. had large contracts with the Russian government for the manufacture of munitions.

On October 31, 1916, an arrangement was entered into by Can Co., Recording Co., and Agency Co. which was expressed in the following letter:

"October 31, 1916.

"American Can Company, 120 Broadway, New York City—Dear Sirs: In consideration of your making advances to Recording & Computing Machines Company of the sums provided in your contract, dated August 23, 1916, with that company for the manufacture of 1,250,000 Russian time fuses, and of

your making the payments to that company of the purchase price of time fuses, as provided in said contract, out of which the sum of one dollar ($1.00) of the purchase price of each fuse delivered shall be paid by you to us, until all sums which may now or hereafter be due from and payable by that company to us are adjusted and paid or otherwise satisfied:

"We hereby agree that you may take security for such advances on all materials purchased by that company from the sums so advanced, and that we will waive any claim or lien which we may have upon the time fuses manufactured for you by that company under its said contract with you, and that we will not interfere with the delivery to you by that company of the time fuses so manufactured for you by that company under its said contract with you. * * *

"Yours very truly,

"Agency of Canadian Car & Foundry Company,
"C. H. Cahan, Chairman of the Board of Directors.

"Accepted by:
"American Can Company,
"J. R. Harbeck, Vice President.

"Accepted by:
"Recording & Computing Machines Company,
"H. A. Toulmin, Vice President."

The above is the document of primary importance in the case.

On January 2, 1917, an agreement (too long to quote) was entered into between "General A. Zalubovsky, President of the Imperial Russian Supply Committee in America, Acting for and on Behalf of the Chief Artillery Board of the Imperial Russian Government," and Agency Co. The instrument was signed, "For Lieutenant General A. Zalubovsky, President of the Imperial Russian Supply Committee in America, by Major General Khrabroff, Vice President." By this agreement, inter alia, Agency Co. assigned to the Russian government the agreement or order of October 31, 1916, supra, "to receive from American Can Company all sums of money payable to the Agency Company under the terms of said agreement," and the Russian government agreed to make certain payments to Agency Co.

Contemporaneously with the agreement of January 2, 1917, there was indorsed on the order of October 31, 1916, the following:

"New York City, January 2, 1917.

"For valuable consideration, Agency of Canadian Car & Foundry Company, limited, hereby assigns to the Imperial Russian Government, all the right, title and interest of said company in and to all sums of money payable under the within agreement, dated October 31, 1916.

"Agency of Canadian Car & Foundry Company,
"By C. H. Cahan,
"Chairman of Board of Directors. [Seal.]"

As part of the transaction of January 2, 1917, Recording Co. on January 11, 1917, entered into an agreement with the Russian government (acting through the same officials) that contractors with Recording Co. for time fuses (which included defendant) should deduct $1 from the purchase price of each fuse and pay the same to the Russian government until payment should be made in full of the amount which the Russian government was required to pay to Agency Co. under the agreement of January 2, 1917.

On September 14, 1917, Can Co. agreed with Recording Co. that Can Co. retain $1,500,000 "for account of Agency of Canadian Car and

Foundry Company or the Imperial Russian government, as their interests may appear" until such time as there was a final adjustment of account between the interested parties or a final determination by law.

Certain differences having arisen, the details of which may be passed by, matters were finally settled between Recording Co., Agency Co., and the Russian government acting through Gen. Khrabroff, now president of the Russian Supply Committee, and the settlement was expressed in elaborate detail in an agreement dated December 18, 1917, and executed by the three parties. On the same day, and as a part of the same transaction, the Russian government, acting through Gen. Khrabroff as "President of the Russian Supply Committee in Behalf of the Russian Government" assigned to Agency Co. and Recording Co. all its right, title, and interest, if any, to the $1,500,000 held by Can Co. Under date of December 19, 1917, Gen. Khrabroff, as president of the Russian Supply Committee in America, also executed and delivered a general release to Recording Co. By an agreement dated December 22, 1917, Recording Co. and Agency Co. stated and adjusted their accounts as between themselves; the amount due Agency Co. out of the $1,500,000 being fixed at $713,176.07.

From the foregoing outline of the essential facts and an examination of the documents, it is clear beyond question that the Russian government has not any beneficial interest in the money held by Can Co. Even if Gen. Khrabroff lacked authority to sign on behalf of the Russian government, that government could not successfully maintain in any court in this country any suit or action against Can Co. for the $1,500,000, or any part thereof, once Recording Co. and Agency Co. had settled their differences.

2. It would be unnecessary to go further, but for the fact that defendant expresses the fear that in some jurisdiction—possibly foreign—it may be held that under the documents the Russian government has a beneficial interest, and that this it has never relinquished because of lack of proof that Gen. Khrabroff had authority to bind the then existing Russian government by his signature to the settlement agreement of December 18, 1917.

The contention, in effect, is that the Russian Supply Committee originally acted for the Imperial Russian government, of which the Czar was head; that that government has fallen and other governments have followed, and, as a result, the Russian Supply Committee no longer had authority; and that proof is wholly lacking as to the powers or status of Gen. Khrabroff.

[1] The attempt was made to offer lay proof as to who were, at present, in control of the Russian government, or, in other words, who or what the present government of Russia is. This line of testimony was excluded upon the well-settled principle that the question of sovereignty is a political question, the determinaton of which by the political branch or branches of our government, i. e., executive and/or legislative departments, binds the judicial department. Jones v. United States, 137 U. S. 202, 212, 11 Sup. Ct. 80, 34 L. Ed. 691; Pearcy v. Stranahan, 205 U. S. 257, 265, 27 Sup. Ct. 545, 51

L. Ed. 793; Williams v. Suffolk Ins. Co., 13 Pet. 415, 419, 10 L. Ed. 226; The Hornet, Fed. Cas. No. 6705; Kennett v. Chambers, 55 U. S. (14 How.) 38, 14 L. Ed. 316; Phillips v. Payne, 92 U. S. 130, 23 L. Ed. 649; Oetjen v. Central Leather Co., 246 U. S. 297, 38 Sup. Ct. 309, 62 L. Ed. 726; Ricaud v. American Metal Co., 246 U. S. 304, 38 Sup. Ct. 312, 62 L. Ed. 733.

After the date of the beginning of the transactions and before the settlement in December, 1917, the United States had recognized the Russian government which succeeded that of the Czar. In response to a letter of inquiry by one of the counsel for defendant, Mr. Polk, the counselor to the Department of State, replied:

"I find that this government instructed the American Ambassador, under date of March 20, 1917, to recognize the new government of Russia and to state to the proper Russian authorities that the United States will be pleased to continue intercourse with Russia through the medium of the new government."

Shortly thereafter, viz. on July 5, 1917, Boris Bakhmetieff was recognized as the Russian Ambassador, and that recognition still continues, as evidenced by the following certificate of our Secretary of State:

"To All Whom These Presents Shall Come, Greeting:

"Know ye that I, Robert Lansing, Secretary of State of the United States of America, do hereby certify that Boris Bakhmetieff presented his letter of credence to the President of the United States and was officially received by the President as Ambassador Extraordinary and Plenipotentiary of Russia on the fifth day of July, 1917; and that the said Boris Bakhmetieff has accordingly since that date been recognized by the Department of State as Ambassador of Russia and as entitled to all the rights, privileges and immunities of such status.

"In witness whereof, I have hereunto subscribed my name and caused the Seal of the Department of State to be affixed.

"Done in the city of Washington this eighth day of May, one thousand nine hundred and eighteen. Robert Lansing. [Seal.]"

This certificate is controlling upon the courts (In re Baiz, 135 U. S. 405, 10 Sup. Ct. 854, 34 L. Ed. 222; Jones v. United States, 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691), and is preliminary to a certificate from Ambassador Bakhmetieff in connection with this suit.

What happened was that Mr. Murray, of Coudert Bros., attorneys for the Russian government, informed the Russian Ambassador of the pendency of this litigation and of a request made of him (Murray) to testify and he asked for the Ambassador's instructions. As a result of this inquiry, Mr. Murray did testify and produced at the trial a certificate of the Russian Ambassador, setting forth the personnel of the Russian Supply Committee, and certifying:

"That the Russian Supply Committee in the United States was organized in October, 1915, for the purpose of purchasing supplies in the United States for Russia, accepting supplies purchased or manufactured in the United States for Russia, and settling all matters relating to contracts for supplies purchased or manufactured in the said United States for Russia; that said committee's authority continued until the first day of March, 1918; that the said committee had full charge of all matters pertaining to the two contracts between Russia and Canadian Car & Foundry Company, Ltd., for 5,000,000

rounds of ammunition, also all the relations between Russia and Agency of Canadian Car & Foundry Company, Ltd., arising from the assignment by Canadian Car & Foundry Company to Agency of Canadian Car & Foundry Company of the contracts for 5,000,000 rounds of ammunition, also of all relations with the Recording & Computing Machines Company of Dayton, Ohio, which company was engaged in the manufacture of Russian time fuses; that the said committee had full power and authority between the date of its organization and the first day of March, 1918, to liquidate and close all accounts with Agency of Canadian Car & Foundry Company, Ltd., Canadian Car & Foundry Company, Ltd., and the Recording & Computing Machines Company."

[2] An ambassador, of course, is not subject to process in a foreign court, and there are, perhaps, some matters in respect of which an ambassador's certificate might not be admissible; but, when he certifies to the law of his country or to the personnel and authority of officials of his government, such certificate is clearly admissible as proof of the facts therein set forth. In the Goods of Klingerman, 3 Sw. & Tr. 18; In the Goods of Anne Downey, 3 Hagg. Ecc. Rep. 767; Goods of Prince Oldenburg, L. R. 9 Prob. Div. 234; The Republic of Mexico v. De Arangoiz, 12 N. Y. Super. Ct. 643, 646. See, also, Wigmore, vol. 2, p. 1820 et seq., §§ 1455, 1456; Chamberlayne, vol. 4, p. 3805 et seq., §§ 2769–2775; 16 Cyc. 1217.

The change in the form of Russian government and the fact that in the original papers that government was described as the "Imperial Russian Government," while the settlement papers are executed on behalf of the "Russian Government," are matters of no significance.

[3] Since the notable precedent of The Sapphire, 78 U. S. (11 Wall.) 164, 20 L. Ed. 127, the principle is firmly established in our courts that the rights and liabilities of a state are unaffected by a change either in the form or personnel of its government, however accomplished, whether by revolution or otherwise. No other doctrine is thinkable, at least among nations which have any conception of international honor. See, also, United States of America v. McRea, L. R. 8 Eq. 69; John Bassett Moore's Digest of International Law, vol. 1, p. 249, and also 251, quoting Secretary Bayard's instructions to the then American Minister to Peru (September 23, 1886).

Other grounds could be stated which, so far as concerns the Russian government, fully support the validity of the settlement of December, 1917; but enough has been pointed out to demonstrate that there is no occasion for further timidity on the part of defendant.

It may, however, be added that the officially responsible character of the Russian Supply Committee as evidenced by the many and, in money, enormous transactions confided to it throughout all the dates relevant to this controversy, should assure defendant that no tribunal in this country will ever subject defendant to a second payment—and we have no concern with remote possibilities as to the action of any foreign tribunal.

[4] It may be further added, in passing, that some cables from Russia were received in evidence, where the proof, because of war conditions, was not in accordance with what defendant regarded as orthodox methods of proving communications of this kind. As I under-

stand, the modern method permits the trier of the facts to determine whether as matter of fact the paper is genuine and was sent as indicated. War exigencies require that the courts shall deal with such situations in a sensible way, not too much fettered by inelastic rules, while at the same time safeguarding against the reception in evidence of fabricated communications.

For the reasons outlined, plaintiffs are entitled to recover.

3. In respect of interest to be allowed, the case should be disposed by the intent of the parties as gathered from the documents and by the situations which developed.

As to the Recording Co.:

Under the agreement of September 14, 1917, Can Co. was required to allow interest from November 1, 1917, at the rate of 2 per cent. per annum "to the date of payment of the amount" or such other rate as the Can Co. would receive from its bankers. Meanwhile Can Co. was to hold the money until Recording Co., Agency Co., and the Russian government arrived at a "final settlement and adjustment of account * * * or until their interests shall be finally determined by law"; "their interests" meaning the interests of the Can Co., Agency Co., and Russian government.

On December 7, 1917, counsel for defendant wrote counsel for Recording Co. that defendant had concluded not to pay the $1,500,000 except "pursuant to the judgment of a court." Under the agreement of September 14, 1917, it was the duty of Can Co. to pay on demand, as soon as it was credibly informed that the parties had "arrived at a final settlement."

Such information was conveyed to Can Co. by a letter of the attorney for Agency Co., dated December 28, 1917. This letter was a demand to pay Agency Co. $713,176.07 with interest and inclosed a copy of the settlement agreement of December 22, 1917, between Agency Co. and Recording Co. and also a copy of the assignment of December 18, 1917, by the Russian Supply Committee to Agency Co. and Recording Co., of all right, title, and interest in and to the $1,500,000.

As defendant had theretofore refused to pay without a lawsuit, further demand was unnecessary, and Recording Co. is entitled to interest at the rate of 6 per cent. per annum from December 28, 1917, and at 2 per cent. per annum (no greater sum having been received from defendant's bankers) from November 1, 1917, to December 28, 1917.

As to Agency Co.:

Agency Co., under the agreement of December 22, 1917, is entitled to half the interest from November 1, 1917, to December 28, 1917, which Can Co. is to pay Recording Co.

Nothwithstanding the argument earnestly pressed by counsel for Agency Co., it seems to me that interest was not payable to Agency Co. until after the December settlement and the Agency Co.'s demand on December 28, 1917. From that date Agency Co. is entitled to interest from Can Co. on its $713,176.07 at the rate of 6 per cent. per annum.

Submit decree in accordance herewith.

Settle decree on three days' notice. As to costs: Plaintiffs may have one bill of costs, the interadjustment of which should be taken care of in decree. Recording Co. will pay all the taxable costs of the reference.

I note appreciation of the aid of counsel in submitting very helpful briefs, and I am further obliged to Mr. Chrystie for the convenient form in which many of the important exhibits were printed.

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Ex parte FISCHER.

(District Court, D. New Jersey. October 28, 1918.)

ARMY AND NAVY ⇐20—SELECTIVE DRAFT ACT—CLASSIFICATION OF REGISTRANTS.

A man inducted into the service under the Selective Draft Act, but who was a few days afterward discharged through error, *held* properly classified in the same position he occupied before the error was committed.

Application by Frederick Fischer for writ of habeas corpus. Writ denied.

Alex. S. Aleinekoff, of New York City, for petitioner.

Andrew J. Steelman, Asst. U. S. Atty., of Jersey City, N. J., for the United States.

HAIGHT, District Judge. This case presents a rather unusual situation. The relator was found qualified and certified for military service in August of 1917 by Local Board, division 164, of New York City. He had presented a claim to that board for discharge, based upon the ground that he was a married man with a wife dependent upon him for support. The local board disallowed the claim. Upon appeal, the district board reversed the local board; but subsequently, after some correspondence between the local board and the district board, the district board reversed its former action, and affirmed the local board. The respondent was thereon, on November 20, 1917, inducted into military service and taken to Camp Upton, in New York state, where he was enrolled as a private in the First Company of the One Hunded and Fifty-Second Depot Brigade of the Seventy-Seventh Division. In the meanwhile he petitioned the adjutant general of New York state to reopen his case and order his discharge from military service on the ground before mentioned. On November 27th his name appeared in Special Orders 96, paragraph 20, issued by the commanding general at Camp Upton on that day, as among those to be discharged from service, because they had been respectively inducted therein "through error." An honorable discharge was thereupon granted to the relator by the commanding officer.

The local board, being advised of the action taken by the commanding officer, endeavored to ascertain from the military authorities the cause of the relator's discharge. The upshot of the investigation which the local board made was that the relator had been discharged through

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

error. The relator, after his discharge, filled out and filed the questionnaire required by the regulations promulgated by the President on the 8th of November, 1917. In the questionnaire he asked for deferred classification upon the ground that he was a married man with a wife dependent upon him for support. The local board disallowed the claim and classified him in class 1–I, and on appeal the district board affirmed the action of the local board. The local board's reason for classifying him in 1–I, and presumably the action of the district board in affirming the former's action, was that, although the relator might, under the facts as divulged by the questionnaire and the other facts which were before them, exclusive of the induction into military service and discharge therefrom, be entitled to be classified in 2–B, in view of the fact that he had been inducted into military service under the old regulations, and had been discharged from service through error, that he should be classified in 1–I (which class is not provided for specifically in the regulations, but is found in the questionnaire which was attached to and became part of the regulations), as a person not included in any other division specified in the schedule attached to the questionnaire.

Their action in this respect, I think, was correct. If the relator was discharged from military service through error (and I think that there was ample evidence before the board to justify their conclusion in that respect), manifestly he should be placed in the same position as he occupied before the error was committed, namely, in the position of a person subject to be immediately inducted into military service. If this is not correct, we would have presented a situation where a person who, through error committed by the military authorities, would be placed in a position more advantageous to him (being a person not desiring to perform military service) than other persons of the same class, and without the possibility of rectifying the error thus committed. This follows because, if he cannot be classified in class 1, he would have to be classified in class 2–B under the board's finding of dependency, etc. The placing of him in that class would relieve him from military service for a long time, and possibly for all time. Thus it would be made to appear that an error would be the means whereby this man could be relieved of military service, or, at least, the service could be indefinitely postponed, even though the error was later found out. I cannot bring myself to believe that any such result was ever intended by the regulations, or that it would be in harmony therewith. Furthermore, section 177 of the regulations would seem to be applicable to this situation, as the relator was not classified until that provision of the regulations of November 8, 1917, became effective.

Consequently my conclusion is, upon the whole case, that the writ should not be issued, and that the rule to show cause before issued should be dismissed.

## PITTSBURGH PLATE GLASS CO. v. H. NEUER GLASS CO.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1918.)

No. 3149.

1. CONTRACTS ⟸10(4)—MUTUALITY—SALES.
   Contracts to furnish such material as one may need in his business for a specified time are mutual, and binding on the parties, where the nature of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate.
2. CONTRACTS ⟸10(4)—MUTUALITY—SALES.
   A contract by which one party agrees to furnish to the other such goods as the latter may decide to order in its business during a specified time at stated prices, leaving it optional with the purchaser to increase or decrease its orders with the rise and fall of prices, is void for want of mutuality.
3. CONTRACTS ⟸10(4)—MUTUALITY—SALES.
   A letter written by defendant to plaintiff, stating, "We have entered your order for polished plate glass, for anything we can furnish from our warehouse, these discounts to apply until June 30, 1916," when accepted, *held*, as against demurrer, to create a valid contract, binding plaintiff to buy and defendant to sell all of the glass of the specified sizes in defendant's warehouse in the normal course of its business up to June 30, 1916.
4. SALES ⟸1(4)—CONTRACT—CERTAINTY AS TO QUANTITY.
   A contract for the sale and purchase of all the glass of specified sizes which defendant could furnish from its warehouse until a certain date is not invalid for uncertainty as to the quantity.
5. CONTRACTS ⟸153—CONSTRUCTION—CONSTRUCTION SUSTAINING VALIDITY.
   As between two equally reasonable constructions, that should be adopted which would make a contract valid as against that reaching a contrary result.

In Error to the District Court of the United States for the Southern District of Ohio; Howard C. Hollister, Judge.

Action at law by the H. Neuer Glass Company against the Pittsburgh Plate Glass Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Tuttle & Ross and Pogue, Hoffheimer & Pogue, all of Cincinnati, Ohio (Burton B. Tuttle and Province M. Pogue, both of Cincinnati, Ohio, of counsel), for plaintiff in error.

Edw. P. Moulinier and John H. Druffel, both of Cincinnati, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and WESTENHAVER, District Judge.

KNAPPEN, Circuit Judge. Plaintiff in error, whom we shall call defendant, was a manufacturer of glass at Pittsburgh, and had a warehouse at Cincinnati, where it kept on hand for sale quantities of glass of various sizes. Defendant in error, plaintiff below, was a Cincinnati jobber of glass. Plaintiff sued on an alleged contract, dated January 3, 1916, taking the form of a letter to plaintiff from defendant, and signed by it, as follows:

"In accordance with our personal conversation, we have entered your order for polished plate glass, for anything we can furnish from our warehouse, these discounts to apply until June 30, 1916, as follows: [Sizes and discounts here stated]—all from the current list of May 1, 1914, and subject to 1 per cent. for cash. I am writing this letter in duplicate, and will thank you to sign and return one copy at your earliest convenience."

The letter bears on its face the word "Accepted," followed by plaintiff's signature. The petition avers that plaintiff gave defendant, under the contract, certain orders for glass which were filled, and gave from May 26 to June 29 other orders for glass, "which defendant could furnish from its warehouse, but which it failed and refused to fill." Plaintiff demanded the difference between the aggregate market and contract prices respectively of the glass not furnished. A demurrer to the petition, as not stating a cause of action, was overruled. Defendant then answered issuably. A trial by jury resulted in verdict and judgment for plaintiff. Defendant's motion for new trial was overruled. On this review, the only proposition open to defendant is that the petition fails to state a case. The proceedings on the trial are not brought up.

Defendant's contention is that the contract is void, as unilateral and lacking mutuality or consideration. The argument is that the contract was merely an offer by defendant to sell to plaintiff such glass of the sizes and kinds named as defendant could furnish from its warehouse, but without any obligation on plaintiff's part to take any glass (except such as it might choose from time to time to order), and without the giving of any consideration for defendant's agreement by way of order accompanying the contract, or otherwise.

Plaintiff's contention is two-fold: First that by the contract plaintiff was bound to buy whatever glass of the kinds and sizes in question defendant should have in its warehouse; and, second (as we understand it), that if the writing is held a mere offer by defendant, subject to withdrawal before its acceptance, the offer was a continuing one, and a contract was created as to each order given by plaintiff while the offer was still open and unrevoked by defendant. The court below agreed with plaintiff on the first proposition, and, at least in its practical result, as to the second. It does not appear that any specific order for glass accompanied the contract, nor that there was any consideration for defendant's promise unless in plaintiff's obligation to buy.

[1] Contracts to furnish such material as one may need in his business for a specified time are, by the weight of authority, held mutual and binding on the parties, where the nature of the purchaser's business is such as to make the quantity of the article he will need subject to a reasonably accurate estimate. In support of this general proposition, as tersely stated in note 43 L. R. A. (N. S.) 730, we need refer only to the decisions of this court. Lima Locomotive, etc., Co. v. National, etc., Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Loudenback Fertilizer Co. v. Tennessee Phosphate Co., 121 Fed. 298, 58 C. C. A. 220, 61 L. R. A. 402; Inman v. Dudley, etc., Co., 146 Fed. 449, 76 C. C. A. 659; Campfield v. Sauer, 164 Fed. 833, 91

C. C. A. 304; Marx v. Amer. Malting Co., 169 Fed. 582, 95 C. C. A. 80.

[2] The basis of this rule is that the purchaser's obligation to buy to the extent of his needs supplies mutuality. We assume, however, for the purposes at least of this opinion, that if the contract is to be construed as binding plaintiff to buy such glass only as it should see fit to take, that is to say, so much as it should decide to order for the purposes of its jobbing trade, it would be void for want of mutuality, as leaving it optional with it to increase or decrease its orders with the rise and fall in price. Loudenback Co. v. Phosphate Co., supra, 121 Fed. 301, 58 C. C. A. 220, 61 L. R. A. 402; Crane v. Crane (C. C. A. 7) 105 Fed. 869, 872, 45 C. C. A. 96 (cited by this court with approval in the Fertilizer Company Case, supra, 121 Fed. at pages 301 and 303, 58 C. C. A. 220, 61 L. R. A. 402); the Lima Case, supra, 155 Fed. at page 79, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; and Campfield v. Sauer, supra, 164 Fed. at pages 834, 835, 91 C. C. A. 304.

[3] We shall accordingly treat the validity and effect of the writing, as a present contract of purchase and sale, as depending on whether plaintiff was thereby *obligated* to buy all the glass of the kinds and sizes in question that defendant should actually and in good faith, and in the normal course of its business, have in its warehouse between the making of the contract and June 30 following. That such was the measure of the *right* which the agreement attempted to give plaintiff is apparent from the language of the writing:

"We have entered your order * * * for anything we can furnish from our warehouse, these discounts to apply until June 30, 1916, as follows."

The entering of the order was prima facie an acceptance of it. Austrian v. Springer, 94 Mich. 343, 347, 54 N. W. 50, 34 Am. St. Rep. 350. Indeed, that such was defendant's construction of the agreement is suggested by the assertion in its answer that it filled plaintiff's specific orders for glass sent in after February 21st (alleged to be the actual date when the contract was executed), "in so far as it had the same in its warehouse in Cincinnati, Ohio," and the District Judge, in his opinion denying motion for new trial, said that—

"The defendant regarded the agreement as binding on it and made deliveries under it. It repudiated its obligations on the sole ground that when the plaintiff made demand the warehouse did not contain the sizes called for."

[4] The pivotal question thus is whether the agreement is to be construed as binding plaintiff to so purchase; for, if so, it would not, in our opinion, be invalid for lack of certainty as to the amount of glass defendant would have in its warehouse, and which plaintiff would be obliged to take. Not only would the amount be susceptible of determination within reasonable limits, but plaintiff's agreement to buy what should be on hand would furish a consideration for defendant's promise. Ramey v. Schroeder (C. C. A. 7) 237 Fed. 39, 43, 150 C. C. A. 241; Burgess Co. v. Broomfield, 180 Mass. 283, 286, 287, 62 N. E. 367; Inman v. Dudley (C. C. A. 6) 146 Fed. 449, 451, 76 C. C. A. 659; and see Caflisch v. Humble (C. C. A. 6) 251 Fed. 1, — C. C. A. — (decided May 17, 1918). That under such contract plain-

tiff would get the benefit of a possible rise in price cuts no figure, for defendant would get a corresponding benefit in case of a decline.

Construing the writing as evidencing merely an offer by defendant to sell, and an acceptance by plaintiff of the offer, it is plain that an express contract resulted, so far as not invalid for indefiniteness in respect of quantity. Lima Co. v. National Co., supra, 155 Fed. at page 79, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Ellis v. Dodge (C. C. A. 5) 246 Fed. 764, 766, — C. C. A. —; Dailey v. Clark, 128 Mich. 591, 594, 595, 87 N. W. 761. Had the word "whatever" been used in place of "anything," we think the writing would naturally be construed, even on the theory of a mere offer by defendant accepted by plaintiff, as binding defendant to sell and plaintiff to buy everything defendant should have in its warehouse, during the period named, corresponding to the stated description; and the word "anything" is not infrequently used colloquially in the sense of "whatever." But, as bearing on the extent of plaintiff's agreement, there seems to us much significance in the fact that the contract began, not with an "offer" by defendant to sell, but with an "order" by plaintiff for the purchase of "anything" the former should be able to furnish from its warehouse, thus in terms prima facie indicating an actual order and a complete contract, good as against demurrer, unless plainly appearing to the contrary on the face of the petition. Defendant's admission, in writing, of a verbal "order" from plaintiff, "entered" and so accepted by defendant, is not plainly nullified by the fact that plaintiff attached its signature to the writing at defendant's request. Such signature may well have been desired as a ratification of the verbal order.

[5] Nor is the mere addition by plaintiff of the word "Accepted" sufficient to effect such nullification. As between two equally reasonable constructions, we should adopt the one which makes the contract valid, as against that reaching the contrary result. Lima Co. v. National Co., supra, 155 Fed. at page 79, 83 C. C. A. 593, 11 L. R. A. (N. S) 713. We find nothing in the language of the petition, as distinguished from the writing itself, necessarily negativing such obligation on plaintiff's part; for we cannot construe the averment that by the writing defendant agreed to sell to plaintiff and that the latter accepted "said offer to sell," in connection with the averment that defendant filled certain of plaintiff's orders and failed and refused to fill others, as actually negativing an obligation on plaintiff's part to take any glass, except such as it might from time to time thereafter elect to order. Plaintiff would naturally specify from time to time sizes for which it had immediate use; and even if plaintiff misunderstood the extent of its liability to buy, it would not thereby be denied relief for defendant's breach unless it had itself broken its agreement, and no such defense is made. Moreover, even as indicating a contemporaneous practical construction, a mere failure on plaintiff's part (which does not, however, affirmatively appear) to call for all the glass answering to the description in the writing would not be decisive against a legal obligation to do so; for it does not appear what the market was before May 26, and after that time defendant would naturally not wish plaintiff to take more than it specifically ordered.

In our opinion, the contract should not be construed, as against demurrer, as lacking mutuality, but as imposing an obligation on plaintiff to buy, commensurate with defendant's obligation to sell. We are the better content with this conclusion from the fact that defendant does not appear to have suffered injustice from its application; for the trial judge states not only (as already said) that defendant regarded the agreement binding on it, but that there was on the trial "sufficient evidence tending to show the warehouse contained, if not as much on each occasion as plaintiff called for, yet sufficient to more than equal the amount of the verdict"—which was in fact less than one-fifth the amount plaintiff sued for.

This conclusion makes it unnecessary to consider the other ground of defendant's liability asserted by plaintiff.

The judgment of the District Court is affirmed.

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PHŒNIX IRON & STEEL CO. v. WILKOFF CO.

(Circuit Court of Appeals, Sixth Circuit. August 5, 1918.)

No. 3122.

1. CONTRACTS ⟸23—OFFER AND ACCEPTANCE—CONDITION—"IT BEING UNDERSTOOD"—"AGREED"—"UNDERSTOOD."

The word "understood" in a contract is synonymous with "agreed," and the words "it being understood," in an answer to an offer, mean provided or on condition it is so agreed.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Agreed; It being Understood; First and Second Series, Understood.]

2. CONTRACTS ⟸23—OFFER—CONDITIONAL ACCEPTANCE.

An acceptance of an option making no mention of the optionee's having a certain right, which he would have as a matter of law if the option should be accepted absolutely, but which acceptance is conditional on the optionor's agreeing that he should have such right, is a qualified acceptance, and such as to prevent the creation of a contract unless the optionor thereafter in some way agrees thereto.

3. CONTRACTS ⟸23—OFFER AND ACCEPTANCE—FORM OF CONTRACT.

A difference between the offer and acceptance, as to the form of a contract, is just as effective to prevent the entering into the contract as one as to its substance.

4. SALES ⟸168(2)—RIGHTS OF BUYER—PLACE OF INSPECTION.

A statute providing that, "unless otherwise agreed, when a seller tenders delivery of goods to the buyer he is bound, on request," to afford a reasonable opportunity for inspection, does not give a buyer of goods to be delivered to a carrier an absolute right of inspection at the point of shipment.

5. CUSTOMS AND USAGES ⟸18—PLEADING AND PROOF.

In an action for breach of a contract alleged to have been made by telegrams set out, which were insufficient to create a contract, plaintiff cannot aid his case by proof of a custom not pleaded.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Action at law by the Phœnix Iron & Steel Company against the Wilkoff Company. Judgment for defendant, and plaintiff brings error. Affirmed.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Hine, Kennedy & Manchester and Stephen S. Conroy, all of Youngstown, Ohio, for plaintiff in error.

Wilson & Wilson and Harrington, De Ford, Heim & Osborne, all of Youngstown, Ohio, for defendant in error.

Before WARRINGTON and KNAPPEN, Circuit Judges, and COCHRAN, District Judge.

COCHRAN, District Judge. The plaintiff in error was plaintiff and the defendant in error defendant below. The action was to recover $202,500 as damages for breach of contract. The defendant denied the existence of the contract, and this was the sole issue in the case apart from that as to amount of damages. On trial before a jury verdict was rendered for defendant, pursuant to peremptory instruction given, after plaintiff had introduced the evidence on which it relied to establish the contract, and upon the ground that such evidence did not establish it. Judgment dismissing the petition was entered thereon, and it is therefrom that this writ has been sued out. Seven errors are assigned, but each in a different way raises the single question as to the correctness of the peremptory instruction.

The alleged contract related to one of two kinds of discard billets, made in the manufacture of high explosive shells. Such billets are cut-offs from billets rolled from ingots. Two are made from the top of each billet. The first is imperfect, in that it contains pipes and seams caused by the passage from the top of the ingot of gases formed by the hot steel. The second is apparently perfect, i. e., free from pipes and seams, and is made to insure that all imperfect steel has been eliminated. The remaining part of the billet is alone used in the manufacture of the shells. It was the latter kind of discard billets which was the subject-matter of the alleged contract.

The plaintiff and defendant are each engaged in buying and selling iron and steel products, the one in New York City and the other at Youngstown, Ohio. Plaintiff's claim was that the contract sued on arose from a telegram and confirming letter sent Monday evening, August 14, 1916, by defendant to it, granting an option, and a counter telegram sent Wednesday morning, August 16th, by it to defendant, accepting the option. It is not necessary to quote the confirming letter, as it contains nothing additional except a specification of the sizes of the billets, nor the formal parts of the telegrams. Defendant's telegram was as follows:

"For consideration of one dollar, receipt of which is hereby acknowledged, we hereby give you option, providing we receive your acceptance not later than Wednesday evening next, to purchase from us 15,000 tons discard billets free of pipes and seams, price $26.50 gross ton f. o. b. cars Youngstown, size of billets as confirmed by letter this evening."

Plaintiff's counter telegram was as follows:

"We accept option, and hereby purchase from you fifteen thousand tons billets on basis of terms and specifications of option given us, it being understood that we have the right to have our inspector at loading point as material is shipped. Acknowledge receipt of this message."

These two telegrams and defendant's confirming letter were filed as exhibits with the plaintiff's petition, and no reason occurs why the question as to whether a contract was thereby constituted might not have been raised by, and determined upon, demurrer to the petition. Subsequent telegrams, which passed between the parties down to August 22d, were introduced in evidence by plaintiff. They had no tendency to help out its case. Nor does it claim that they did. On the contrary, defendant claims that they show that the plaintiff as well as defendant did not regard that a contract had resulted from the previous communications. As it is not necessary to determine this, those telegrams, except one sent by defendant to plaintiff Wednesday evening the 16th upon receipt of plaintiff's telegram, are not quoted. That telegram was as follows:

"Billets on hand ready to ship. Your message satisfactory provided you make inspections Thursday or Friday this week. If billets satisfactory will then sign contract. Wire when your inspector will be here."

Inspection was made on Friday of the billets thus referred to and they were rejected.

The question as to the correctness of plaintiff's claim depends on whether its counter telegram was an absolute acceptance of the offer made by defendant's telegram and confirming letter. If it was not—if it was only a qualified acceptance thereof—no contract arose therefrom; for it is trite in the law that, in order for a contract to arise from the acceptance of an offer, the acceptance must be absolute and unqualified. The reason for this is thus stated in Wald's Pollock on Contract (3d Ed., by Williston) p. 43:

"For unless and until there is such an acceptance on the one part of the terms proposed on the other part there is no expression of one and the same common intention of the parties, but at most expression of the more or less different intentions of each party separately; in other words, proposals and counter proposals."

The question, therefore, whether, in any given case, an acceptance of an offer constitutes a contract may be viewed as one of identity. Do the offer and the acceptance each express one and the same intention, i. e., an assent to one and the same thing?

[1] Without doubt plaintiff's telegram on its face was a qualified, and not an absolute, acceptance of defendant's offer. It contained two sentences. The second called for an acknowledgment of its receipt. The first begins, it is true, by stating unqualifiedly that plaintiff accepted the option, and thereby purchased 15,000 tons billets "on the basis of terms and specifications of option"; but this statement was immediately followed by the words "it being understood that we have the right to have our inspectors at loading point as material is shipped," a matter of which defendant's communications made no mention. The word "understood" is synonymous with "agreed." 39 Cyc. 672, n. 90. And the words "it being understood" mean provided or on condition it is so agreed. The plaintiff in error practically concedes this. Its contention is that, even though this is so, yet the acceptance was in reality, an absolute and unqual-

ified acceptance. It attempts to make this out in this way. It mantains that had its telegram said nothing as to the right of inspection therein specified as defendant's communications did, and hence its telegram been really as well as on its face an absolute acceptance, it would, under the contract thus formed by law, have had such right of inspection. This being so, notwithstanding its acceptance was expressly made conditional on its being so agreed, it was in reality an absolute and unqualified acceptance. It bases its position that in that contingency it would have had such right on subdivision 2 of section 8427 of the General Code of Ohio, a part of which is known as the Williston Sales Act, in force also in New York, which provides as follows, to wit:

"Unless otherwise agreed, when the seller tenders delivery of goods to the buyer he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract."

It cites and relies on the cases of Turner v. McCormick, 56 W. Va. 161, 49 S. E. 28, 67 L. R. A. 853, 107 Am. St. Rep. 904, and Horgan v. Russell, 24 N. D. 490, 40 N. W. 99, 43 L. R. A. (N. S.) 1150, in support of its contention that on the basis that in such contingency it would have had such right, its acceptance was in reality absolute and unqualified. These two cases were both option cases. In each the option and the acceptance was in writing. In each also, though the writing of the optionee began with an absolute acceptance, it was not limited thereto. In the Turner Case the acceptance was followed by a request, and in the Horgan Case by a demand of something not within the option, and which therefore the optionee would not have been entitled to had the writing been limited to the absolute acceptance. In other words, the request in the one case, and the demand in the other, went beyond what the optionee would in that contingency have been entitled to. It was held in each case that a contract had been formed notwithstanding such request or demand. It was so held on the ground that the request in the one case, and the demand in the other, though contained in the same writing as the acceptance, had no relation thereto, and hence did not qualify it, but related solely to the matter of performance of the contract formed by the absolute acceptance which the optionor might comply with or not as he saw fit, just as much so as if the request or demand had been made subsequent to and not simultaneous with the acceptance. Possibly the correctness of the decision in the Horgan Case is not so certain as that in the Turner, on the idea that an agreement to do a certain thing and a demand of the contrary are mutually exclusive and not to be conceived of as parts of the same act. It is not entirely clear that plaintiff in error limits these two cases to a support of its contention as thus stated. Possibly it thinks that support therein can be found for the position that its telegram should be interpreted as meaning that it accepted defendant's offer absolutely, and requested, as the statute authorized, that it might make the inspection specified. Of course, if such was the true meaning of the telegram, then those cases are authority for the position that a con-

tract was thereby formed, and that whether or not plaintiff was entitled to make such inspection—more so, it would seem, if it was so entitled than if it was not. But those cases are no support whatever for the position that such was the true meaning of the telegram. No such meaning can be extracted from it without treating it vilely. The true meaning of the telegram is that the option was accepted provided or on condition that it was agreed that plaintiff should have such right. And this case has to be disposed of on this basis. Nor do they afford any support to the contention that, notwithstanding such was the true meaning of the telegram, it amounted to an absolute and unqualified acceptance of defendant's option on the ground that, had it said nothing as to the right of inspection therein specified, as defendant's communications did, and hence its telegram been on its face as well as in reality an absolute acceptance, it would, under the contract thus formed, have, by law, had such right. A decision that an absolute acceptance of an option followed in the same writing by a request or demand of something not within the option, and to which the optionee is not entitled, creates a contract, is not an authority for holding that one is created when the acceptance is on its face qualified by being made conditional on its being agreed that the optionee shall have a right not mentioned in the option if he would have had such right by virtue of the law had he absolutely accepted the option, on the ground that in such a case the acceptance, though such is its character on its face, is in reality an absolute acceptance. In one particular the question is the same in each instance. It is a question of interpretation. But they differ as to what is the subject-matter of interpretation. In the former instance it is the acceptance. According to its true meaning, is it absolute or qualified? Does the presence of the request or demand in the same writing as the acceptance cut it down from what it is in terms, i. e., an absolute acceptance to a qualified one, whereas, in the latter instance, it is assumed that the acceptance is on its face qualified and the subject of interpretation is the option? According to its true meaning, is it broad enough to include the qualification in the acceptance, so that in reality both, i. e., the option and the acceptance, express one and the same intention, i. e., an assent to one and the same thing? This is made plain by the two illustrations with which plaintiff in error attempts to enforce its contention.

Suppose, it suggests, that it had said in its counter telegram, "it being understood that said discard billets shall be free from pipes or seams," or that the option had been for 15,000 bushels of wheat, and to the acceptance thereof had been added, "it being understood that there shall be sixty pounds in each bushel of wheat." Clearly, in each case there would have been a contract entered into. This because, though the acceptance had been on its face qualified, there was in reality no qualification in that the condition was within the option. What the defendant offered in the one case was "discard billets free from pipes and seams," and what in the other it would have offered was 15,000 times 60 pounds of wheat, for a bushel of wheat consists of 60 pounds thereof. In fact, therefore, each party

expressed one and the same intention, i. e., an assent to one and the same thing.

But these illustrations, whilst they bring out clearly the question we have here, and make plain that the decisions relied on have no bearing on that question, cannot be said to conclude it. It calls for further consideration. We have given so much space to these two decisions because plaintiff in error is possessed of the idea that they are conclusive of this case, when in fact they have nothing to do with it.

To repeat, then, the question before us is this: If an optionee expressly qualifies his acceptance by making it a condition thereof that it is to be agreed that he is to have a right to which he would have by law been entitled had his acceptance been absolute, there being no reference to such right in the option, is the acceptance in reality absolute in that the option and the acceptance each express one and the same intention, i. e., an assent to one and the same thing, and that therefore a contract has been formed? In determining this question there is a dearth of authority bearing upon it. Counsel's research and our own has yielded none.

The case of Hussey v. Horne-Payne, 4 A. C. 311, is cited on behalf of plaintiff in error as having to do therewith, and it is claimed that it is favorable to its contention. There the subject-matter of the negotiations was certain real estate. In the course thereof the seller by letter offered the property at a certain price. In the answer thereto the buyer accepted the offer, adding, "subject to the title being approved by our solicitors." There had been negotiations preceding the sending of these letters, and in them the subject of how the price should be payable, in case agreement should be had as to the amount of it, had been considered, without any conclusion being reached, and, after their sending, this matter was further considered, with like result. The buyer thereupon brought suit for specific performance, claiming that a contract had resulted from the two letters, under which the price was payable upon performance by the seller. In the court of original jurisdiction, i. e., before the Vice Chancellor, this claim was sustained. On appeal to the Court of Appeals the decree was reversed on the ground that the acceptance was not absolute, but qualified, in that the words, "subject to the title being approved by our solicitors," in the acceptance, added a new term to the contract not contained in the offer. It interpreted these words to mean nothing more than provided a good title is shown, but provided our solicitors so determine, thus making them arbiters of that question. On appeal to the House of Lords this decision was affirmed, but not on this ground. It was affirmed on the ground that the two letters should not be considered apart from the entire negotiations, and, considering the entire negotiations, the parties had never come to a concluded agreement. It differed with the Court of Appeal as to the ground upon which it placed its decision. It construed the added words, though not without some doubt, to mean "provided a good title is shown," and assumed that, so construing them, a contract had been entered into apart from the consideration upon which it based its decision. As to the correctness of this

assumption there cannot be the slightest doubt. According to a true interpretation of the seller's offer, the qualification of the acceptance was within its meaning. What the seller offered to convey to the purchaser was a good title to the real estate which was the subject-matter of the negotiation, so that the offer and the acceptance expressed one and the same intention, i. e., an assent to one and the same thing. It was as if the purchaser had said, out of abundant caution, "I understand your offer to mean that I am to have a good title to the real estate, and if my understanding is correct I accept your offer." As such was the true meaning of the offer, a contract would have resulted from the acceptance had it not been for the consideration on which the House of Lords based its decision. Possibly this case is authority here for the position that, if the right of inspection specified by plaintiff in its acceptance was one which it would have had by law had it accepted defendant's option absolutely, and if, further, the acceptance had been made on condition simply that plaintiff should have such right, a contract would have been entered into. We are not disposed to say that it is not. If in such contingencies a contract would have been entered into, it must have been on the ground that, according to a true interpretation of defendant's option, such condition was within it, i. e., plaintiff was to have such right; so that it is true to say that the offer and acceptance each expressed one and the same intention, i. e., an assent to one and the same thing, to wit, that plaintiff was to have such right. In other words, it must be worked out in some way that the option expressed the intention that the plaintiff was to have the right of inspection at the loading point as the material was shipped. Possibly it can be worked out in this way. By the option defendant offered to sell plaintiff material of the character therein described. Thereby it expressed the intention that, if the option was accepted, it should be under obligation to deliver material of such description, and that plaintiff should not be under obligation to accept material tendered unless it was, and, as plaintiff could not determine whether such was the case without an inspection, that it should have the right of inspection. As to the place of inspection, it expressed the intention that plaintiff should have such right at such place as the law allowed. This is the extent to which it can be said that the expression of intention as to this matter went. It cannot be said that the option expressed directly the intention that plaintiff should have the right of inspection at the loading point as the material was shipped. This cannot be said on the idea that defendant is presumed to have known the law that it would have the right of inspection at such place. That one is presumed to know the law is a pure fiction, and a fiction has no place in a search for reality.

Whether in the two contingencies named a contract would have been formed on the basis of the reasoning suggested we do not find it necessary to determine. This is so because neither of these contingencies exists in this case. Take the second one first. It is that plaintiff in its counter telegram conditioned its acceptance on its having the right to make the inspection therein specified. Such was not

the condition set forth in the telegram. It was that it should be agreed that it should have such right. It called for an assent on defendant's part that it should have such right. Plaintiff did not interpret defendant's communications as contemplating that it should have such right. Hence it called for an assent on defendant's part thereto and made its acceptance conditional thereon. The second sentence of plaintiff's telegram is to be accounted for on this basis. An acknowledgment of receipt thereof, without more, would have been an assent on defendant's part to the condition. Had the second sentence been omitted it would not have been otherwise. The telegram would still have called for an assent on defendant's part which possibly would have been given by mere silence.

Defendant so interpreted plaintiff's counter telegram in its response thereto, whereby it postponed the matter of entering into a contract with plaintiff until the inspection should be had.

[2, 3] That an acceptance of an option making no mention of the optionee's having a certain right which he would have as a matter of law, if the option should be accepted absolutely, conditional on the optionor's agreeing that he should have such right, is a qualified acceptance, and such as to prevent the formation of a contract, unless the optionor thereafter in some way agrees thereto, would seem to be clear. By reason thereof it cannot be said that the option and the acceptance express one and the same intention, i. e., an assent to one and the same thing. They differ as to what shall be the form of the contract. It is the intention of the option that the form thereof shall be as therein set forth, whereas it is that of the acceptance that it shall embrace a term expressly giving the optionee such right. Such an acceptance in such a case is in effect a rejection of the option because of its form, i. e., it does not expressly embrace such a term in it. A difference as to the form of a contract is just as effective to prevent the entering into of a contract as one as to substance.

Nor is the right of inspection which plaintiff stipulated for in its acceptance the same right which it would have had had it made no mention thereof and accepted the option absolutely, and that even though the statute relied on by plaintiff in error applies in such a case as we have here. Apart from this statute, how does the matter stand? Had plaintiff so accepted the option, would it have had the absolute right to inspect the material at the loading point, i. e., the point of shippment, as it was shipped? Williston on Sales, § 480, says:

"The place of inspection is prima facie the place where the goods are delivered to the buyer."

He continues:

"The contract may, however, provide for inspection at some other place, and the nature of the contract may be such that, even in the absence of express provision, the law will hold some other place than that of delivery to be the point for inspection."

The reason why in such a case the law will so hold he thus sets forth:

"The chief ground for such an implication seems to be that a reasonable examination cannot readily be made at the place of delivery."

He then gives an instance where such an implication is made:

"It is on this ground that, where goods are shipped to the buyer, inspection need not be made on delivery to the carrier, though title passes at that moment, and the carrier becomes bailee for the buyer."

In note 69 to section 473 he gives a list of cases where it has been held that in such a case the buyer has the right of inspection on the arrival of the goods at their destination.

In Burdick on Sales, § 198, it is said:

"Although the place of inspection, in the absence of special agreement or custom, is presumably the place of delivery, yet the circumstances may show that such a place would be an unreasonable one, or that the parties did not contemplate an inspection there."

He cites, as an instance where the circumstances show that the place of delivery would be an unreasonable one, or that the parties did not contemplate an inspection there, the case of Pierson v. Crooks, 115 N. Y. 539, 22 N. E. 349, 12 Am. St. Rep. 831, which is one of the cases cited by Williston in note to section 470, and was a case of the ordering of goods of a specific quality by a distant purchaser of a manufacturer or dealer, with directions to ship them by a carrier, which is one of the most frequent commercial transactions, and the nature of that involved here.

These extracts from these authors assume that the place of delivery to the carrier on behalf of the buyer is properly characterized as place of delivery to the buyer or place of delivery simply, and lay down that the prima facie or presumptive rule that the place of inspection is at the place of delivery to the buyer has no application to such a delivery to him because of the unreasonableness of such a place of inspection in such a case. In Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393, it is said that in such a case the buyer has "no opportunity to inspect the goods" until they reach their destination.

Mechem on Sales sets forth no prima facie or presumptive rule on the subject. In vol. 2, § 1377, he says:

"The place of inspection, in the absence of a contrary intention, must ordinarily be the place at which acceptance is due—as distinguished from the place of receipt where they are separate—the place at which the buyer is finally bound to accept or reject the goods."

This covers a case of delivery to a carrier on behalf of the buyer, and lays down that in such a case the place of inspection "must ordinarily" be at the destination of the goods, which is the place at which acceptance is due. In support of it he cites Pierson v. Crooks, supra, and Holt v. Pie, 120 Pa. 425, 14 Atl. 389, another of the cases cited by Mr. Williston in connection with that of Pierson v. Crooks.

Now, neither one of these authors deals with the question whether the buyer in such a case ever has a right of inspection at any other place than at the destination of the goods, as, for instance, at the place of delivery to the carrier on behalf of the buyer, and, if so, under what circumstances such right can be exercised. In Williston on Sales, § 473, it is said:

"It is often said in such cases that delivery to the carrier is delivery to the buyer, and it may be urged that the buyer should exercise his right of inspection before such delivery to him, and that, if he fails to do so, he waives his right; but whether or not the buyer is entitled to inspect the goods at the point of shipment, it is clear that the delivery to the carrier, and the transfer of the property thereby to the buyer, do not preclude a right of examination when the goods reach their destination."

He thus refers to the question whether the buyer has the right of inspection at the point of shipment, but passes it by without expressing any opinion on it. In section 480, above quoted, however, he says that inspection need not be made on delivery to the carrier, which implies that, though it need not be so made, it may be. Mechem, in saying that the place of inspection "must ordinarily" be the place at which acceptance is due, i. e., the destination of the goods, would seem to imply that it is not always limited thereto.

In Pierson v. Crooks, supra, Judge Andrews said:

"Where goods are ordered of a specific quality, which the vendor undertakes to deliver to a carrier, to be forwarded to the vendee at a distant place, to be paid for on arrival, the right of inspection, in the absence of any specific provision in the contract, continues until the goods are received and accepted at their ultimate destination."

In saying that the right "continues" until then he implies that it exists before then.

In the case of Lawder Co. v. Mackie Grocery Co., 97 Md. 1, 54 Atl. 634, 62 L. R. A. 795, where a seller in Baltimore contracted to sell a buyer in New Orleans a quantity of canned tomatoes "f. o. b. Baltimore," "terms cash," "buyer to give shipping instructions when requested by the seller," it was held that the buyer had no right to refuse payment for the goods until he had received and inspected them to see if they conformed to the contract, because he had agreed to pay cash for them on delivery to the carrier. It was said:

"There was no reason why the goods might not have been inspected at the seller's place of business in Baltimore rather than at the destination of the goods."

In that case, however, opportunity to inspect the goods after they reached their destination was not a condition precedent to the buyer's obligation to pay therefor, because he had agreed to pay cash on delivery to the carrier. And this was so whether or not he had the right to inspect at the seller's place of business in Baltimore.

These are all the references to the right of buyer in such a case to inspect before the goods reach their destination to which our attention has been called or that we have found. The rule that in such a case the buyer has a right of inspection at the place where acceptance is due, i. e., the destination of the goods, views the matter from the standpoint of the buyer. It is unreasonable that he should not have the right of inspection at such place. And this is so, ordinarily at least, because he has no reasonable opportunity of making an inspection at the point of shipment or elsewhere. To a degree it favors the buyer over the seller. The seller incurs the risk of having the goods, if rejected, on his hands at a distance from his

place of business. Of course he can avoid this by seeing that the goods are of the description called for by the contract. But, in view of this, it is open to claim that the buyer should not also have the right of inspection at the point of shipment if the existence of such right there will be injurious to the seller, particularly if his right of inspection at the place where the goods are destined is a condition precedent both to his obligation to pay for the goods or the freight for their transportation, which it ordinarily is and was, at least as to the price, under the option here. Williston on Sales, §§ 473, 478. An absolute right to inspect the goods at the point of shipment may be injurious to the seller in delaying him in shipping the goods, if not otherwise.

In Pierson v. Crooks, supra, Judge Andrews, in arguing against the seller's right to limit the buyer's right of inspection to the point of shipment said:

"It would be a most embarrassing and inconvenient rule, more injurious even to the dealer or manufacturer than to the purchaser, if delivery to the carrier was held to conclude the party giving the order from rejecting the goods on arrival, if found not to be of the quality ordered."

But at least the right of inspection at the point of shipment, if it exists at all in such a case as we have here, is not an absolute right. The buyer, if he desires to exercise such right, must first notify the seller and request that he be permitted to make such inspection. In the absence thereof, the seller is under no obligation to notify the buyer of his intention to make shipment and to hold it up until the buyer has an opportunity to be present. To this extent, at least, the buyer does not have an absolute right to inspect at the point of shipment.

[4] Coming, then, to the statute on which plaintiff in error relies, it may be a question whether it has any application to the case we have here. It applies "when the seller tenders delivery of goods to the buyer." In a sense, a delivery of goods to a carrier on behalf of a buyer is a delivery to the buyer. In the previous section it is provided that it shall be "deemed to be a delivery of the goods to the buyer." But it is not a delivery to the buyer in the same sense that a delivery to the buyer himself or to his servant is a delivery to him, and in previous sections of this Sales Act we find references to a delivery to the buyer, to a carrier, and to other bailees in the same connection, in which instances, of course, the words "delivery to the buyer" do not include a delivery to the carrier or other bailee on behalf of the buyer. But, assuming that this provision of the statute does apply here, it is not an absolute right of inspection which it confers. The seller is bound to afford the buyer a reasonable opportunity to examine the goods only on request of the buyer that he be permitted to make such inspection. There is the same qualification of the right to make inspection at the point of shipment which we have found is the least qualification thereof in the absence of the statute. What the plaintiff stipulated for in his telegram was not the right on request to make inspection at the loading point as the material was shipped, but the absolute right to do so. Giving the defendant's

option the broadest interpretation possible, it can be made to mean no more than that the plaintiff should on request have the right to make inspection at the loading point as the material was shipped. The plaintiff, by his counter telegram, in effect rejected this, and stipulated that he should have the right of inspection irrespective of any request from it. This necessitated that defendant before making shipment should notify plaintiff that it was about to do so, and give it a reasonable opportunity to be present and inspect, and would involve delay on defendant's part. If the plaintiff had accepted defendant's option absolutely, and any portion of the material was loaded when the option was sent, and had been started moving immediately on receipt of the acceptance, plaintiff would have lost the opportunity of inspecting it at the loading point without any ground of complaint of defendant. This would not have been the case had a contract been formed by the acceptance as it was. Defendant could not have shipped a pound without first notifying plaintiff and giving him reasonable opportunity to inspect it. It is true that, if his absolute acceptance had been followed by a request that he be permitted to inspect the material at the loading point, he could have prevented shipment of any portion without his first having such opportunity. But plaintiff's acceptance was not followed by such a request. He stipulated for an agreement that he should have the right of inspection absolutely when defendant had made him no such offer. It must be held, therefore, that the lower court did not err in giving the peremptory instruction.

On the trial the plaintiff offered to introduce evidence tending to show that at the time of the negotiations there was an established custom in and about Youngstown that, in a transaction involving the sale of discard billets, the purchaser had the right to have an inspector at the loading point, and that such custom was known to the parties. The court, upon objection by defendant, refused to permit the introduction of such evidence. Plaintiff in error urges that the judgment of the lower court should be reversed because of this refusal. There are two grounds why it should not be. Such refusal is not assigned as error. As heretofore stated, seven errors are assigned, but each in a different way raises the single question as to whether the giving of the peremptory instruction was erroneous. The only error which it can be claimed covered this refusal is the sixth. It is in these words:

"That said court erred in refusing and denying to this plaintiff the right to introduce its complete proof on all the issues in this cause, and in refusing to allow, and not allowing, the jury to determine said issues."

This assignment has no reference to the refusal of the court to permit the plaintiff to introduce such evidence as to custom, but merely to its action in giving the peremptory instruction after the plaintiff had introduced its evidence bearing on the existence of the contract without hearing its evidence as to damages. Usually a court hears all the evidence bearing on both the right of recovery and the amount thereof, and, if it thinks that the defendant is entitled to a

peremptory instruction, gives it at the close of all such evidence. This course was not pursued in the lower court, and that properly so. After hearing all the evidence introduced by plaintiff bearing on its right of recovery, it gave the peremptory instruction. Plaintiff intended by this assignment to raise the question whether the giving of the instruction was not premature and nothing else. It filed a motion for new trial. It did not urge the refusal to permit the introduction of this evidence as a ground of the motion. The third ground was:

"That the decision of the court in stopping the further trial of said case and directing the jury to bring in a verdict for the defendant is contrary to law."

[5] It is this same question that is raised by the sixth assignment of error.

But the lower court properly refused to permit the introduction of this evidence. If the existence of any such custom would have made a contract out of the communications which passed between the parties, it should have been alleged in plaintiff's petition. It was not. The petition based its claim that there was a contract solely on these communications. As no contract arose out of them, considered apart from any such custom, the petition was bad and subject to demurrer. A fact essential to make a petition good should be alleged.

Perceiving no error, the judgment of the lower court is affirmed.

NORTHERN PAC. RY. CO. v. THOMPSON, County Treasurer.

THOMPSON, County Treasurer, v. NORTHERN PAC. RY. CO.

(Circuit Court of Appeals, Ninth Circuit. May 20, 1918.)

No. 3085.

1. TAXATION ⊜179—PUBLIC LANDS—RAILROAD GRANT.
Until approval by the Commissioner of the General Land Office, etc., of plats for the survey of lands granted to a railroad company, such lands are not subject to taxation under Act July 10, 1886; so, where the approval was not had until after March, 1915, Montana lands so granted were not subject to taxation for that year or the year previous, the Montana statutes allowing taxation only of property having a taxable status on the first Monday in March.

2. TAXATION ⊜179—PUBLIC LANDS—RAILROAD GRANT.
Where plats showing the survey of lands granted a railroad company were approved in 1915, and in March, 1916, filed in the local land office for Montana, the lands were subject to state taxes for 1916, for the land must have been identified prior to the first Monday in March, so as to have a taxable status under the Montana statutes, as the plats were required to be in the possession of the land office 30 days before filing.

Ross, Circuit Judge, dissenting in part.

In Error to the District Court of the United States for the District of Montana; George M. Bourquin, Judge.

Action by the Northern Pacific Railway Company against J. R. Thompson, as County Treasurer of Flathead County, Mont. There was judgment for plaintiff on two of the three counts, and for defendant on the other, and both parties bring error. Affirmed.

Gunn & Rasch, of Helena, Mont., for plaintiff.

S. C. Ford, Atty. Gen. of Montana, Frank Woody, Asst. Atty. Gen. of Montana, and C. H. Foot and T. H. MacDonald, both of Kalispell, Mont., for defendant.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The Northern Pacific Railway Company brought an action in three counts against the county treasurer of Flathead county, Mont., to recover money paid under protest for taxes on lands of the company for the years 1914, 1915, and 1916. The court below entered a judgment on the pleadings on behalf of the railway company on the first two causes of action, and a judgment for the defendant on the third cause of action, holding that at the time of the assessment of the taxes for 1914 and 1915 the lands of the railway company had not been surveyed, but that they had been surveyed at the time of the assessment for 1916. The railway company by writ of error seeks to review the judgment on the third cause of action, and the county treasurer brings a writ of error to review the judgment on the first two causes of action.

[1] The contention that the court below erred in ruling in favor of the railway company on the first two causes of action cannot be sustained. In consequence of the decision in N. P. Ry. Co. v. Traill

County, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477, holding that until the railroad company shall have paid into the treasury of the United States the cost of surveying, locating, and conveying the lands granted to it in aid of railroad construction the lands are exempt from state or territorial taxation, Congress passed Act July 10, 1886, c. 764, 24 Stat. 143 (Comp. St. 1916, § 4883), providing as follows:

"No lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by states, territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed," etc.

By the statutes of Montana it is only property which has a taxable status on 12 o'clock noon on the first Monday in March of each year that may be taxed for that year. It was shown in the pleadings that for all the lands involved the field work for surveying was done prior to the first Monday in March, 1914, but that the plats were not approved by the surveyor general of Montana until June 12, 1915, and that none of the plats of the surveys was approved by the Commissioner of the General Land Office until December 17, 1915, and that the approved plats were not filed in the local land office until March 8 and March 15, 1916. It follows that at the time of the assessments for the years 1914 and 1915 the survey of the lands involved had not been completed, and therefore the lands had not then been identified, so as to be rendered subject to taxation.

[2] The railroad company contends that the surveys had not been completed on the first Monday in March, 1916, for the reason that at that time the approved plats had not been filed in the local land office. The purpose of the act of July 10, 1886, was simply to remove an obstacle to the taxation of railroad lands that had been surveyed. The express exclusion of unsurveyed lands from the operation of the act was unnecessary and superfluous, because of course the United States had no lien for the cost of surveys on unsurveyed lands. In United States v. Morrison, 240 U. S. 192, 210, 36 Sup. Ct. 326, 60 L. Ed. 599, the court discussed the question whether prior to an authorized withdrawal for forestry purposes there had been a survey, and said that the surveying of the public lands is an administrative act, confided to the control of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, and that it was competent for the Commissioner to direct how surveys should be made, and to require that they should be subject to his examination and approval, "before they were filed as officially complete in the local land office." This was not to say that a survey was not officially complete at any time prior to the filing thereof in the local land office. It may fairly be inferred from other language of the opinion that a survey is officially complete from the time when the last administrative act is done, namely, the approval of the survey by the Commissioner, for on page 211 the court said that:

"The approval of the surveyor general of Oregon did not make the survey complete as an official act. It still remained subject to the examination and approval of the Commissioner."

It is to be conceded that public lands are not regarded as legally surveyed in such a sense as to open them to selection, location, sale, or other disposition until the approved survey is filed with the local land office; but this is not for the reason that the approval of the Commissioner is insufficient to render the survey complete, but for the reason that the local land office has no jurisdiction to deal with lands as surveyed until it has on file the necessary records.

A different principle is involved in determining whether land granted to a railroad company is vested in the company at the time when its property becomes assessable for taxes. For the purposes of taxation, it should be held that lands are surveyed when they are identified; that is to say, when the survey thereof is finally approved. The grant to the railroad company was a grant in præsenti, but title did not vest in any particular tract of land until the same was identified by a government survey. So far as the decisions have gone, the survey and the approval of the survey have been uniformly recognized as the conditions precedent to the vesting of title so as to render lands subject to taxation. 37 Cyc. 868; Clearwater Timber Co. v. Shoshone County (C. C.) 155 Fed. 612; Robertson v. Sewell, 87 Fed. 536, 31 C. C. A. 107; Bird Timber Co. v. Snohomish County, 81 Wash. 416, 143 Pac. 433; Upshur v. Pace, 15 Tex. 531. Said the court in Wisconsin Railroad Co. v. Price County, 133 U. S. 496, 505, 10 Sup. Ct. 341, 344 (33 L. Ed. 687):

"When the government has ceased to hold any such right or interest in the property as to justify it in withholding a patent from the donee or purchaser, and it does not exclude him from the use of the property, then the donee or purchaser will be treated as the beneficial owner of the land, and the same be held subject to taxation as his property."

There is no force in the suggestion that the filing of the plat of the survey marks the limit of the Commissioner's power to disapprove the survey and order another. He has the same power and to the same extent, both before and after the filing of the plat in the local land office. The filing of the plat does not abridge or affect it. Knight v. United States Land Ass'n, 142 U. S. 161, 12 Sup. Ct. 258, 35 L. Ed. 974.

Two decisions of the Department of the Interior are cited to sustain the contention that a survey is not complete until the plat thereof is actually filed in the local land office. The first is F. A. Hyde & Co., 37 Land Dec. 164. All that was ruled in that case was that the survey of certain school lands granted to the state of California was not complete until the plat of the survey "was approved by the Commissioner of the General Land Office." Said the Assistant Secretary:

"Proceedings for survey of public lands have not been regarded as complete, or public lands as surveyed and subject to disposal, until approval of the plat of survey by the Commissioner of the General Land Office."

The other citation is Anderson v. State of Minnesota, 37 Land Dec. 390, ruling that public lands are not surveyed until the approved plat of survey thereof is officially filed in the local land office. This ruling was made with special reference to the right of an applicant to make homestead entry on the surveyed land, and the circular of the Gen-

eral Land Office of January 25, 1904, was cited, which provides as follows:

"Hereafter, when an approved plat of the survey of any township is transmitted to the register and received by the surveyor general, they will not regard such plat as officially received and filed in their office until the following regulations have been complied with: (1) They will forthwith post a notice in a conspicuous place in their office specifying the township that has been surveyed, and stating that the plat of survey will be filed in their office on a day to be fixed by them and named in the notice, which shall not be less than thirty days from the date of such notice, and that on and after such day they will be prepared to receive applications for the entry of lands in such township."

On the first Monday in March, 1916, these lands had been identified. The surveys had been made, and the last administrative act had been done to complete them. The only thing that remained to be done was to place the file mark of the local land office on the approved plats. It appears from the circular of January 25, 1904, that the plats thus finally approved must have been in the possession of the local land office 30 days before they were filed, and consequently they were there before the first Monday in March, 1916. Said the court in Wells County v. McHenry, 7 N. D. 246, 252, 74 N. W. 241, 243, referring to the situation before the enactment of the act of 1886:

"The extraordinary spectacle was presented of a recipient of governmental bounty escaping one just obligation to the state because it had failed to discharge another obligation to the general government. The statute passed to wipe out such an inequitable rule should be given a liberal construction—one which will carry out the purpose of Congress to compel the company to pay taxes when they are justly due."

The judgment is affirmed.

ROSS, Circuit Judge (dissenting in part). I dissent from that portion of the opinion respecting the third cause of action set out in the complaint, and am of the opinion that the plaintiff in the case was entitled to a like recovery on that count as on counts 1 and 2, being of the opinion that under the decision of the Supreme Court in the case of United States v. Morrison, 240 U. S. 192, 36 Sup. Ct. 326, 60 L. Ed. 599, the survey of the public lands therein described was not a completed act until the approved plat thereof was filed in the local land office, and that, as the government survey of the lands was not a completed act at the time of the levy of the assessment, the lands involved in the third count were not then segregated from the public domain, which segregation I understand to be essential to any authority of the state to tax them. Northern Pacific Ry. Co. v. Traill County, 115 U. S. 600, 6 Sup. Ct. 201, 29 L. Ed. 477.

## THE GRACIE D. CHAMBERS.

(Circuit Court of Appeals, Second Circuit. May 22, 1918.)

No. 223.

1. SHIPPING ⟸145—CARRIAGE BY WATER—RIGHT TO FREIGHT.
Freight is earned only upon delivery of cargo.

2. SHIPPING ⟸152—REFUNDING FREIGHT.
Unless the bill of lading contains stipulations to the contrary, freight prepaid must be returned, if for any cause the cargo is not delivered.

3. SHIPPING ⟸152—BILLS OF LADING—CONSTRUCTION.
Where a bill of lading recited: "Restraints of princes and rulers excepted." "Freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost" freight prepaid might be retained whenever delivery of the cargo was prevented because of a restraint of princes; the meaning being perfectly clear, despite the insertion of the conjunction between the words retained and irrevocably.

4. SHIPPING ⟸152—FREIGHT—RETENTION—"RESTRAINT OF PRINCES."
Where the United States government refused clearance papers to sailing vessels whose voyages would bring them within the submarine danger zone, a shipper who had prepaid freight on goods delivered for transportation on such a sailing vessel cannot recover the same; the act of the government amounting to a "restraint of princes" within the bill of lading, which provided for retention of freight prepaid in case delivery was prevented by such restraint.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Restraints of Kings or Princes.]

5. SHIPPING ⟸105—CARRIERS—FREIGHT.
Goods delivered to a carrier by water, even before actual loading on board, are in his custody, and the maritime engagement is then begun.
Learned Hand, District Judge, dissenting.

Appeal from the District Court of the United States for the Southern District of New York.

Libel by the International Paper Company against the schooner Gracie D. Chambers, her tackle, etc., claimed by Florence G. Payne. From a decree for libelant, claimant appeals. Reversed.

Robinson Leech, of New York City, for appellant.

Stetson, Jennings & Russell, of New York City (R. L. Von Bernuth, of New York City, and Frederic Cunningham, Jr., of Washington, D. C., of counsel), for appellee.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

WARD, Circuit Judge. September 14, 1917, the schooner Gracie D. Chambers began to load a general cargo in the port of New York, to be delivered at Bordeaux. Between September 27 and 29 the libelant Paper Company shipped 120 tons of print paper. September 28, at 4:25 p. m., the Treasury Department at Washington telegraphed the collector at the port of New York to withhold clearance of all sailing vessels, any part of whose voyages would bring them within

the danger zone. There was no official publication of this embargo, but it was put into effect, beginning September 29, by the refusal of clearances to such vessels as applied for them. Both the shippers and the shipowners had heard rumors of the embargo as early as October 1.

October 3 the schooner moved out to an anchorage at the Red Hook flats, to save wharfage charges and to await clearance. October 4 the freight was paid against delivery of the bill of lading. October 5 the master applied to the collector for clearance, which was refused. He then applied to the authorities at Washington to except this schooner from the embargo, on the ground that she had begun to load before the order was made. Refusal to allow an exception in her favor was not definitely and finally made until October 10. Subsequently the cargo was discharged and the owners refused to return the prepaid freight.

The bill of lading contained the following provisions:

"Restraints of princes and rulers excepted."

"Freight for the said goods to be prepaid in full without discount retained and irrevocably, ship and/or cargo lost or not lost."

Claimant relies on these clauses for a defense to the libel.

[1, 2] By our law freight is earned only upon delivery of cargo. The ship may have carried the cargo on a voyage of 3,000 miles, and to within 1 mile of destination; but the carrier has earned no freight, and must return any freight prepaid if he has not delivered. The parties, of course, may agree upon a different rule, and for that purpose a clause has been introduced into bills of lading and charter parties from time out of mind that prepaid freight shall not be returned "ship lost or not lost." The clause variously phrased is intended to cover all contingencies. If only the loss of the ship were contemplated, the additional words "or not lost" would be meaningless. What the parties intend is that the carrier shall keep the freight, even if he does not deliver the cargo, unless the failure to deliver be due to the carrier's fault, or to a peril not excepted in the bill of lading or charter party.

[3-5] The clause in this bill of lading is not very artistically drawn, because of the insertion of the conjunction "and" between the words "retained" and "irrevocably." Yet the meaning is perfectly clear; "retained and irrevocably, ship and/or cargo lost or not lost," means retained and irrevocably retained. In the case of The Allanwilde (D. C.) 247 Fed. 236, the words were "retained and irrevocable," but the meaning is exactly the same, to wit, that the prepayment of freight was irrevocable and was to be irrevocably retained. The marine document in each case contained an exception of the restraint of princes. The government's embargo was such a restraint, and an exception covered it exactly as it would cover perils of the sea.

It is to be remembered that goods delivered to the carrier, even before actual loading aboard, are in his custody, and that the maritime engagement is begun; the goods being bound to the ship for the freight and the ship bound to the goods for transportation in accordance with the contract. Bulkley v. Naumkeag Co., 24 How. 386,

16 L. Ed. 599; Scott v. The Ira Chaffee (D. C.) 2 Fed. 401. The money sought to be recovered in this case was paid as freight against delivery of the bill of lading, whether earned or not.

The apparently inequitable result in this case is a temptation to interfere in a contract made by parties perfectly competent to contract, and contracting in the face of the very emergency which subsequently arose. This is to be especially avoided in construing familiar and long-established provisions in commercial documents. The District Judge, in the case of The Allanwilde, supra, made an additional suggestion to the effect that the carrier was bound to transship the cargo. That, however, is a discretion which is to be properly exercised on behalf of the shipper, when he is not present or cannot be communicated with, which is not this case. It is also a privilege which the law gives the master, as representing the owner, to earn his freight if he will lose it by abandoning the voyage. The District Judge thought that if the ship had broken ground—e. g., if she had sailed a mile—the prepaid freight might be retained. Clearly it could not be retained for that reason, because under our law it is not earned until delivery of the cargo. Only the clause in the bill of lading could authorize the retention.

The case of The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747, is not applicable. The voyage in that case was completely frustrated by a fire which rendered the ship unseaworthy and unable to proceed within a reasonable time. The question involved was the right to transship the cargo. The carrier claimed a lien upon the cargo for his freight on the ground that he had been deprived of his right to transship it and so earn his freight. No freight was prepaid or payable, and none had been earned. The court held that the parties had contracted with reference to a particular vessel which no longer existed, and likened the case to that of Taylor v. Caldwell, 3 Best & Smith, 826, in which the owner of a music hall was excused from his contract to let it for a performance because it had been burned down. If the contract in the case of the music hall had contained a provision that the owner was to be liable, even if it burned down, the conclusion would obviously have been different. The House of Lords in the case of Coker v. Limerick S. S. Co., 34 Law Times Rep. 18, lately decided that the shipowner was entitled to recover freight payable on signing bills of lading, although the vessel and cargo were burned during the loading, and before the voyage began, but after bills of lading were signed; the English law on the subject of prepaid freight being the same without any specific contract as our law is when the contract provides that it shall be retained.

Our decision in National Steam Navigation Co. v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563, requires the decree to be reversed, and what was said in Ocean S. S. Co. v. United States Steel Products Co., 239 Fed. 823, 152 C. C. A. 609, as to the retaining of prepaid freight, being concededly obiter, is not controlling.

Decree reversed.

LEARNED HAND, District Judge (dissenting). Under the American rule, prepaid freight, which is not earned till the voyage is com-

pleted, may be recovered back. Griggs v. Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175. Hence under our law the claimants must rely wholly upon the clause in the bill of lading. It must be conceded that in England prepaid freight is now recoverable, even though the ship have never broken ground, but is burned at her pier. Coker v. Limerick S. S. Co., 34 Times Law Reports, 18. We have therefore to determine what meaning to ascribe to language which, like all that used in such documents, is scarcely more than a skeleton of the thought's body.

Much could be said for the libelant's position, had the clause merely read "retained irrevocably"; but it did not. We must take the addition as qualifying the meaning by the conditions which it introduces. The loss of the ship is one condition, and it is urged that the other includes every possible contingency in which the ship is not lost. Read verbally this may be so; yet if one in this way makes the two alternatives logically exhaustive, the result is to give no meaning whatever to the added conditions. They can, I think, hardly have been intended merely as an intensive, and, if they have any qualifying value at all, I see no other so natural as to include contingencies which should frustrate the venture after its inception. At least this, it seems to me, is the most extended meaning which it can have.

So much for mere textual consideration of the language. However, as in all such cases, the meaning of words is best gathered from the purpose that informed them, and that purpose, taken from the standpoint of a fair observer, was to meet the possible difficulties which might arise in the performance of the contract. If a ship breaks ground and is lost, or returns to her port of departure, the shipper has got nothing for his freight. From his view it is an injustice that the ship should hold prepaid freight. Yet the ship has performed part of the service, and from its view the prepayment may be taken at least in part as compensation for the service so far performed. The ship has given a part of her time; her loss is actual. There is, therefore, an entirely understandable reason why the shipper should accept the hazard of the voyage once begun. A nicer justice might, it is true, apportion the prepayment to such time as the ship had in fact lost, if the frustration was partial, but there are obvious practical difficulties in such a course.

This, however, is not the case of frustrating a voyage, but a contract, and, looked at from the time when the contract was made, it can hardly be thought that the shipper was to bear, not only the chance of the voyage, but of the contract. Because, if the contract be frustrated before loading the ship has lost nothing, and if the frustration occurred before breaking ground at most nothing beyond detention while loading and discharging. She remains available for carriage during the same period as before. If one construes the clause as justifying her retention of the prepaid freight, she is in effect given two freights for the same period. Such a conclusion can hardly be within the compass of what the shipper would have conceded or the owner demanded, had they been faced with the possibility at the outset. Therefore I think the result was not within the intention of the parties, when in one way or another some construction must be imposed upon a mere outline of

intent like this. I conclude, therefore, that the clause applies to the voyage only, and that if the voyage be frustrated in limine—that is, before ground broken—it does not entitle the owner to retain the freight.

The authorities, so far as they go, are at least not to the contrary. In The Tornado, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747, the ship was destroyed at her pier, and the owner sued the cargo, demanding freight, because he had not been allowed to complete the voyage in another bottom. The headnote says that the freight was to be paid upon delivery, but an examination of the record does not bear out the statement. In any event the court decided that the shipper was absolved from further performance on account of the frustration of the voyage in limine. The implication at least was that, had the vessel broken ground, the result might have been different. While it is hard to see how the owner could in any case have recovered more than damages, that point was not raised, and the case seems to me an authority for the proposition that a frustration in limine puts an end altogether to the contract of affreightment. Now, I suppose no one would contend that the result would be different under the clause at bar if the ship had been burnt. If so, I cannot quite see why the owner should be allowed to keep his unearned freight, and yet under The Tornado, supra, not be allowed to sue because he was prevented from earning the freight. The Allanwilde (D. C.) 247 Fed. 236, went further than need be here, further perhaps than I should care to go. I have found no other case in point. Prepayment clauses under our law must be construed as intended for security rather than insurance to the owner. I am disposed, therefore, to look narrowly upon a clause like this, which seeks to impose upon a shipper, not only the risks of a voyage, but a gratuity for a voyage never undertaken.

I dissent.

## DALTON ADDING MACH. CO. et al. v. ROCKFORD MILLING MACH. CO. et al.

(District Court, N. D. Illinois, E. D. October 8, 1918.)

No. 84.

1. PATENTS ⊂⊃69—VALIDITY—PRIOR PUBLICATION.
A prior patent for a machine, although the machine may not be practically operative, may operate as a prior publication, which will invalidate a subsequent patent to another, which embodies the same principle in an operative machine.

2. PATENTS ⊂⊃32—IMPROVEMENT—PRESUMPTION FROM GRANT OF SEPARATE PATENTS.
There is a presumption, from the grant of separate letters patent for two improvements on the prior art, that there is a specific difference between the inventions.

3. PATENTS ⊂⊃49—SUIT FOR INFRINGEMENT—PROOF OF UTILITY OF PRIOR STRUCTURE.
As against complainant in an infringement suit, the presumption of utility of the machine of a prior patent is greatly strengthened by the fact that complainant for many years represented it to be useful.

4. PATENTS ⊂⊃66—ANTICIPATION—OPERATIVENESS OF PRIOR MACHINES.
The machine of a patent relied on as an anticipation is not to be deemed inoperative, if it can be made to work by a slight alteration.

5. PATENTS ⊂⊃46—ANTICIPATION—OPERATIVENESS OF PRIOR DEVICE.
The test of operativeness is to ascertain whether the patented device does, even imperfectly, perform the things claimed for it in the methods described.

6. PATENTS ⊂⊃49—PRESUMPTION OF VALIDITY—PRIMARY INVENTION.
The presumption of validity of a patent for a primary invention, covering a machine absolutely new in the art, is much stronger than in the ordinary case.

7. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—ADDING MACHINE.
The Hopkins patent, No. 1,039,130, for an adding and writing machine, as to the adding machine claims is valid, but is for an improvement on a prior machine, and limited to the precise structure shown; also *held* not infringed by a machine made under another improvement patent.

In Equity. Suit by the Dalton Adding Machine Company and the Addograph Manufacturing Company against the Rockford Milling Machine Company and others. On final hearing. Decree for defendants.

Banning & Banning, of Chicago, Ill., for plaintiffs.
Miller, Chindahl & Parker, W. Clyde Jones, and Lincoln B. Smith, all of Chicago, Ill., for defendants.

SANBORN, District Judge. This is an infringement suit on patent No. 1,039,130, issued to the Addograph Company September 24, 1912, on application filed January 24, 1903, by Hubert Hopkins, for a patent on an adding and writing machine. The defenses are noninfringement and invalidity in part. A general idea of the invention may be had by consulting Dalton Adding Machine Co. v. Moon-Hopkins Billing M. Co. (D. C.) 223 Fed. 51; Moon-Hopkins Billing

Mach. Co. v. Dalton Adding Mach. Co., 236 Fed. 936, 150 C. C. A. 198. The patent contains 284 claims, of which 44 are in suit, relating only to the adding machine feature, and not to the typewriter.

The really important question is whether Hopkins is to have the credit of converting the Burroughs machine, with its 81 keys, into a 10-key machine, which will do the same work, or whether a prior inventor, Helmick (No. 630,053, of August 1, 1899), is entitled to this important advance in the adding machine art. Very briefly stated, this advance consisted in the employment of a movable stop field, by which all but 10 of the Burroughs 81 keys, and all but 10 of the same number of connections between keys and stops, are dispensed with. The question of priority depends on whether Helmick produced an operative machine, or whether the 10-key principle was known to him, or made the subject of a printed publication by him, before Hopkins entered the field.

[1] Rev. St. § 4886, as amended March 3, 1897 (Comp. St. 1916, § 9430), provides that the inventor of a new and useful machine, manufacture, etc., "not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before his invention or discovery thereof, or more than two years prior to his application," may obtain a patent therefor. Now, it is obvious that the only question in relation to a machine cannot be whether it is practically operative in all its parts as held in Besser v. Merrilat Core Co., 243 Fed. 611, 156 C. C. A. 309 (where the inventor's conception was fundamentally defective), since the very gist of the discovery may be a new subcombination, or an improvement designed to be added to an already established machine. The new conception might be complete in itself, and the patent covering it operate as a prior publication, or as showing prior knowledge or use, although the patentee might make a mistake in combining it with such prior machine, so that the combination would not operate.

This distinction is well illustrated by the Helmick patent referred to. It might fully describe the mechanism by which the 81-key operation of Burroughs was changed into the 10-key operation, and yet fail to make a fully operative adding machine by not correctly describing the old system of carrying wheels or of recording the result. Helmick made a mistake in one of his patent drawings, so that a machine built exactly like the drawing shows the wrong figures. But he still described an operative mechanism by which the use of 81 keys is reduced to 10. Therefore he ought not to be deprived of the credit of having discovered a new principle, and of exhibiting it in a prior publication, because he may not have produced a complete adding machine. In the Besser Case the device could not be made to work by the use of galvanized iron in an expansible and contractible core, because galvanized iron possesses no resiliency, and so was radically defective. If this be the proper conclusion, it is obvious that the novelty of Hopkins, coming later than Helmick, does not reside broadly in a 10-key machine, but merely in his particular development of the 10-key principle.

"If one inventor precedes all the rest, and strikes out something which includes and underlies all that they produce, he acquires a monopoly, and subjects them to tribute. But if the advance towards the thing desired is gradual, and proceeds step by step, so that no one can claim the complete whole, then each is entitled only to the specific form of device which he produces, and every other inventor is entitled to his own specific form, so long as it differs from those of his competitors, and does not include theirs." C. & N. W. Ry. Co. v. Sayles, 97 U. S. 554, 24 L. Ed. 1053.

[2] There is a presumption, from the grant of separate letters patent for two improvements on the prior art, that there is a specific difference between the inventions. Kokomo Fence Machine Co. v. Kitselman, 189 U. S. 8, 23, 23 Sup. Ct. 521, 47 L. Ed. 689.

"If the combination constituting the invention claimed in the subsequent patent was new, or if the ingredient substituted for the one withdrawn was a newly discovered one, or even an old one performing some new function, and was not known at the date of the plaintiff's patent, as a proper substitute for the ingredient withdrawn, it would avoid the infringement, as a new combination or a newly-discovered ingredient substituted for the one omitted." Gould v. Rees, 15 Wall. 187, 21 L. Ed. 39; Ries v. Barth Mfg. Co., 136 Fed. 850, 69 C. C. A. 528 (7th Circuit).

The objection of the inoperativeness of the Helmick machine is presented under quite unusual circumstances. The following facts appear in evidence:

The plaintiffs owned the Helmick patent from 1903 until it expired. After the purchase of the patent in 1903, the plaintiffs caused it to be reissued, with certain amendments to the specification, and with additional and broader claims, thus representing and asserting the patentability of the invention (and the operativeness of the disclosure), and receiving from the United States a grant based upon such representation. From 1906, when the first Hopkins machine was sold, until 1913, when the Hopkins patent issued, the plaintiffs' machine was marked and sold under the Helmick patent. The plaintiffs thereby held out the patent to the public as a valid patent, and gave warning to the public and to any possible competitors that they asserted and claimed a monopoly under that patent. The plaintiff Dalton Adding Machine Company, under its former name of Adding Typewriter Company, was the defendant in a suit brought by the Standard Adding Machine Company for infringement of certain patents, and in that suit defended on the ground that the Hopkins machine was, in general, the machine of the Helmick patent, modified to employ the swinging type segments and the swinging rack segments of the Burroughs patents.

The present plaintiffs brought suit against the Moon-Hopkins Billing Machine Company for an infringement of the Helmick patent. In that suit the plaintiffs alleged that after they had become deeply involved in the enterprise of manufacturing and selling inventions of the said Hubert Hopkins, and had expended in such enterprise a large sum of money, they learned of the existence of the Helmick patent, and found that the inventions and improvements sold to them by the said Hubert Hopkins were subordinate to, and built upon, and embodying the plan and principle of operation described and claimed in, the said Helmick

patent, and that it was necessary to purchase the said Helmick patent in order to protect their business, and to prevent the loss of the large sums of money that they had already invested and expended. That suit was begun in July, 1911, and was prosecuted until after the issuance of the Hopkins patent, and after the institution of another suit against the same defendants on the Hopkins patent, when the suit on the Helmick patent was voluntarily dismissed by the plaintiffs. During the prosecution of the Hopkins application in the Patent Office the Helmick patent was cited as a reference on many claims, some of which were rejected on such reference; but the applicant made no contention that Helmick was inoperative.

[3] While these facts did not, strictly speaking, create an equitable estoppel in favor of the defendants, because they were not in the same business at the time, and were not misled by the acts of the plaintiffs, yet they do greatly strengthen the presumption of operativeness, and place the plaintiffs in inconsistent positions, from which it is difficult to see how they can be extricated. Rice-Stix Dry Goods Co. v. J. A. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Stockland v. Russell Grader Mfg. Co., 222 Fed. 906, 138 C. C. A. 386. It is a most pregnant proof of utility that plaintiffs for years represented the Helmick patent to be useful. Works v. Betts Machine Co. (C. C.) 27 Fed. 301.

In addition to the above reasons for believing the Helmick device operative, an actual trial of a machine constructed by a workman not skilled in adding machines shows that the device does correctly make the proper addition. It truly shows the numbers struck by the keys, and the final sum. It is slow, difficult to operate, and easily put out of order; but it will correctly add. This is all that is requisite to show operativeness, in the view of the patent law. The correction of the imperfect drawing was clearly a matter requiring only mechanical skill, as appears from inspection of the patent, and from the fact that a workman unskilled in the adding machine art made an operative machine from the specifications and drawings.

[4] A patent relied on as an anticipation is not to be deemed inoperative, if it can be made to work by a slight alteration. Dashiell v. Grosvenor, 162 U. S. 425, 16 Sup. Ct. 805, 40 L. Ed. 1025. In that decision the question is discussed by Justice Brown, who says:

"It does not seem probable that the patentee would have taken out a patent for a wholly inoperative combination, especially in view of the fact that there were at least half a dozen operative devices already in existence upon which his was claimed to be an improvement. Inoperative devices are frequently set up as anticipations, but they are usually such as have proven to be so far failures that the inventor has not taken out patents for them, and are resuscitated for the purpose of showing that other machines similar to the one patented have been invented before. The very fact that a machine is patented is some evidence of its operativeness, as well as of its utility, and where a model is constructed after the design shown in a patent which is not perfectly operative, but can be made so by a slight alteration, the inference is that there was an error in working out the drawings, and not that the patentee deliberately took out a patent for an inoperative device."

"Persons possessed of the most brilliant conceptions are sometimes the poorest mechanics." Packard v. Lacing Stud Co., 70 Fed. 66, 16 C. C. A. 639.

[5] Imperfections in a machine, not affecting the substance of the invention, and which are curable by mechanical skill, do not render the patent inoperative. Pickering v. McCullough, 104 U. S. 310, 26 L. Ed. 749; The Telephone Cases, 126 U. S. 1, 8 Sup. Ct. 788, 31 L. Ed. 863.

"The test of operativeness is to ascertain whether the patented device does (even lamely and imperfectly) perform the acts claimed for it in the method described, and (perhaps) for the reasons given." Engineer Co. v. Hotel Astor (D. C.) 226 Fed. 779; Id., 226 Fed. 949, 141 C. C. A. 553.

[6] The Helmick invention meets this test. It describes a machine absolutely new in the art, and is clearly a primary invention. Such an invention should not be held inoperative without ample proof. The presumption of validity is much stronger than in the ordinary case. Von Schmidt v. Bowers, 80 Fed. 121, 25 C. C. A. 323; Scott v. Fisher, 145 Fed. 915, 76 C. C. A. 447. It requires but slight evidence of successful operation to avoid the defense of want of utility of a patent sued on. Thayer v. Wold (C. C.) 142 Fed. 776; Wold v. Thayer & Chandler, 148 Fed. 227, 78 C. C. A. 350. Under the facts shown in evidence, it should require very strong proof to avoid the patent.

[7] The Helmick patent being valid, both Hopkins and Sunstrand (under whose patent the alleged infringing machine is made) are to be deemed improvers on Helmick, and each entitled to his own form, if there is a patentable difference between them. As already seen, Helmick's invention consisted in the use of a movable stop field, by bringing the 10 keys into co-operative relationship with the 81 stops. The chief difference between Hopkins and Sunstrand is that the former employs a direct and immovable series of connecting links between keys and the rows of stops, and a like series between the respective rows of stops and the printing device, while Sunstrand employs in each instance a series of connecting links, which are fixed with relation to the keys, but movable with relation to the field of stops. Each has thus a different mode of operation, a patentable difference which is enough to distinguish the two forms, and to show noninfringement. Being improvers on Helmick, each is entitled to his own construction.

The bill should be dismissed, with costs.

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## KNAPP v. WILL & BAUMER CO.

(District Court, N. D. New York. October 7, 1918.)

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—DESIGN FOR CANDLE.
The Knapp design patent, No. 44,480, for an ornamental design for a candle, shows a new combination of old elements, which discloses invention; also *held* infringed by a candle which has substantially the same structure and design, producing the same general effect on the beholder.

2. PATENTS ⇐41—INVENTION—DESIGN—NOVELTY.
A design, to be patentable, must disclose originality and the exercise of the inventive faculty; but invention may reside in a new combination of old elements, such as to give a new and an ornamental effect.

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. PATENTS ⊂=174—INFRINGEMENT—PATENT FOR IMPROVEMENT.
If a defendant appropriates a patented invention and improves upon it, and obtains a patent, his patent gives him an exclusive right to the improvement, but no right to use the invention of the prior patent.

4. PATENTS ⊂=252—INFRINGEMENT—DESIGNS.
It is not necessary to constitute infringement of a design patent that the similarity be so precise that every purchaser would be misled, but it is sufficient if ordinarily the ordinary purchaser would be.

In Equity. Suit by Edward J. Knapp against the Will & Baumer Company. On final hearing. Decree for complainant.

Suit in equity to restrain alleged infringement of design United States letters patent of August 12, 1913, to Edward J. Knapp, No. 44,480, and for an accounting.

Harry de Wallace, of Syracuse, N. Y., and Wm. G. Henderson, of Washington, D. C. (W. B. Matterson, of Syracuse, N. Y., of counsel), for plaintiff.

Arthur E. Parsons, of Syracuse, N. Y. (Howard P. Denison, of Syracuse, N. Y., of counsel), for defendant.

RAY, District Judge. [1] The patent in suit, United States letters patent No. 44,480, dated August 12, 1913, and issued to Edward J. Knapp, the complainant, is for a design and the claim reads:

"The ornamental design for a candle as shown and described."

The specification contains the following description:

"The design, as illustrated in the drawing, is a pillar or column, substantially square in cross-section, mounted upon a substantially cylindrical longitudinally fluted pedestal, and surmounted by a bell-shaped cap, with its base lines set back from the square edges of the pillar top."

We have then the following elements *in combination,* which make up the patented design or ornamental candle, and each element must be deemed material, viz.: (1) The pillar or column, square in cross-section; (2) the substantially cylindrical longitudinally fluted pedestal; and (3) the bell-shaped cap, *with its base lines set back from the square edges of the pillar top.* The whole candle is made integral. In this art a bell-shaped cap surmounting the pillar or column of the candle was old. The cylindrical longitudinally fluted pedestal was also old. A *cylindrical* pillar or column was also old, as were pillars or columns of various and many other shapes. It is claimed by complaint that the *square* column was not old. The evidence shows beyond question that the so-called Cleopatra candle was old. The pillar of this candle is square, but not of the same diameter from top to bottom. It slopes and narrows the column gradually and uniformly from base to top. It was not made in the United States, so far as appears, but was imported, and sold and used here long prior to the granting of the patent in suit.

The claim for this patent, as first presented, read: "The ornamental design for a candle *as shown.*" The words *"and described"* were added by amendment after rejection by the examiner. The present specification, as above quoted, was put in by amendment in place of the following:

"Of which the following is a specification, reference being had to the accompanying drawing, forming a part thereof. The figure is a perspective view of the candle, showing my new design."

On appeal, after rejection the applicant said:

"It is submitted that the design, consisting of the square column resting upon a cylindrical pedestal and mounted by a bell-shaped cap, whose base lines are set back from the square edges of the column, thus having an offset between the *flat* sides of the pillar and its cylindrical pedestal, and an offset at the top between the square edges of the column and base line of the cap, is not shown in any of the references cited."

On appeal the examiners in chief said:

"There appears to be a certain unity in design between a rectangular form of the candle and that of the tip, which possesses some degree of novelty and invention."

On this the reversal seems to have been based, and it follows, I think, that the novelty found in this combination consisted, not in the square form of the candle, but in the peculiar and, as found, novel combination of the bell-shaped tip with the square column; that is, the setting back of the base of the bell-shaped cap from the square edges of the square column having flat sides. While, in view of the prior art, it may be doubted whether there is patentable invention in this combination containing this feature, I am inclined to hold the patent valid, as the presumption is in its favor. This candle is certainly attractive and ornamental, and the combination is new. Complainant's candle is not designed for use as a light giver, a burner, but as an ornament. As compared with the round candle, the square candle as a burner, or for lighting purposes, would be and is inferior. The square candle would not show utility or improvement. It would burn down faster at the sides than at the corners, and cause waste and an inferior light.

There is no prior art showing the combination of the patent, but each and every element, standing alone, is substantially old. The coach candle, Defendant's Exhibit T T, shows a bell-shaped cap set back from the rounded top edge of the column, which is cylindrical; but the shoulder is not square, but rounded and curved, forming a sort of trough between the rounded edge of the cylindrical column and the base of the bell-shaped top. Therefore the bell-shaped cap does not have its base lines "set back from the *square edges* of the pillar top." The pillar top, or top of the pillar of this "coach candle," Exhibit T T, does not have square edges or a square shoulder, as does the camplainant's candles, but still the edge of the bell-shaped top is set back from the edge of the column. As to patentability I may cite Bush & Lane Piano Co. v. Becker Bros., 222 Fed. 902, 138 C. C. A. 382 (2d Circuit), where the court said:

"The drawing of the design shows an upright piano case in the conventional form. The casual observer, unless his attention were particularly directed to the new features, would hardly be able to distinguish the patented design from many of the designs found in the prior art. However, we agree with Judge Hazel in the statement that: 'On comparison with the prior art, because of the configuration of the columns, the paneling, and the substantiality thereof, it is easily distinguishable from other upright pianos.'

There are some characteristic features of the design in controversy which distinguish it from those of the prior art, although the general contour of the case is alike in all, and several of the cases of the prior art show designs which, to the ordinary purchaser, whose attention is not called to details, would seem to embody the principal features of the design of the patent. Nevertheless, having in mind the rule applicable to design patents, we cannot say that it is anticipated or void for lack of patentability."

In Grelle v. City of Eugene, Or., 221 Fed. 68, 137 C. C. A. 18, the court held:

"That each separate element in a patented design was old does not negative invention, which may reside in the manner in which they are assembled."

In Ashley v. Weeks-Numan Co., 220 Fed. 899, 136 C. C. A. 465, the same doctrine was expressly held:

"Tested by this rule, the defendant infringes. It is true that there are some differences between the design of the complainants and the design of the defendant. But the differences are differences of detail, and not of substance. The defendant has not made a Chinese copy of the complainants' inkstand, and yet it imparts to the mind the same general appearance, which would deceive an ordinary observer into buying one inkstand believing it to be the other."

[2] It is well settled, if ever there was any question, that a design, to be patentable, must disclose originality and the exercise of the inventive faculty. Smith v. Whitman Saddle Co., 148 U. S. 675, 13 Sup. Ct. 768, 37 L. Ed. 606; Steffens et al. v. Steiner et al., 232 Fed. 864, 147 C. C. A. 56. It is also settled that invention may reside in a *new* combination of old elements, such as to give a new and an ornamental effect. This combination is ornamental, and it is *new,* in that the complainant's candle is made up of the pedestal, old, combined with a square column of equal diameter from pedestal to tip, with plain flat sides, *such* square columns being old, but not in the candle art, forming a new combination of pedestal and square column in so far as the form of the column is concerned; and the combination as a whole is also new, in that the joining of such a pedestal and column, so combined with the tip, in the manner described, is also new. This combination of these elements is a new combination, and it is ornamental. No one had made *this* combination before, or produced this effect. This art of making ornamental candles was old and crowded, and it is some evidence of invention, as distinguished from mere skill, that no one had formed this combination of old elements before. This is not the case of a *mere* choice of old forms, as the substitution of the oval shape for the circular in a lacing hook, but involves change of form of candle, and also the method and form of combining the substituted form of column with other elements. The result was a new form of candle with a distinctive and pleasing effect.

In Strause Gas Iron Co. v. Wm. M. Crane Co., 235 Fed. 126, 131, 148 C. C. A. 620, 625, the court (C. C. A. 2d Circuit), said:

"The test for invention is to be considered the same for designs as for mechanical patents; i. e., was the new combination within the range of the ordinary routine designer? We believe that any one starting to design sadirons, with the art before him, and governed only by considerations of proportion and plan, would have had no difficulty in making the plaintiff's iron."

In Steffens et al. v. Steiner et al., 232 Fed. 862, 147 C. C. A. 56, the court (C. C. A. 2d Circuit) held:

"To sustain a design patent, the design must involve something more than mere mechanical skill; and whether the assembling of old design elements into one unitary design is patentable depends on whether, in the particular case, such assembling rises to the level of invention and the result possesses originality and beauty."

There is this to be said: That in complainant's candle, as in all candles, the column rests upon the pedestal and the tip upon the column. This is the order of assembly in all candles. Having selected a square form of column of equal diameter from base to top, with plain flat sides and without ornamentation of any kind, it was joined in the old way to the old and well-known pedestal before described. Then came the selection with the aid of the prior art of a tip and also the adoption of a mode or form of combining it with the column. Here we find a departure from the prior art and a new combination in one harmonious, ornamental whole. We find some degree of originality and beauty. This involved more than mere selection and assemblage. All this was not mere mechanical act. A skilled mechanic or candle maker might have hit this combination, and he might not. In a somewhat crowded art, no one had.

Having arrived at the conclusion that the patent is valid, the question is presented: Does the defendant infringe? The defendant's candle has the same cylindrical longitudinally fluted base or pedestal as does complainant's candle. Its pillar or column is square in cross-section, except that a depressed panel is cut out from the pedestal to the top of the column on each of the four otherwise flat sides. The sides of defendant's candle are not flat, because of this depression. This depression occupies about two-thirds of the width of each side. Still the general form of the column is square. Where the column joins the bell-shaped cap, which is substantially identical with complainant's cap, there is no shoulder, except at each of the four corners of the column. There is no setting back of the base lines of the bell-shaped cap from the square edges of the pillar top, except at and adjoining the four corners. There we find this setting back. Place the two candles side by side, or at a short distance from each other, and we perceive this difference in the structural appearance of the two candles; but place them at a considerable distance from each other in the same room, and from the observer, and the general appearance and effect is the same. We would not, under such circumstances, note the difference in appearance or form of the candle, unless examining for a difference. It would make a difference whether the room were brilliantly or dimly lighted in noting this difference. It should also be noted that defendant has cut off the corners of its bell-shaped top, or tip, giving it eight sides (not all of the same width, however), instead of four sides; but this does not change the general appearance.

On the market the horizontally fluted cylindrical pedestal is attractive in the combination. When the candle is in its stick or socket, this is to an extent immaterial, as the pedestal is mostly hidden from

sight. But it was old, and defendant had the right to use it. The bell-shaped cap was old, and defendant had the right to use it. I think the substantially square candle, as shown in the Cleopatra candle, was old, and that defendant had the right to use that form. "Modern Soaps, Candles and Glycerin," by Lamborn, published in 1906, says (page 526):

"Candles are molded in a great variety of shapes; the most common shape being that of a plain cylinder of varying diameter and length. A great variety of ornamental forms for religious and decorative purposes are molded in numerous prismatic cross-sections, as square, triangular, octagonal, etc. They may also be molded, longitudinally or spirally fluted. The latter form was originally turned in a lathe, but is now made in molds, and in ejecting the candles from such molds the candles are made to rotate. Decorated candles are of every color, shape, and design. Red, green, pink, white, and yellow are the most popular colors. The decorations are made of wax, and put upon the candles by hand. The wax is colored, so as to give the decorator's artistic taste the widest possible range."

The combination of these elements, substantially as shown, except the setting back mentioned, and the plain, square column of equal diameter from its base to its top, was old (see the Cleopatra candle), and defendant had the right to use that combination; but the peculiar formation of the top end, where the bell-shaped tip joins the column in combination with a square column of uniform diameter from base to top, was new. This the defendant, in view of the patent, had no right to appropriate and use. Defendant did appropriate this set-back formation, so far as the four corners of the candle are concerned, but not in its entirety, for it cut away a portion of each of the flat sides of the column, making the depression mentioned, and cut back up to the very base of the bell-shaped cap. Hence, except at the corners, as stated, there is found in defendant's candle no setting back of the base lines of the cap from the square edges of the pillar top. Defendant also appropriated in his combination the square form of equal diameter from base to top of the column, cutting a depressed panel therein on each side.

It is not the case of "a Chinese copy," but still complainant had a new and a novel design, pleasing to the eye, and defendant has copied it, with the changes mentioned, leaving the same general impression on the beholder who sees the two. The resemblance is such as to deceive the ordinary observer and purchaser. It has not used the Cleopatra candle column. The evidence conclusively shows that for a long time defendant purchased these ornamental candles from the complainant, or rather from a company making ornamental candles in accordance with the design of this patent and sold them in its business. The candles so purchased had been marked "Patented" by complainant; but this, after a time, was omitted in the candles furnished defendant for its trade at its request. The defendant finally concluded to make and sell a candle of its own make, which it did, and thereafter made and sold the candle alleged to be an infringement of complainant's patent and candle. Defendant used cartons and labels similar to complainant's; but this not material, as unfair competition is not involved in this case. The defendant created the differences between the two candles intentionally. Can we say it

was an improvement on the prior art simply (aside from complainant's candle), and not an infringement? Hardly. In defendant's candle we have the same general combination of the same elements which we find in complainant's, with the same general appearance and effect on the eye, but with the change made by cutting out a depression in each of the four flat sides of the candle, and which cutting out of necessity does away with a continuous setting back of the base lines of the bell-shaped cap from the square edges of the pillar top. But still that setting back is present at the four corners and for a little distance to the right and left therefrom.

[3] Defendant says the complainant's candle belongs to the "Mission" age or period in candle making, and that defendant's candle belongs to the "Colonial" style or period in the same art; that the one is distinctive and clearly distinguishable in structure and appearance from the other. This I cannot see. The slight change in the shape of the bell-shaped top has no substantial effect on the general appearance. The defendant has a patent for its design. This is evidence of a possible improvement in design clearly. To it I have called attention. But I think it well settled that, if a defendant appropriates an invention, be it a mechanical apparatus or a design, for which a patent has been granted, and improves upon it and obtains a patent, his patent covers his improvement, to which improvement he has the sole and exclusive right; but this subsequent patent does not impair the rights of the prior patentee, nor does it confer on such subsequent patentee any right to use or appropriate such prior invention duly patented. If he does so appropriate it, and use or make it in connection with his improvement, he infringes. In short, a valid patented invention is in no way annihilated or impaired by an improvement thereon by another and duly patented, and which improvement, in order to be of use, necessarily must be used with the invention of such prior patent. A valid pioneer invention, or an improvement thereon, may be improved upon as matter of course, and the improvement may be patented if it discloses patentable invention; but the improver cannot avail himself of the prior invention and appropriate it, in order to make his patented improvement available and of value to himself, without the consent of the prior inventor. If he does, he is liable as an infringer. Cantrell v. Wallick, 117 U. S. 689, 6 Sup. Ct. 970, 29 L. Ed. 1017. If A. has obtained the right to the use of the original invention, he may also obtain the right to use the improvement, and add it, and thus have the advantages of both. The invention of an ornamental candle, in this day, does not revolutionize the world, nor does an improvement thereon; but it is of value to the inventor of the ornamental design, and, when patented, if patentable invention is disclosed, becomes his property. Improvements are welcome, and, as stated, are patentable, if invention is disclosed.

In this case the difference between the actual design of the pedestal and column of the Cleopatra candle and the pedestal and column of the complainant's candle are not very great, and still are quite marked. This is true of the general appearance of the two. The

evidence is convincing that complainant's candle met with great favor and large sales. The defendant for a time was a large purchaser and seller of these candles. This is some evidence of invention. I cannot find, however, that the differences between defendant's candle and complainant's candle were intended to be merely colorable, and were made to avoid a claim of infringement. Assume such changes were made in good faith, and with the firm belief defendant's candle does not infringe. This is no defense, if it in fact has substantially all the elements of complainant's candle in the same combination, producing the same result in the same way; that is, the same general appearance to the eye of the beholder. The test of infringement of a design patent is stated in Gorham Mfg. Co. v. White, 14 Wall. 511, 20 L. Ed. 731. It is there said:

"The acts of Congress which authorize the grant of a patent for designs contemplate not so much utility as appearance; and the thing invented or produced, for which a patent is given, is that which gives a peculiar or distinctive appearance to the manufacture or article to which it is applied. It is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design. It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same—if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other—the one first patented is infringed by the other. * * * We hold, therefore, that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one, supposing it to be the other, the first one patented is infringed by the other."

Subsequent cases are to the same effect. See quotation from Ashley v. Weeks-Numan Co., supra.

[4] It is not necessary that the similarity be so precise that every purchaser would be misled; but it is sufficient if ordinarily the ordinary purchaser would be. It is not what an expert would say or discover, or what a court may discover, by way of structural differences, but what is the general appearance and the causes thereof. Of course, there is a general resemblance between all candles, and at some little distance most, and possibly all, of the differences between round candles and square candles would not be observed. So of the differences and similarities noted. But no one will contend that infringement of a design patent does not occur because of the fact that at a distance we note no difference in appearance, structural or otherwise. Nor would we say one design patent infringes another for the sole reason the general appearance and effect is the same at a little distance, or at a considerable distance. The design as well as general appearance must be there. Gorham Co. v. White, 14 Wall. p. 526, 20 L. Ed. 731. This defendant, with its candle, has substantially the same structure and design as complainant, producing the same general appearance and effect on the beholder. If the slight structural changes made by defendant had produced a substantially

different appearance in the two candles, both to purchasers and those seeing them when in use, we could not find infringement.

I have examined and compared quite a number of ornamental candles in evidence, some of which have ornamentation other than the general from and design of the candle itself. Exhibits O, P, and R are candles the general form of which is nearly square in cross-section, but each has rounded corners and a deep, angular groove in each of its otherwise flat sides. The pedestal in each is smooth, as is the tip, and this portion slopes with a slight curve gradually from the sides of the column to the wick. The tip of each may be said to be bell-shaped, but the structural formation and general appearance are quite different from those of complainant's candle. The design is markedly different. Exhibit G is twisted, and has a bell-shaped tip, which is set back from the sides of the column; but it was never square in cross-section (although nearly so), as it has rounded corners, and the sides, otherwise flat, are depressed, made concave. It is of greater diameter at the base than at the top, and has no pedestal.

I am constrained to the opinion that complainant's patent is valid, and infringed by defendant, giving to his patent the limitations we should, in view of the prior art.

There will be a decree accordingly.

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## UNITED STATES v. SIX BARRELS OF GROUND PEPPER.

(District Court, S. D. New York. February 27, 1917.)

FOOD ⟸24—FOOD AND DRUG ACT—ADULTERATION OF GROUND PEPPER.

Ground black pepper, although conforming to the standard fixed by the Agricultural Department for pure pepper, as to its properties and their proportions, *held*, on the evidence, to have been adulterated by the addition to the natural berry, when ground, of foreign pepper shells.

Libel by the United States for condemnation of six barrels of ground pepper. Decree for libelant.

On May 24, 1916, the United States attorney for the Southern District of New York, acting upon a report by the Secretary of Agriculture, filed in the District Court of the United States for said district a libel for the seizure and condemnation of six barrels of ground pepper, remaining unsold in the original unbroken packages at New York, N. Y., alleging that the article had been shipped on or about April 18, 1916, by McCormick & Co., Baltimore, Md., and transported from the state of Maryland into the state of New York, and charging adulteration and misbranding in violation of Food and Drug Act June 30, 1906, c. 3915, 34 Stat. 768 (Comp. St. 1916, §§ 8717–8728). The article was labeled in part: "Pure Ground Black Pepper. McCormick & Co. * * * Baltimore, Md." Adulteration of the article was alleged, in substance, in the libel, for the reason that added pepper shells had been mixed and packed therewith, so as to reduce and lower and injuriously affect its quality and strength, and had been substituted wholly or in part for the article. Misbranding was alleged in the libel (as amended during the trial) for the reason that the statement, to wit, "Pure Ground Black Pepper," was false and misleading, in that said article was an imitation of, and was offered for sale

under the distinctive name of, another article, to wit, black pepper, when it was not, and for the further reason that it was labeled and branded so as to deceive and mislead a purchaser in that it purported to be another article.

On September 16, 1916, the said McCormick & Co., claimant, filed its answer denying the allegations of the libel. On December 20, 21, 22, 27, and 29, 1916, the case came on to be heard before the court, trial by jury having been waived by stipulation, and after the introduction of evidence and arguments by counsel, the case was taken under advisement by the court. On February 10, 1917, final arguments were made by respective counsel and briefs filed. On February 27, 1917, a finding was made sustaining the contentions of the government, as will more fully appear from the opinion of the court.

H. Snowden Marshall, U. S. Atty., and Ben A. Matthews, Asst. U. S. Atty., both of New York City, for libelant.

Charles Wesley Dunn and Samuel J. Reid, Jr., both of New York City, for claimant.

MANTON, District Judge. On the 17th of April, 1916, ten barrels of pepper were sold by the claimant to Samuel Wildes Sons Co. under an order calling for "10 barrels pure ground black pepper." The shipment was so marked, and it was conceded by the claimant—indeed, so claimed—that the pepper sold and shipped was pure ground black pepper. On the 24th of February, 1916, six barrels were seized by the marshal, and on the 27th of May, 1916, they were sampled by the libelant and thereafter experimentation with the samples was made as hereafter stated. The samples were taken by the government inspector at the house of Wildes, a hole was bored about a quarter of an inch in bore through one of the staves of each of the barrels by a brace and bit. The samples so taken were from various parts of each barrel. Care was taken in the preservation of these samples, and they were given to the government chemist, Seeker, for analysis in his laboratory. He, together with an assistant, Cummings, conducted the experimentation with the results herein stated. The claimant contends that this pepper was Lampong pepper, a high grade of black pepper grown in the southeastern end of the island of Sumatra, and commonly used in this country. The claimants, McCormick & Co., are large importers of pepper, perhaps the largest in this country, and have been engaged in business in Baltimore for a long period of years.

Pure ground black pepper is defined in Circular 19, issued by the Department of Agriculture on June 26, 1916, as follows:

"*Pepper.*—Black pepper is the dried immature berry of Pipernigrum (L.) and contains not less than six (6) per cent. of nonvolatile ether extract, not less than twenty-five (25) per cent. of starch, not more than seven (7) per cent. of total ash, not more than two (2) per cent. of ash insoluble in hydrochloric acid, and not more than fifteen (15) per cent. of crude fiber. One hundred parts of the nonvolatile ether extract contain not less than three and one-quarter (3.25) parts of nitrogen. Ground black pepper is the product made by grinding the entire berry and contains the several parts of the berry in their normal proportions."

The Department of Agriculture officially advised McCormick & Co. on August 1, 1916, that:

"Ground peppers will be regarded as adulterated and misbranded if, upon examination, they are found not to comply with the standards in Circular 19, office of the Secretary of Agriculture."

The government has taken the position generally, in the enforcement of the federal Food and Drugs Act of June 30, 1906, that a ground black pepper conforming to the standard above mentioned, defined in Circular 19, is not a violation of the act. A product not made solely by grinding the entire black pepper berries and containing the several parts of the berry in their normal proportions, but containing also some added foreign substance, is not a pure ground black pepper, and if shipped in interstate commerce is in violation of the federal Food and Drugs Act. The government's claim is that McCormick & Co., in order to gain an advantage in competition, adulterated its black pepper with foreign pepper shells, and it contends that this adulteration was carried on only to such an extent that an analysis made of the product would find that such adulterated and misbranded pepper would come within the limits of Circular 19.

In Lampong pepper the ash and fiber are comparatively high, due to excess sand, twigs, and trash. Hence, to make room in Lampong pepper for the addition of a larger quantity of shells, all of this excess trash, twigs, and mineral matter is taken out. If, from 100 pounds of pepper, there is removed 3 per cent. or 3 pounds of sand or gravel, leaving 97 pounds of pepper, there would be practically a negligible quantity of ash. By taking shells containing 8.21 per cent. of ash, 25 pounds can be added to the 97 pounds of clean pepper, and the result, 122 pounds mixture, would give 95 pounds less ash than the original 100 pounds contained. This 25 pounds is, of course, in addition to the shells that might safely have been mixed in the pepper before the excess mineral matter was removed. Control of crude fiber could be illustrated in exactly the same way and with substantially the same result. It is claimed by the government that by some such method of scientific control this pepper was standardized and kept as near uniform as possible. In other words, to each grind as much shell was added as could be put in with safety. After the grind, customarily analyses were made, as Shoul testified, to ascertain whether the pepper, as sold, came up to the requirements of Circular 19. Both the government and the claimant concede that, if foreign pepper shells were added to the natural pepper berry, such a mixture would be an adulteration and a violation of the act.

The sole inquiry, therefore, is one of fact, whether under the proof in this case this pepper sold to Wildes and subsequently sampled contained pepper shells as charged in the libel. This question of fact the court is called upon to decide. It may readily be conceded that, with the possibility of mixing pepper shells and the pepper berry, the mix can be so arranged that it will contain the essential properties required under Circular 19. Therefore a chemical analysis alone is not sufficient as a method of detection. Apparently the government recognized this, for it conceived a method of detection and carried out its plan. It experimented, prior to endeavoring to carry out its plan of detection, and found that quinine alkaloid was no part of the properties of pepper or pepper shells. Such experiments were had that it was scientifically determined by the experimenting chemist that, if

quinine alkaloid were mixed with pepper and pepper shells, it could be subsequently detected in the laboratory on analysis.

Two well-known tests of obtaining such result are known to science. One is the so-called modified Thalleioquin test, and the other the hereapathite and fluorescence tests. With this knowledge, after learning that McCormick & Co. were the consignee of 199 bags of pepper shells then at a dock in Baltimore, the government inspectors, on May 27, 1916, proceeded to the dock, and there, with the use of a syringe, mixed quinine alkaloid with each of the bags of pepper shells, putting an equal quantity, 1 ounce, of quinine alkaloid in each bag. After the samples were obtained from the barrels seized at Wildes' house, the government analysts, Seeker and Cummings, examined 19 separate samples from 7 different barrels of the shipment of pepper in issue, to determine the presence of quinine alkaloid. The modified Thalleioquin test was employed. Of the 19 samples so tested, 13 returned a negative and 6 returned a positive reaction. Of the first series of samples 4 returned a negative and 3 a positive reaction. Of the second series of samples, 4 returned a negative and 2 a positive reaction. Of the third and final series of samples, 5 returned a negative and 1 a positive reaction. Three barrels returned a negative reaction upon every test. One barrel returned a positive reaction throughout. One barrel returned 2 positive and 1 negative reaction, and another barrel returned 2 negative and 1 positive reaction.

The examining chemist explains that positive reaction refers to the red color obtained by the application of the test, and alleges that this demonstrates the presence of quinine alkaloid. In addition, the chemist, Seeker, testified that he applied the hereapathite and fluorescence tests on a composite sample of 400 grams of mixture, two samples from barrels A and B, and a third sample from barrel A. These last two tests returned a positive reaction. These tests were those applied by the chemist, Seeker, in his experiments prior to syringing quinine alkaloid into the pepper shells. From his previous experience, Chemist Seeker learned that a minimum of 2 mm. of quinine in 200 gms. of pepper sample would invariably return the positive red color reaction. Approximately 30 cc. of quinine solution was injected into each of the 199 bags of pepper shells as previously described, and Seeker estimates that he can detect the presence of 6 per cent. at a minimum of the treated shells in this pepper, and concludes, upon the result of his examination, that this pepper contains from 10 to 28 per cent. of quinine-treated shells.

The inquiry, therefore, is whether this conclusion is positive and accurate. Cummings, the assistant to Seeker, gives corroborative testimony as to the findings. The entire consignment of 6 barrels is all part of the same grind or mix, and the claimant concedes that, if quinine alkaloid was found in 3 barrels, and that this indicates a mixing of pepper and pepper shells, the 6 barrels should be condemned. Learned counsel for the claimant argues that, assuming that the presence of quinine alkaloid in a part of this pepper has been conclusively established, it follows that, before such evidence can be accepted as

sufficient proof of the addition of quinine alkaloid treated shells to this pepper, the government must show the absence of any other reasonable possibility of quinine alkaloid finding its way into this pepper. In view of the concession that quinine alkaloid is not one of the properties of pepper, and that McCormick & Co. were concededly using pepper shells, I cannot agree with counsel that it is incumbent upon the government to show the absence of any reasonable possibility of quinine alkaloid finding its way into the pepper in any other manner.

The examination made of this pepper by Seeker is attacked as insufficient and inconclusive, because it is said that the examination as made does not demonstrate the presence of quinine alkaloid with the certainty required. I cannot find that any of the experts called by the defense, and they were many, had ever actually experimented in detecting quinine alkaloid where it has been mixed with pepper shells. A very general and severe attack is made, however, upon the sufficiency of the tests used by Dr. Seeker; but when the testimony is examined with care it will demonstrate that it resolves itself largely into a matter of opinion—opinion expressed by men learned in the science, but men who have not experimented. Drs. Pond and Winton gave no testimony at all upon quinine tests. Dr. Penniman stated that the proof was not sufficiently conclusive, and further that "you could not determine the presence of quinine with certainty, unless you had pure quinine to test." But he did admit that if the Thalleioquin test were applied, and the result obtained as claimed by Dr. Seeker, it would be some evidence of the presence of quinine and that positive reaction from the hereapathite test would be evidence of the presence of quinine, and that the fluorescence test would also give some evidence of the presence of quinine, and admitted generally that the three tests were of value in detecting the presence of quinine. He says that the density of the color obtained upon the positive reaction would be indicative of the quantity of quinine present, and that the density would have some relation to the quantity. He then describes a method of making this test, which upon comparison with Dr. Seeker's, I find to be precisely what he did. This materially weakens the opinion evidence of Dr. Penniman.

Dr. Deghuee, another expert, on direct examination, expressed grave doubt of the sufficiency of the tests made by Dr. Seeker, but says that, if both the hereapathite and Thalleioquin tests were made, both together would "make out a little stronger case." Dr. Fuller admits that the three tests used by Dr. Seeker, if the observations of Dr. Seeker are correct, would be some evidence of the presence of quinine alkaloid. Dr. Winton's testimony is not at variance with this method of detection. Dr. Winton further testified that a microscopical examination "in itself" is not sufficient, except in cases where a foreign ingredient, such as almond or cocoanut shells or olive stones are used, and further that "if it were a carefully selected Lampong pepper, which had been cleaned and scoured and some of the natural elements removed, and those were afterwards replaced by pepper shells," he would not expect to find from 10 to 28 per cent. of shells on a microscopical ex-

amination. Such quibbling of experts, expressing but opinion testimony, in the absence of similar experimentation to that of Dr. Seeker, cannot be said to overcome the observations of Dr. Seeker, after his study, research, and labor, which obtained a positive reaction indicating the presence of the detector which was used by the government inspectors.

But it is said that the test of the microscope, as applied by Dr. Rusby, submitted by him, negatives the claim made here. Dr. Winston's doubt of the sufficiency of the microscopical examination "in itself," for the purposes of detection, creates grave doubt as to its sufficiency. He admits that he cannot distinguish the shell of Lampong pepper from Acheen pepper. The latter, Acheen pepper, is a lower grade pepper than Lampong, and it is hard to conceive of how the difference between the lower grade of Lampong pepper and a mixture of shells and the higher grade pepper can be determined by the microscope. This witness produced slides in court, and gave the court an opportunity to observe his various specimens. I do not think that this testimony overcomes that offered by the government, which, I believe, shows by a fair preponderance of the evidence that quinine alkaloid was found in the pepper seized. Quinine alkaloid could not accidentally have found its way into the 6 barrels seized. Mr. Shoul testified that no chemicals of any kind or foreign drugs could possibly get mixed in the pepper or pepper shells, nor can I infer that by some possibility empty cinchona bark barrels might have been used for packing the 6 barrels of pepper. Each of the barrels seized were lined with a heavy grade of paper and there is no evidence in the record that the barrels were used for cinchona bark at any time. Shoul, who had charge of the grinding department, testified that no pepper shells could have accidentally found their way into this lot of pepper, and that, if the pepper did contain added shells, they must have been put in deliberately.

R. A. McCormick seems to have charge of the spice department of the claimant, while M. McCormick is in charge of the drug department. Shoul has been the sole head of the spice department. Large quantities of pepper shells were received within the preceding year of the date of the seizure, which are not satisfactorily accounted for by the evidence of the claimant. The original records produced did not show the disposition of the pepper shells and particularly of the quinine alkaloid marked pepper shells received in this lot of 199 bags. The only record produced of a shipment of pepper and pepper shells, properly marked, was to one Goldberg.

This, with the other testimony in the record, leads to the conclusion that the pepper in question was adulterated, and I will accordingly give a decree for the libelant.

Thereafter, on March 20, 1917, a formal decree of condemnation and forfeiture was entered in conformity with the foregoing decision, and it was ordered by the court that the product should be sold by the United States marshal after having been labeled "Ground black pepper containing from 10 per cent. to 28 per cent. of added pepper shells," and that the costs of the proceedings should be paid by McCormick & Co.

BARRETT v. MACOMBER & NICKERSON CO.

(District Court, D. Rhode Island. September 26, 1918.)

No. 1283.

ADMIRALTY ⇐20—ACTION FOR INJURY TO SERVANT—LAW GOVERNING.

A state Workmen's Compensation Act, which in actions against an employer who has not accepted its terms provides a different measure of compensation from that of the maritime law, does not apply to a seaman injured while employed on a vessel on the navigable waters of the United States.

At Law. Action by Maurice Barrett against the Macomber & Nickerson Company. On demurrer to declaration. Sustained.

Cooney & Cahill, of Providence, R. I., for plaintiff.
Frank Healy, of Providence, R. I., for defendant.

BROWN, District Judge. The declaration states that the plaintiff was employed by the defendant, a corporation of Rhode Island, upon its fishing boat the Macomber, in Portsmouth Bay, a part of Narragansett Bay, and that other servants of the defendant were—

"engaged in handling or swinging aloft a certain hook attached to a net, which hook and net were of great weight, and through the negligent manner in which said net and hook were then and there being handled by the said servants or agents of the defendant corporation, the same fell with great violence upon and against the person of the plaintiff, as he was then and there in said boat engaged in pursuing such duties as were assigned to him."

It is alleged that the defendant corporation had wholly failed to accept the provisions of the Workmen's Compensation Act of the state of Rhode Island then in force; that is, chapter 831 of the Public Laws of Rhode Island, approved April 29, 1912, entitled:

"An act relative to payments to employees for personal injuries received in the course of their employment, and to the prevention of such injuries."

Section 7 of this act provides:

"The right to compensation for an injury, and the remedy therefor granted by this act, shall be in lieu of all rights and remedies as to such injury now existing, either at common law or otherwise; and such rights and remedies shall not accrue to employees entitled to compensation under this act while it is in effect."

The following provisions of section 1 apply to an employer who does not elect to accept the provisions of the act:

"It shall not be a defense: (a) That the employee was negligent; (b) that the injury was caused by the negligence of a fellow employee; (c) that the employee has assumed the risk of the injury."

Upon behalf of the defendant it is contended that this act does not apply to a seaman engaged on board a vessel upon the navigable waters of the United States; that the state of Rhode Island is without power to make the remedy given in such act exclusive, or to abridge or enlarge the responsibilities or duties of the maritime law.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The plaintiff contends that by sections 24, par. 3, and 256, par. 3, of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091, 1160 [Comp. St. 1916, §§ 991, 1233]), the clause "saving to suitors, in all cases, the right of a common-law remedy where the common law is competent to give it," entitles him to maintain a suit which shall be governed both in questions of right and of damages by the law of Rhode Island and by the statute of Rhode Island applicable to employers who have not elected to become subject to the provisions of the Workmen's Compensation Act (chapter 831).

The defendant relies principally upon Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. The plaintiff contends that that case is not controlling, and can be distinguished on the ground that the vessel in question in that case was engaged in interstate commerce, while the boat in this case was not, and that in the Jensen Case the New York state court had granted affirmative relief according to the New York Compensation Act (Consol. Laws, c. 67), whereas in this case the plaintiff does not rely upon any affirmative right created by statute, but upon its common-law right of action as modified by the state statute abolishing the defenses of contributory negligence, the negligence of a fellow employé, and the assumption of risk.

The opinion of the Supreme Court in Chelentis v. Luckenbach S. S. Co., Inc., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, considers directly the effect of the clause "saving to suitors, in all cases the right of a common-law remedy where the common law is competent to give it," saying:

> "Plainly, we think, under the saving clause, a right sanctioned by the maritime law may be enforced through any appropriate remedy recognized at common law; but we find nothing therein which reveals an intention to give the complaining party an election to determine whether the defendant's liability shall be measured by common-law standards rather than those of the maritime law. Under the circumstances here presented, without regard to the court where he might ask relief, petitioner's rights were those recognized by the law of the sea."

The opinion cites the rules laid down in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, and applies the doctrine approved in Southern Pacific Co. v. Jensen:

> "No state has power to abolish the well-recognized maritime rule concerning measure of recovery and substitute therefor the full indemnity rule of the common law."

It is apparent, therefore, that upon the facts alleged in the present declaration the extent of the obligation of the defendant was fixed by the maritime law, which controlled, not only any suit in the admiralty court, but any action in a common-law court; the right being the same in both courts. See Chelentis v. Luckenbach S. S. Co., 243 Fed. 536, 156 C. C. A. 234, affirmed by Supreme Court June 3, 1918, 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171; The City of Alexandria (D. C.) 17 Fed. 390.

Upon an examination of the authorities cited it will appear that by the maritime law the ordinary negligence of the seaman or of oth-

ers of the ship's company, and the doctrine of the assumption of risk, do not debar him from the rights given by the maritime law to be cured at the ship's expense and to his wages.

Upon the question of the principle of liability there would seem to be little difference between rights afforded by the maritime law and those afforded by section 1 of the Workmen's Compensation Act of Rhode Island. In respect to the extent of recovery, however, the rules are substantially different, being limited by the maritime law to wages and to being cured at the ship's expense, using the term "cured," not in an absolute sense, but as the term is applied in the authorities cited in The City of Alexandria (D. C.) 17 Fed. 393 et seq. As the injuries were received and the action brought before the amendment of sections 24 and 256 of the Judicial Code, the effect of such amendments need not be considered on this demurrer.

In view of the reasoning of the court in Chelentis v. Luckenbach S. S. Co. and Southern Pacific Co. v. Jensen, it is not apparent that the distinction which plaintiff seeks to make between an "interstate vessel" and a fishing vessel is material. Though the declaration describes the vessel only as a "fishing boat" it was stated at the argument that she is a fishing steamer.

The plaintiff's employment was maritime, and the facts alleged show a case clearly within the admiralty jurisdiction.

In the dissenting opinion by Mr. Justice Pitney, in Southern Pacific Co. v. Jensen, 244 U. S. 252, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, it is pointed out that the decision of the majority cannot logically be confined to cases that arise in interstate or foreign commerce, and that in cases ex delicto the admiralty jurisdiction is dependent upon locality, and that if a cause of action arise upon navigable waters of the United States, even though it be upon a vessel engaged in commerce wholly intrastate, or upon one not engaged in commerce at all, the maritime courts have jurisdiction. There is a well-recognized rule concerning measure of recovery in such cases, and it seems to follow from the decisions that the state is without power to deprive either the seaman or the vessel owner of the respective rights under the maritime law.

I am of the opinion, therefore, that the Rhode Island statute is inapplicable to the facts alleged.

As the plaintiff's declaration seeks full indemnity under the law of the state of Rhode Island, and does not set forth merely a claim for any wages unpaid or for the expense of cure and maintenance for a reasonable time, according to the rule stated in The Osceola, 189 U. S. 158, 175, 23 Sup. Ct. 483, 47 L. Ed. 760, the demurrer must be sustained.

Demurrer sustained.

## Ex parte HENRY.

(District Court, E. D. Wisconsin. August 10, 1918.)

1. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—EFFECT ON CIVIL AUTHORITY OF STATES.
   Selective Draft Act May 18, 1917, does not in itself change the status of persons of draft age, but recognizes the continued existence of the civil authority of the states over them until actually called for service.
2. ARMY AND NAVY ⊂=20—SELECTIVE DRAFT ACT—STATUS OF PERSONS CALLED.
   A person of draft age and registered, but who had pleaded guilty to a felony under the law of the state, and was in custody awaiting sentence, was not, while having such status, subject to call for service.

Application by Robert Henry for writ of habeas corpus. Denied.

W. J. Kershaw, of Milwaukee, Wis., for petitioner.
H. A. Sawyer, U. S. Atty., of Milwaukee, Wis.

GEIGER, District Judge. The facts as presented by the petition in this matter are in brief these: The applicant, a registrant under the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76), was informed against in the criminal court for Milwaukee county, charged, I believe, with the crime of grand larceny. He was taken into custody, and thereafter such proceedings were had in such court, resulting in his offer and its acceptance of a plea of guilty. On the day of the reception of the plea the municipal judge deferred sentence, I believe, until the second day thereafter. At the time, or shortly after reception of the plea, the local board having jurisdiction over the petitioner served him with a notice, in the ordinary form, requiring him to report for military duty, I believe, on the following day, fixing the hour for his report under the law prior to the time to which the court had deferred the matter of sentencing him. On the following day the petitioner appeared in court, and, in connection with the further proceedings to which the case had been adjourned, advised the court of what had transpired in the meantime, necessarily thereby advising the court of the status which he claimed to have received by virtue of the occurrences in the interim. The court thereupon imposed a sentence, I believe, of two years' imprisonment, which being done, a motion in arrest of judgment was made, which was denied. Thereupon application is made to this court for a writ of habeas corpus, seeking to discharge the custody which necessarily ensues upon the enforcement of the conviction in the criminal court of Milwaukee county.

Petitioner takes the broad view—asserts, rather—that because of the happening of the contingency under the Selective Service Law, through which he is inducted into the military service, the criminal court lost power to impose sentence. Counsel for the petitioner thus states the contention in a brief, after quoting from service law and its regulations, namely:

> From and after the hour just named [quoting from the notice served] you will be a soldier in the military service of the United States. This order of

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

induction [says counsel] is to be found on page 177, section 301, of the selective service regulations and is a part of the law.

The contention is further thus stated:

The chapter on mobilization, section 157, provides with reference to this matter as follows: "From and after the day and hour thus specified each such registrant shall be in the military service of the United States." Further, section 140, page 72, of the selective service rules, provides as follows: "Persons inducted into military service who absent themselves therefrom with the intent to evade military service are deserters"—and further points out the steps to be taken in cases where such registrants fail to report.

Whereupon it is asserted on behalf of the petitioner:

From these provisions it is apparent that the military jurisdiction attaches wholly, completely, and entirely from the date named in this order, if not from the date of the making of this order. No other or subsequent time is named as fixing or establishing his status as a soldier. If this be true, then petitioner's personal right to his liberty within this new status as a soldier and under the military jurisdiction is absolute, subject, of course, to military law. In addition to this there is also involved the right of the federal government to the jurisdiction of his person, because that jurisdiction has never been surrendered to the civil authorities of the state.

Counsel proceeds:

It seems to me that in a broad sense there can be no conflict between state and national jurisdiction in cases of this kind, because, immediately upon declaring a state of war, all states and municipalities within the state, and all sworn officers of such organizations, become agencies and instrumentalities of the national government in the prosecution of such war and the marshaling of all of our resources for the purpose.

It may be said that, if the premise advanced is conceded, if the Selective Service Law be given the effect claimed for it in what I have read, the conclusion is or may be quite inescapable. I am unwilling to accept the premise. The Selective Service Law is just what it professes to be, a law to enable the raising of an army; and, as I shall say in another case to be determined this morning, the law in and of itself does not effect a change of status. There will be no disagreement upon that point. And, certainly, it is the duty of every agency of the state and of the National government and of every municipality to give the fullest possible force and effect to that law in order to accomplish the broad purpose. But that is quite a different proposition from giving it an effect which must ascribe to Congress an absurd intention. The mere fact that Congress has stated in the law that certain persons within certain ages shall be liable to be called does not lead to the result upon the terms of this law that every one of an age within prescribed limits, merely by virtue of the possession of an age between those limits, must go.

[1] Now, that is said for the purpose of getting to this point: That the law contemplates continued existence of civil authority in all of the states until such time when it shall unmistakably be indicated that ordinary civil authority is superseded. And it is not incumbent upon the courts to ascribe to Congress an intention by this law to supersede a status which attached to an individual prior to the time of its attempted application to that individual, which status

involved his incarceration for a violation of the public law of the state. Putting it in a more homely way, it is not fair, at this time, at least, to ascribe to Congress an intention to allow the Selective Service Law to operate as a jail delivery measure. In that connection counsel for the applicant was asked a question, during the presentation of the matter, whether, if a man who is incarcerated in a state or federal penitentiary for a long term had that status at the time of his call, it would be the duty of the warden of the penitentiary, as custodian, to surrender him? I think counsel made the only answer possible consistently with his contention in this case—namely, in the affirmative. I am unwilling to give the law that effect, because it ascribes to Congress an intention which it would have effectuated other than through legislation disclosing merely the ranges of ages and the additional direction that those within those ages shall be liable to be drawn.

[2] Congress intended to recognize the continued existence of the civil authority of the states and the nation, and, necessarily, to recognize the continued status which individuals might have acquired by virtue of the exertion of such continued civil authority; and when it appears, as it appears here, that the individual called was lawfully in the custody of the state, in the exercise of its civil authority to prevent or to vindicate infractions of its criminal law, it should not be said that Congress intended that that status should be superseded; and the courts ought to say, as I do in this case, that in view of the relations subsisting between the federal and the state government, each recognizing the continued existence of the civil authority of the other, a person having this sort of a status under the state authority is not a person liable to be called.

And the application for a writ will be denied.

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## UNITED STATES v. GIN ONG.

(District Court, S. D. California, S. D. September 21, 1918.)

No. 946.

ALIENS ⇐23(2)—DEPORTATION OF CHINESE—LAWFUL ENTRY AS STUDENT.

A Chinese person entering the United States in good faith as a minor child of a member of the exempt class and for the purpose of study, and who is still a student, although obliged to work a part of each day to earn living expenses, is not subject to deportation.

Proceeding by the United States for the deportation of Gin Ong. On review of order of deportation. Reversed.

Robert O'Connor, U. S. Atty., and Clyde R. Moody and L. L. Young, Asst. U. S. Attys., all of Los Angeles, Cal.

Frank Stewart, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. In this case, "it is the contention of the government that defendant's entry was fraudulent, and that, as he

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has not a section 6 certificate, he is illegally within the United States and should be deported to China."

The evidence was that the appellant came to this country when he was about 14 years of age, and was admitted as the minor son of a merchant and member of the diplomatic service. He came here to study the English language; but, as above stated, he came and was admitted as the minor son of one entitled to be and remain here. Under such circumstances, no certificate under section 6 of the act of May 6, 1882, was necessary. United States v. Mrs. Gue Lim, 176 U. S. 459, 20 Sup. Ct. 415, 44 L. Ed. 544; In re Chung Toy Ho and Wong Choy Sin (C. C.) 42 Fed. 398, 9 L. R. A. 204; United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204. No certificate having been demanded at the time of his admission, it must be held as conclusively established thereby that his entry was as the minor child of one entitled to remain, and not as a student on his own account. So far as the record discloses, in my judgment, his entry as such minor child was in entire good faith. The fact that his father returned to China within two years after his entry is not of itself any proof of a fraudulent disposition upon his part either at the time of entry or thereafter.

Diligently, and to the exclusion of everything else, seemingly, he pursued his studies from the time of his entry until nearly a year after his father returned to China and then still continued, but, because of an absence of further funds wherewith to support himself, was compelled to engage himself for a portion of his time in house service. He is still a student primarily, but still, as heretofore, owing to the necessity of the case, is engaged in the performance of house service a part of each day in order that he may live.

I do not understand the government to contend, nor do I understand it to be the law, that conceding his entry into the United States to have been blameless, i. e., devoid of fraudulent intent, and conceding his subsequent conduct to have been lawful, i. e., that he continued to be a student, he may now be deported solely because his father has heretofore returned to China. On this theory, if his father had remained here after the attainment of his majority, he would thereafter have been subject to deportation because of the fact that he had lost his previous and lawful status as "a minor child." I understand, however, the contrary to be the holding. United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; United States v. Foo Duck (D. C.) 163 Fed. 440; United States v. Chin Sing (D. C.) 153 Fed. 590; United States v. Lim Yuen et al. (D. C.) 211 Fed. 1001.

It was said by the Circuit Court of Appeals of this circuit, in a case not dissimilar to this (172 Fed. 856, 858, 97 C. C. A. 204):

"We know of no law providing for the deportation of a Chinese person who has lawfully obtained admission into the United States, and has not become subject to deportation under the general immigration laws."

Whether, if hereafter defendant should change his status from that of a student to that of a laborer, he would be entitled to remain (United States v. Joe Dick [D. C.] 134 Fed. 988), need not now be considered upon the present case. My conclusion is that having come into this country in good faith as the minor child of a member of the exempt

class and for the purpose of study, and being still a student in the substantial aspect of the term, there is no law which justifies his deportation at this time.

The order of deportation heretofore made by the commissioner is therefore reversed.

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UNITED STATES v. SCHENCK et al.

(District Court, E. D. Pennsylvania. September 9, 1918.)

No. 111.

1. CRIMINAL LAW ⇐423(3)—ACTS OF CONSPIRATORS—EVIDENCE.
In a prosecution for conspiracy to obstruct the draft, minutes of meetings of an executive committee kept by one of defendants, a committee member, showing passage of resolutions pursuant to which the other defendant caused circulars to be printed and mailed to persons drafted, *held* admissible against both defendants.

2. CONSPIRACY ⇐24—CRIMINAL CONSPIRACY.
It is immaterial at what time a defendant joined a criminal conspiracy, where it is shown that he joined with others in carrying out the common design.

Criminal prosecution by the United States against Charles T. Schenck, Elizabeth Baer, and others. On motion by defendants named for new trial. Denied.

Francis Fisher Kane and T. Henry Walnut, both of Philadelphia, Pa., for the United States.

Henry J. Gibbons and Henry John Nelson, both of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The jury was directed to acquit the defendants Sehl, Root, and Higgins, because there was not sufficient evidence to connect them with the charge in the indictment.

The motion for a new trial as to Charles T. Schenck and Dr. Elizabeth Baer is based upon the claim that there was not sufficient evidence to establish a conspiracy between them.

[1, 2] The principal ground of error urged is the action of the court in admitting in evidence the minutes of the meetings of the executive committee of the Socialist party on August 13 and August 20, 1917. The evidence showed that Schenck was general secretary of the Socialist party; that the typewritten minutes and the notes in longhand were found in his office at the headquarters of the Socialist party, of which he was in charge, and were identified by him as such, and the longhand notes were stated by him to be those of the secretary. There was testimony to show that Schenck ordered the circulars printed and that they were distributed from the headquarters. There was testimony that the minutes were admitted by Dr. Baer to be hers. In the minutes her name appears as secretary of the meeting. It was further shown by the mouth of the defendants' own witness that she was a member of the executive committee. The minutes were therefore evidence, at least, against her as admissions by her of acts done with others "to the grand inquest unknown" and relevant and material to show her connection with the alleged conspiracy and overt acts in its accomplishment. There was evidence

that what was proposed in the minutes was carried out by Schenck as general secretary of the Socialist party, that the plan adopted by the resolution of August 13th was ratified and further instructions given to Schenck at the following meeting on August 20th after the preparation and printing of the circulars, and that thereafter the circulars were distributed at the office under his charge and were sent through the mails to men who had been accepted in the draft. The minutes were therefore clearly admissible against him as declarations and acts showing a common design in the transaction and in and of themselves forming part of the circumstances in which the alleged conspiracy was formed and carried out. The minutes therefore not only affected Dr. Baer, but her associate in the common enterprise, Schenck. And it is immaterial at what time Schenck joined the conspiracy, or whether he was present at the meetings, provided he and Dr. Baer were joined in carrying out the common design. United States v. Logan (C. C.) 45 Fed. 872; United States v. Cassidy (D. C.) 67 Fed. 698; United States v. Cole, Fed. Cas. No. 14,832; Sommer v. Gilmore, 160 Pa. 129, 28 Atl. 654; Palmer v. Gilmore, 148 Pa. 48, 23 Atl. 1041; McCabe v. Burns, 66 Pa. 356; Stewart v. Johnson, 18 N. J. Law, 87; McCaskey v. Graff, 23 Pa. 321, 62 Am. Dec. 336.

I am of the opinion that the minutes were evidence, not only against Dr. Baer, but against Schenck, and that there was sufficient evidence from which the jury could find the conspiracy and overt acts in furtherance thereof. Motion denied.

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## UNITED STATES v. JIN FUEY MOY.

(District Court, W. D. Pennsylvania. January 19, 1918.)

No. 89.

1. POISONS ⇐2—HARRISON ANTE-NARCOTIC ACT—CONSTITUTIONALITY.
Harrison Anti-Narcotic Act Dec. 17, 1914 (Comp. St. 1916, §§ 6287g-6287q), was within the constitutional powers of Congress, and is valid.

2. POISONS ⇐9—VIOLATION OF ANTI-NARCOTIC ACT—INDICTMENT.
Indictment under Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. 1916, § 6287h), charging that defendant did sell, barter, exchange, and give away narcotic drugs, contrary to its provisions, *held* sufficient.

3. POISONS ⇐4—ANTI-NARCOTIC ACT—CONSTRUCTION—"SELL, BARTER, EXCHANGE, OR GIVE AWAY."
The provision of Harrison Anti-Narcotic Act Dec. 17, 1914, § 2 (Comp. St. 1916, § 6287h), making it a criminal offense to "sell, barter, exchange, or give away" certain narcotic drugs, except on orders on prescribed forms, does not include only cases where title to the prescribed drug was in him who undertook to dispense it.

Criminal prosecution by the United States against Jin Fuey Moy. On motion in arrest of judgment. Overruled.

E. Lowry Humes, U. S. Atty., and John M. Henry, Asst. U. S. Atty., both of Pittsburgh, Pa. John W. Dunkle and N. S. Williams, both of Pittsburgh, Pa., for defendant. Joseph Stadtfeld and R. P. Marshall, both of Pittsburgh, Pa., for Jos. Fleming & Son Co.

THOMSON, District Judge. The defendant was indicted under section 2 of the Harrison Anti-Narcotic Act (Act Dec. 17, 1914, c. 1,

38 Stat. 786 [Comp. St. 1916, § 6287h]), wherein it is charged that he did unlawfully sell, barter, exchange, and give away certain drams of morphine sulphate to different persons therein named. The indictment contains 20 counts, in form all the same, differing only in the names of the persons to whom the drugs were distributed and the amount dispensed. A motion to quash the indictment was made, alleging the unconstitutionality of the Harrison Act, and that the indictment as drawn does not charge the defendant with the commission of any offense prohibited by the act. The motion to quash was overruled, and the defendant tried and convicted on eight counts. The case is now before the court on a motion in arrest of judgment.

The reasons assigned in support of this motion are: First, the so-called Harrison Anti-Narcotic Act is unconstitutional and void; second, the so-called Harrison Anti-Narcotic Act is unconstitutional and void, so far as it does or attempts to control and regulate the practice of a physician; third, the indictment as a whole does not charge the defendant with the commission of any offense prohibited by the so-called Harrison Anti-Narcotic Act, or with the commission of an offense prohibited by any other law of the United States; fourth, there was no competent evidence submitted upon the part of the United States to sustain the verdict rendered by the jury.

[1] First, as to the constitutionality of the Harrison Act. It seems to me that this act should be read in the light of the previous legislation of Congress in restraint of the traffic in opium. The act approved February 9, 1909 (35 Stat. 614, c. 100, § 1 [Comp. St. 1916, § 8800]), provides:

"That after the first day of April, 1909, it shall be unlawful to import into the United States Opium in any form or any preparation or derivative thereof: Provided, that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law."

The second section (section 8801) provides a maximum punishment of two years' imprisonment and $5,000 fine, of any person who shall fraudulently or knowingly import or assist in doing so, any opium or derivative thereof contrary to law, or who shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such drug after importation, knowing the same to have been imported contrary to law. It further provides that the drug shall be forfeited and destroyed, and that possession of such drug shall be deemed sufficient evidence, if unexplained, to authorize conviction of the person in possession thereof.

It is plain that Congress had the power to prohibit altogether the importation from foreign shores of this deadly narcotic, or they had the right to admit it under such restrictions as to its use, in protection of the public, as they might see fit to impose. And having done so, they may prescribe such regulations, penal or otherwise, as will effect the purpose intended; that is, to restrict its use to that for which alone it was admitted.

Every provision of the Harrison Act which deals with the use of the drugs in question shows that its use is restricted and intended to be confined to medicinal purposes only. This is in harmony with the law prohibiting its importation or use for any other purpose. It is a matter of common knowledge that no opium is produced in the United States; but this can perhaps not be assumed, when the act undertakes to deal with those who produce it. In the case of the United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the Supreme Court said:

"A statute must be construed, if fairly possible, so as to avoid, not only the conclusion that it is unconstitutional, but also grave doubts upon that score."

In the same opinion the court said:

"It may be assumed that the statute [the Harrison Act] has a moral end as well as revenue in view, but we are of opinion that the District Court, in treating those ends as to be reached only through a revenue measure and within the limits of a revenue measure, was right."

I am not convinced that the Congress in enacting the Harrison law exceeded its constitutional powers, and the motion in arrest of judgment on this ground cannot be sustained.

[2] Again, it is urged that the indictment as a whole does not charge the defendant with the commission of any offense prohibited by the Harrison Act. All the counts of the indictment, which are the same in form, are drawn under the second section of the act, and charge that the defendant was a practicing physician, and did unlawfully, willfully, etc., sell, barter, exchange, and give away certain drams of morphine sulphate to the person therein named, not in pursuance of a written order from such person on a form issued in blank for that purpose by the Commissioner of Internal Revenue. There is no possible question that the indictment thus far distinctly charges an offense under section 2, but the pleader, instead of stopping here, undertook to negative the exception of that section in relation to the distribution of drugs by a physician. It was not necessary for the pleader to do so, as the exception is entirely separated from the words of the section defining the offense. The rule of pleading in such case is clearly set forth in United States v. Cook, 17 Wall. 168, 21 L. Ed. 538. The first exception to section 2 is in these words:

"Nothing contained in this section shall apply (a) to the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon, registered under this act, in the course of his professional practice only"

—with certain requirements as to the keeping of records. As it was not necessary in this case for the pleader to negative the exception, the only question is: Is there anything in the subsequent words of the indictment that destroys the legal effect of the previous words, wherein the charge is specifically and legally made? After charging the offense as above quoted, the indictment proceeds:

"That is to say, that at the time and place aforesaid he, the said Jin Fuey Moy, did unlawfully and willfully, knowingly and feloniously sell, barter, ex-

change, give away, dispense and distribute to the party named twelve drams of morphine sulphate in manner following, to wit, that the said Jin Fuey Moy at the time and place aforesaid, did issue and dispense to the said party a certain prescription, a copy of which is as follows: [Then follows a copy of the prescription signed by the defendant, wherein the morphine sulphate is prescribed to be used as directed]—and the said party [naming him] was not then and there a patient of the said Jin Fuey Moy, and the said morphine sulphate was dispensed and distributed by the said Jin Fuey Moy not in the course of his professional practice only, contrary to the form of the act," etc.

The offense under section 2 is to sell, barter, exchange, or give away any of the prescribed drugs, except in pursuance of an order on the designated order form. The registered physician may successfully defend on the ground that he did not dispense or distribute the drug in question except to a patient in the course of his professional practice only. But this is a defense which must be set up by the physician, in order to escape the general requirements prescribed in section 2. The words in which exception (a) are negatived in the indictment must be read in the light of the words in which the offense is charged under the general provisions of section 2. It is alleged under the videlicet that the defendant "did unlawfully, willfully, knowingly, and feloniously sell, barter, exchange, and give away," with the additional words "dispense and distribute" to the party the drug in question. This is followed by giving the manner of the disposition of the drug, by the issuing of the prescription therein set forth. To this there can be but one meaning; that is, that the drugs were disposed of by means of the prescriptions. Then follow the words which take the physician out of the exception, namely, that the party was not a patient of the physician and the drug was dispensed and distributed by the physician not in the course of his professional practice only. It cannot be complained that the words "dispensed and distributed" are not used in the enacting clause of section 2. In order to escape the effect of the words "sell, barter, exchange, or give away," used in the enacting clause of section 2, the physician must show that the drugs so disposed of were dispensed or distributed by him to a patient in the course of his professional practice. I held before, and still hold, that the indictment sufficiently charges a violation of section 2 of the Harrison Act.

[3] It is insisted that to dispense or distribute the drugs on a prescription is not to sell, barter, exchange, or give them away. It is held in United States v. Stowell, 133 U. S. 1, 10 Sup. Ct. 244, 33 L. Ed. 555, that statutes enacted to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they may impose penalties or forfeitures, are to be fairly and reasonably construed so as to carry out the intention of the Legislature. It could hardly be said that words of so broad import as "sell, barter, exchange, or give away," when standing together, were intended by Congress to be so narrowly and strictly construed as to include only those cases where title to the prescribed drug was in him who undertook to dispense or distribute it. The lawmakers were not concerned with the ownership of the drug, but with its unlawful distribution. It could matter

nothing to the poor victim in the fatal clutches of the drug habit, where title was to the narcotic which was thus dispensed to him, every grain of which brought him nearer to the grave. Whether the victim procured the drug from the hand of the physician, or through the druggist on an order or prescription of the physician, can matter nothing, unless we look blindly at the letter of the act, wholly forgetting its spirit and purpose.

In the last place, it is claimed that there was no competent evidence submitted on the part of the government to sustain the verdict of the jury. On the contrary, there was a superabundance of such evidence. Unless this section of the act is a dead letter, it would be hard to conceive a more flagrant case of its violation. The defendant seems to have obtained an extended and unenviable reputation as a dispenser of morphine sulphate. From Brooklyn to Chicago, from all the Lake cities, the victims of the drug habit came to Dr. Moy and procured the drugs. When we remember that the testimony showed that morphine sulphate is at least eight times as powerful and deadly as opium; that one-half grain is a large dose, and a grain a fatal dose to the nonuser; that there are 60 grains in one dram, and that the defendant time and again issued prescriptions for as much as 16 drams to one person, or 960 grains, enough to kill an entire regiment; that he issued, in the two years preceding the indictment, 11,687 prescriptions, calling for 15,796 drams, and in addition 43,200 one-half grain morphine tablets and 30,600 one-quarter grain tablets, we can have some conception of the magnitude of the defendant's unlawful business in the distribution of narcotics; and when we consider that for every dram prescribed he received $1, the commercial feature of the unlawful business becomes painfully and alarmingly apparent.

The motion in arrest of judgment is overruled.

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KNOXVILLE GAS CO. v. CITY OF KNOXVILLE et al.

(District Court, E. D. Tennessee, N. D. September 23, 1918.)

No. 27.

1. GAS ⟸14(1)—GAS COMPANIES—CHARGES—FRANCHISE ORDINANCE—CONTRACT.

   The voluntary acceptance by a gas company of an ordinance granting it a franchise on condition that it should never charge more than a stated price for gas to consumers created a contract which, if within the powers of the city, is binding on the company during its term.

2. GAS ⟸14(1)—CONTRACT FIXING RATES—CONSTITUTIONALITY.

   A contract between a gas company and a city, fixing a maximum price to be charged by the company for gas, if reasonable and valid when made, cannot be set aside by a court of equity as confiscatory and unconstitutional, because subsequent conditions have made such rate unremunerative.

3. GAS ⟸14(2)—GAS COMPANIES—POWER OF CITY TO FIX RATES—CONDITIONAL FRANCHISE.

   Under Shannon's Code Tenn. 1896, § 2208, providing that a gas company shall not use the streets of a city "until the consent of the

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municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done," a city has authority in such ordinance to fix maximum rates to be charged by the company.

4. GAS ⊂⇒14(2)—GAS COMPANIES—REGULATION OF RATES.

A statute providing that gas companies shall charge reasonable rates, not exceeding a rate named, does not impair the right of a city, authorized by another statute to prescribe terms on which a gas company may use its streets, to prescribe a maximum rate as one of such terms.

In Equity. Suit by the Knoxville Gas Company against the City of Knoxville and others. On motion by complainant for restraining order. Denied.

Lindsay, Young & Young, of Knoxville, Tenn., for plaintiff.

J. Pike Powers, Jr., City Atty., and Cates & Price, all of Knoxville, Tenn., for defendant city of Knoxville.

McCALL, District Judge. Several weeks ago this case was before me on application for temporary injunction upon the bill and affidavits thereto and affidavit of the defendants. After consideration, the application for temporary injunction was denied. Since that time there have been filed a sworn answer and an additional affidavit in support of the bill. The case is before me again, first, for an order setting a date for the hearing of the case; second, for a restraining order; and, third, for a reference to a special master.

There is nothing new presented on this hearing by the plaintiff affecting the merits of the application for an injunction, other than the additional affidavit of Mr. Young, which brings the financial showing of the company down to July, 1918, and tends to intensify the present financial stress of the plaintiff. The application at this time for a temporary restraining order, in view of the fact that the court had recently denied a temporary injunction, is rather an unusual proceeding. The court sees no sufficient reason to change its views in regard to the injunctive features of the case, and the application for temporary restraining order is denied.

It appearing that the bill and answer present questions of law about which no evidence need be taken, it was suggested that the court at this time pass upon the questions of law and its action upon them to determine the order to be made on the application for reference. It was agreed at the hearing that it was a useless and expensive proceeding to send the case to reference, unless the court should be of opinion that the plaintiff upon the record as now presented, assuming that the issues of fact raised by the bill and answer were decided in its favor, is as a matter of law entitled to the redress it seeks.

[1] The undisputed facts on which the questions of law arise are as follows: In about 1854 the Knoxville Gaslight Company (hereafter called the Light Company) was organized and chartered under the laws of Tennessee. It was granted a franchise to furnish the city of Knoxville with gas for a period of 50 years, and for that purpose it was permitted by the city to occupy its streets and alleys with pipes, conduits, and other equipment necessary for the production and distribu-

tion of gas to consumers. In 1903 certain parties acquired the stock of the Light Company and obtained a charter from the state under the name of the Knoxville Gas Company. It was the intention and purpose of the Gas Company to acquire the property, rights, and franchises of the Light Company. This it did after having obtained the consent of the city by ordinance so to do. See section 2, Exhibit A to the bill, and chapter 70, Acts of Tennessee 1889; Shannon's Code of Tennessee 1896, § 2047.

The Gas Company thereafter made application for and was granted a franchise to run for 50 years to operate its plant over and along the streets of said city by ordinance passed September 8, 1903, as amended by ordinance approved September 28, 1903. Section 11 of this ordinance provides that, unless the Gas Company shall, within 20 days from and after the passage and approval of the ordinance, accept the same and the terms thereof, and notify the city of Knoxville of such acceptance in writing, all rights, privileges, and franchises granted to said city should be absolutely forfeited. Within the 20 days so allowed the Gas Company in writing accepted the franchise, together with its terms and conditions, in language as follows:

"To the Mayor and Aldermen of the City of Knoxville: You are hereby notified that the undersigned, Knoxville Gas Company, has accepted and does hereby accept the ordinance passed and approved by you on September 8, 1903, granting it certain rights, privileges, and franchises, as amended by the ordinance passed and approved September 28, 1903, and the terms and provisions of said original ordinance as amended aforesaid."

The Gas Company thereupon entered upon the manufacture and supplying of gas to the city of Knoxville under the terms and conditions of said ordinance as previously accepted by it, and has so continued from that time without complaint, so far as this record shows, until after the entrance of the United States into the war with Germany. On the 5th day of March, 1918, the city of Knoxville passed an ordinance making it unlawful for any person, firm, or corporation supplying any article of public utility within the corporate limits of the city of Knoxville to any consumer or patron intentionally to demand, accept, or charge any unlawful rate or charge for the public utility article or service rendered or required to be rendered under its contract or franchise with the city of Knoxville to a consumer or patron.

Upon this state of fact, the bill is filed to have its contract with the city, made under the ordinance of September 8, 1903, declared ultra vires and void, and to enjoin the city from enforcing as against it the ordinance of March 5, 1918, on the grounds that said two ordinances are in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, in that they deprive the plaintiff of its property without due process of law and without just compensation. A paragraph of section 7 of the ordinance of September 8, 1903, provides as follows:

"And said Gas Company shall at all times furnish to the consumers of gas within the limits of the city of Knoxville gas of not less than fifteen candle power and shall never charge for the same more than $1.10 per thousand cubic

feet, less 10 cents per thousand cubic feet if paid on or before the 10th day of the succeeding month."

It is alleged in the bill, notwithstanding the Gas Company accepted the franchise as provided in the ordinance, on the terms and conditions that it would never charge more for gas than the maximum rate named in the ordinance, that its acceptance of the franchise in writing is not binding upon it, by virtue of the Fifth and Fourteenth Amendments of Constitution of the United States, and that upon a sufficient showing that it is not earning a reasonable return upon its investment, a court of equity has the power to relieve it from its contract so made, and permit it to charge such a price per thousand cubic feet of gas as will afford it a reasonable net return on the investment.

The city by ordinance said to the company:

"You may occupy my streets and alleys for 50 years with your pipes and conduits and other things necessary to the manufacture and distribution of gas, upon condition that you will never charge more than $1.10 per thousand cubic feet therefor."

The company replied in writing that it accepted the franchise with that condition. I think that constitutes a contract between the city and the Gas Company. Vicksburg v. Vicksburg Water Co., 202 U. S. 453, 26 Sup. Ct. 660, 50 L. Ed. 1102, 6 Ann. Cas. 253; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 27 Sup. Ct. 762, 51 L. Ed. 1155; Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341; Cunningham v. City of Cleveland, 98 Fed. 657, 39 C. C. A. 211; Illinois Trust & Savings Bank v. Arkansas City, 76 Fed. 271, 22 C. C. A. 171, 34 L. R. A. 518; Omaha Water Co. v. Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614.

[2] The contract, having been made by the Gas Company before it acquired the gas plant in Knoxville, and, indeed, prior to having any investment there, was made, as I think, at arm's length with the city. The city did not have to grant to the Gas Company this or any other franchise. The Gas Company did not have to accept this or any other franchise not to its liking. It is not alleged in the bill that the city was guilty of deceit, fraud, or duress, or that the plaintiff was in any way overreached in the premises. Hence it must be that the Gas Company entered into the contract freely, voluntarily, and understandingly. That conditions have radically changed within the last year must be admitted. The war with Germany has brought about a great scarcity of labor on the one hand, and largely increased its cost on the other. The cost of all material entering into the making and distributing of gas has also greatly advanced.

Under such circumstances, has a court of equity power to relieve the Gas Company from a contract it voluntarily and understandingly made, and permit it to make another more to its liking, upon the ground that subsequent events have so changed conditions that the contract made by the plaintiff is no longer remunerative? In Blake v. Pine Mountain Iron & Coal Co., 76 Fed. 624, 22 C. C. A. 430, the Circuit Court of Appeals of the Sixth Circuit said:

"It is just these hardships which a court of equity cannot relieve by rescinding contracts, or making new ones by construction, through the process of

balancing blame for nonperformance, and going into parol proof of other or different conditions than those expressed in the contracts themselves, intentions relative to failures not anticipated at the time the contracts were made, or not provided for by the terms of the agreements, as they would have been if the parties had not been improvident in neglecting such protection as was open to them against possible failure and change of conditions. The reasonableness of a contract, its fairness and justice, are to be determined as of the time when the parties entered into it, and so of the intentions involved in the construction of their agreements, and none of these are to be influenced by the force of subsequent changes in events or circumstances."

The Blake Case was cited and followed by the Circuit Court of Appeals for the Sixth Circuit in Ruggles v. Buckley, 158 Fed. 950, 86 C. C. A. 154. So that it would seem to follow that, unless plaintiff can bring itself without that general rule, a court of equity has no power to relieve it, notwithstanding, under the new conditions that have arisen, the contract has become a hardship on the plaintiff, and it cannot be performed without loss.

[3] It is insisted, however, that the city had no power to incorporate into the ordinance a maximum price which the company should charge for gas, because the power to do so had not been delegated to it by the state. Upon this assumption it is argued that the contract made is unenforceable and void as to the plaintiff. By Acts of Tennessee 1887, c. 176, the General Assembly amended Acts of 1875, c. 142, and also the charters of gas companies incorporated under the latter act, by providing, immediately following the clause permitting the use of municipal streets, the following:

"And provided further, that no one of the streets or alleys of said city shall be entered upon or used by said company for laying pipes, conductors, or otherwise, until the consent of the municipal authorities shall have been first obtained, and an ordinance shall have been passed prescribing the terms on which the same may be done." Shannon's Code of Tennessee 1896, § 2208.

The plaintiff was incorporated six years subsequent to the passage of the act of 1887, and is subject to the provisions of that act. In the case of City of Knoxville v. Africa, 77 Fed. 507, 23 C. C. A. 258, the Circuit Court of Appeals for the Sixth Circuit had under consideration section 1921 of Milliken & Vertrees' Code of Tennessee, a provision relating to street railways similar in terms to the provisions, supra, relating to gas companies, as follows:

"No one of the streets of said city shall be used by said company, nor shall any rails be laid down, until the consent of the city authorities has been first obtained, and an ordinance shall have been passed, prescribing the terms upon which the same may be done."

In discussing this provision, Judge Lurton, speaking for the court, said, among other things:

"As we have already seen, the power to grant a right of way upon the public streets resides primarily in the Legislature of the state. This power may be, and is, by provision of the street railroad law, delegated to the municipal government of the city in which the proposed railroad is to be operated. This delegated authority is a trust, to be exercised for the public benefit by ordinance duly passed, and subject to the limitations and for the purposes intended by the statute. What is the extent of the power intrusted to the city government? The answer is plain. 'It is to consent' to the occu-

pation of such of the streets of the city between the termini named in the charter, and within the general route designated therein, as shall be deemed in the interest of the public. * * * The power to 'consent,' and the power to prescribe the 'terms' upon which it will consent, implies the power to refuse consent, or to consent only upon terms and conditions deemed wise"—citing authorities.

While the Africa Case related to street railway franchises, I think by analogy it applied with full force to the act of 1887, supra, relating to gas companies. In McQuillin, Municipal Corporations, § 1644, it is said, if the consent of the municipality is necessary to the use of streets by a public service company, the municipality, upon granting the right to use the streets, may impose conditions on the company which would be binding on the company if it accepts the right to use the streets. In Boerth v. Detroit City Gas Co., 152 Mich. 654, 116 N. W. 628, 18 L. R. A. (N. S.) 1197, the court said:

"Where a gas company is given the right to occupy city streets only with the consent of the municipality, the city is under no compulsion to grant such right, and as to the price thereof may impose such restrictions as to rates as it sees fit."

The ordinance under consideration having been duly enacted under statutory authority, and the terms and conditions thereof having been voluntarily and understandingly accepted by the Gas Company in writing, constitutes a contract from which the plaintiff cannot be relieved without the consent of the city. Cleveland v. City Ry. Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Cleveland v. Cleveland Elec. Ry. Co., 194 U. S. 538, 24 Sup. Ct. 764, 48 L. Ed. 1109; Detroit v. Detroit Citizens' Ry. Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

Per contra, Home Telephone Co. v. Los Angeles, 211 U. S. 270, 29 Sup. Ct. 50, 53 L. Ed. 176, is cited and relied on by the plaintiff. I think that case is clearly distinguished from the instant case. There it is held that a municipality may not enter into a contract fixing unalterably during the term of franchise the charges for telephone service, and thus disable itself from exercising the power of regulation, under a charter authority to regulate telephone services, and to fix and determine the charges therefor, in the absence of clear and affirmative legislative expression granting such power, or from which such power may be necessarily implied. That is not the question before the court. The clause of the contract under consideration undertakes to bind the Gas Company to only one thing, to wit, that the Gas Company during the life of the franchise will never charge for gas more than the rate named. The city has not undertaken to nor has it contracted away its charter right of "prescribing the terms" on which the Gas Company may occupy its streets. It may yet permit the Gas Company to increase or under proper showing require it to decrease charges for its service. In the Telephone Case, supra, Mr. Justice Moody said:

"It is obvious that no case, unless it is identical in its facts, can serve as a controlling precedent for another, for differences, slight in themselves may through their relation with other facts turn the balance one way or the other."

Other cases cited and relied on by the plaintiff in support of its contention are not in point, as I think, and for that reason it is unnecessary to comment on them.

It is further insisted that the ordinance is not binding on the city, and hence could not be on the Gas Company, since the present or any succeeding law-making power of the city may change or repeal the ordinance outright. In other words, the contract made by virtue of the ordinance is unilateral, and hence voidable by either party. This contention I think is met and refuted in Omaha Water Co. v. City of Omaha, 147 Fed. 1, 77 C. C. A. 267, 12 L. R. A. (N. S.) 736, 8 Ann. Cas. 614, where it is pointed out that municipal corporations have two classes of powers, the one governmental, in the exercise of which their officers may not bind the municipalities beyond their terms of office; the other business or proprietary, in the exercise of which they are governed by the rules as individuals or private corporations. The contract here is ordinancial in form, in the making of which I think the city officials were in the exercise of their business or proprietary functions. Under Knoxville Water Co. v. Knoxville, 189 U. S. 434, 23 Sup. Ct. 531, 47 L. Ed. 887, it may be, if it appeared that by charging the maximum rate the Gas Company was realizing more than a reasonable return, the city might require the Gas Company to charge less than the maximum rate named in the ordinance, since the contract only provides that the Gas Company shall never charge more than the rate named, and does not provide that it may not be required to charge less if the lesser rate appeared to be reasonable. That case is not authority for the insistence that the Gas Company, without the consent of the city, may charge more than the maximum rate, for which it contracted to furnish its patrons with gas.

[4] Section 2209, Shannon's Code of Tennessee (1896), provides that gas companies shall have the privilege of erecting, establishing and constructing gasworks, and manufacturing and furnishing gas in towns, cities, and villages by means of public works; the gas companies being authorized to charge a reasonable price for gas not higher than the price allowed by existing charters to gas companies heretofore chartered in this state, provided that said companies shall never charge more than one cent for every cubic foot of gas used, etc. Chapter 142, Acts of Tennessee of 1875, as amended by chapter 176 of the Acts of Tennessee of 1887.

This section is made a basis for the argument that under its charter the gas company has a right to charge one cent for every cubic foot of gas, if it appeared such charge was reasonable. This probably would be true, but for the provision of section 2208 of Shannon's Code, which provides that the streets and alleys shall not be entered or used by a gas company for laying pipes, conductors, or otherwise, until consent of the municipal authorities shall have been obtained, and an ordinance shall have been passed prescribing the terms under which the same may be done. Under this section the city of Knoxville by ordinance prescribed, as one of the terms on which the Gas Company might use its streets and alleys, that it

would never charge more than $1.10 per 1,000 cubic feet for gas. The Gas Company accepted this franchise, with this limitation, and by so doing it would seem to have waived whatever rights it might otherwise have had under section 2209, supra, and thus during the life of the present contract cut itself off from the benefit of any rights it may otherwise have had under said section.

My conclusions are: (1) The ordinances of which complaint is made are neither violations of the Constitution of the United States or of the state of Tennessee. (2) The municipality of Knoxville, in passing them, was acting within its delegated powers. (3) The ordinance of September 8, 1903, as amended by ordinance of September 28, 1903, conditionally granting to the Gas Company a franchise on certain terms, when accepted by the Gas Company in writing, constituted a valid contract between the city and Gas Company. (4) In the absence of a showing of deceit, fraud, duress, or that plaintiff was overreached in the premises, a court of equity has no power to grant the relief sought by the bill.

The parties may, if they be so advised, treat this as a final holding on the law questions presented, and enter a final decree dismissing the bill, with costs; or, if they be so advised, they may treat this merely as a denial of the application for restraining order, and refer the case to a master, to take proof and report upon such issues of fact as counsel may deem necessary in relation to the capital invested in the enterprise, its running expenses, the amount of its earnings annually, and the net earnings of the company, if any, and any other issues of fact that appear material—the special master to be agreed upon by counsel, or, failing in this, the court will appoint one.

JOHN E. McCALL, Judge of the United States District Court, Western District of Tennessee, sat herein by designation for the judge of the United States District Court, Eastern District of Tennessee.

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## UNITED STATES v. McHUGH et al.

(District Court, W. D. Washington, N. D. November 23, 1917.)

No. 3780.

1. CONSPIRACY ⟸23—OFFENSE—NATURE OF.

A conspiracy may be defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner, and while the gravamen of the offense is the conspiracy, some overt act by one or more of the conspirators is necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conspiracy.]

2. CONSPIRACY ⟸47—SELECTIVE SERVICE ACT—PROOF.

In a prosecution for conspiracy to violate Selective Service Act May 18, 1917, the common design is the essence of the charge, and proof that the alleged conspirators knowingly worked together for a common illegal

purpose will establish a conspiracy; it not being necessary to show a formal explicit agreement or undertaking.

3. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—EXEMPTIONS.
Under the Selective Service Act and regulations making all male citizens of certain ages liable to military duty, registrants having dependent parents may be exempted.

4. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—"DEPENDENT."
A "dependent" is a person who is not self-sustaining and relies on another for support, and under the Selective Service Act and regulations, providing for exemptions to registrants having dependent parents the exemption should not be granted if the parent is able to maintain himself, either from property which he owns or from his labor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

5. CRIMINAL LAW ⟸651—EVIDENCE—APPEARANCE OF DEFENDANT.
In a prosecution for conspiracy to violate Selective Service Act, by falsely claiming exemption on the ground that registrant's father was dependent on him for support, the jury could determine the physical condition of the father from their observation of him while on the stand, etc., and his physical infirmities need not be established by medical expert testimony.

6. CRIMINAL LAW ⟸369(1)—TRIAL—OTHER OFFENSES.
In a prosecution for conspiracy to violate the Selective Service Act, where it was asserted that a registrant and his father falsely represented that the father was dependent on the registrant, the jury cannot consider whether the father was guilty of misapplication of funds in his possession which he claimed did not belong to him, but were trust funds.

7. CRIMINAL LAW ⟸561(1)—"REASONABLE DOUBT."
A "reasonable doubt" is such a doubt as would make a man of ordinary prudence and sensibility and decision, in determining an issue of like concern to himself, pause or hesitate in arriving at his conclusion; and that is the criterion for the jury in a criminal prosecution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Doubt.]

John Edward McHugh, James A. McHugh, and James Gordon were indicted for conspiracy to commit an offense against the United States by violating the Selective Service Act of May 18, 1917. Verdict directed for the last-named defendant, and the case against the other defendants submitted to the jury.

Clay Allen, U. S. Atty., and Ben L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

Beeler & Sullivan and Winter S. Martin, all of Seattle, Wash., for defendants.

NETERER, District Judge. The issue in this case is raised by the indictment which has been returned by the grand jury, to which each of the defendants have entered a plea of not guilty, and that places in issue every material allegation in the several counts of the indictment. While the indictment has two counts, it in fact charges only one offense. It is a different statement of the same charge against the defendants, and it will be considered only as one count; and

when I refer to the indictment, or to any count in the indictment, it will simply be to the one offense. Count 2 completely states the charge with the reference therein made to count 1.

It is charged that the defendants did unlawfully and feloniously combine, conspire, confederate, and agree together, and one with the other, to commit an offense against the United States; that is, to violate the act of Congress approved May 18, 1917 (40 Stat. 76, c. 15) entitled "An act to authorize the President to increase temporarily the military establishment of the United States," and the regulations prescribed by the President, the object and purpose of the conspiracy being to obtain the discharge of John Edward McHugh from the Selective Service Act upon false, fraudulent, and fictitious grounds, and to which the said John Edward McHugh was not lawfully entitled; that each of the defendants knew that the said John Edward McHugh was at that time not entitled, and would not thereafter be entitled, to such exemption from the said act and regulations, it being the intent and purpose of the defendants to make and file a false, fraudulent, and fictitious claim for exemption from said act and the regulations made by the President, by asserting that he is the son of an aged and infirm father, dependent for support upon the labor of the said John Edward McHugh, and each and all defendants, knowing the said assertion and claim to be false, made certificates and affidavits in support of such claim, and that said affidavits and claim were false, as fully set out in the indictment, and then states the doing of certain overt acts to carry out the objects of the conspiracy as set out. In the indictment, likewise, is set out the charge that the statements with relation to the income were false, and known to be false by the defendants.

[1, 2] A conspiracy may be defined as a combination of two or more persons by concerted action to do an unlawful thing, or to do a lawful thing in an unlawful manner. The gravamen of the offense charged is conspiracy, but some overt act in furtherance of the conspiracy must be done by some one of the conspirators in order to give life to the conspiracy. To make the statute clearer, if possible, I will call your attention to its three essential elements: First, the act of conspiring together of two or more persons; second, to commit the offense charged in the indictment, which is a violation of the Selective Service Act, as charged; and, third, the doing of what is termed as an overt act, or the element of one or more of such parties doing one or more acts to effectuate the object of the conspiracy.

The common design is the essence of the charge, and, while it is not necessary, to establish a conspiracy, to prove that two or more persons met together and entered into a formal and explicit agreement or understanding, or that they should directly or by words or in writing state what the unlawful scheme was to be, or the general understanding or detail of the plan or means by which an unlawful combination was to be made effective, if they knowingly work together for a common purpose, and that purpose is the illegal act charged as their object, and if the acts of the parties so dovetail and

fit together that the conclusion is inevitable that there was an understanding between them as to the thing to be done, as charged, it would establish a conspiracy. In other words, where an unlawful object is sought to be effectuated, and two or more persons, actuated by a common purpose of accomplishing that object, work together in any way in furtherance of the unlawful scheme, every such person is a party to the conspiracy, no matter what part he may take in carrying out the general plan; and where several persons are proven to have combined together for the same illegal purpose, any act done by one of the parties in furtherance of the original concerted plan, and with reference to the common object, is, in contemplation of the law, the act of the whole party, and any statement or declaration made by one of the parties during the pendency of the illegal enterprise is not only evidence against himself, but is evidence against the other parties, who, when the combination is proven, are as much responsible for such declaration, and acts to which they relate, as if made or committed by themselves.

In this case evidence was received of a statement claimed to have been made by the defendant James A. McHugh, the father, in the absence of the other defendants, John Edward McHugh and Gordon. So far as Mr. Gordon is concerned in this case, the action will be dismissed. In other words, you will be directed to return a verdict of not guilty as to him. There is no evidence before the court that would justify the court in submitting to you the claim of the government, charging him with being a party to the conspiracy in this case, if one did exist. This statement of the defendant James A. McHugh cannot be received against John Edward McHugh, unless it is established by the evidence that the conspiracy was entered into.

[3] You are instructed that, under the Selective Service Act referred to, all male citizens of the United States, and others enumerated, and which is not material here, are liable to military duty; and the law provides the manner of selecting the persons within military ages for services in the National Army. It also provides that certain men who are eligible may be exempted from military duty under certain conditions, and that a person selected may at the time of registration, or later, when actually called, make his claim for exemption, and, if he comes within the class of persons provided, it may be granted. One of the classes exempted are those who have persons designated by the act dependent upon them for support. It is sufficient for the purpose of this case to say that a man having a father or mother dependent upon him for support may be exempt. In this case it is charged that the defendants conspired, as I have already stated, to have John Edward McHugh make a false claim for exemption, asserting that his father is dependent upon him for support, and that this claim was supported by affidavits made by the defendants James A. McHugh and James Gordon which have been filed in this case.

The government contends that the claim made by the defendant John Edward McHugh was false, that the defendants knew it was false, and that it was the intent and purpose of the defendants to

evade the law in the manner charged; while the defendants contend that the claims made by John Edward McHugh were true, or at any rate they believed them to be true, and they acted honestly with relation to the claim made. The issue before you is not complicated. It is simply to determine whether the defendants did conspire as charged in this indictment, and did the acts which it is charged, or some of the acts charged in the indictment as having been performed by them. The claims made by the defendants for exemption might be untrue, and yet the defendants might not be guilty of the crime charged. It is also contended on the part of the defendants that, if the statements made by the defendants were understatements of income or overstatements of the physical condition of James A. McHugh, the father, these statements were merely errors of judgment, and were made from honest motives, and not purposely or intentionally to mislead the officers of the government, whose duty, under the Selective Service Act and the rules promulgated for carrying it out, it was to determine between these conditions. You have the story from both sides and you must determine where the truth in the case lies, and what the fact therefore, is.

You are instructed that intent is an element of the offense charged, and it must be established by the same degree of proof as any of the other elements that enter into the completed offense. It is psychologically impossible to enter into a man's mind and determine by testimony what the actual intent was. So that you must conclude with relation to the element of intent from the facts disclosed by the evidence in this case, taking into consideration the conduct of the parties with relation to the matter charged, and every circumstance which bears upon the issue, bearing in mind that a man intends the natural consequences of his act intentionally or knowingly done; and when you have considered all of the acts of the parties, their relation to each other, the object to be attained, the things that were done, the circumstances under which they moved, and the motives that prompted the various acts so far as disclosed from the evidence, from all these you will determine what the intention of the parties really was.

[4, 5] You are instructed that a dependent is one who is sustained by another; one who relies upon another for support; a person who is not self-sustaining. In order for the defendant James A. McHugh to be dependent for support upon the defendant John Edward McHugh, every other source of support or sustenance would have to be eliminated. If the defendant James A. McHugh had money or means from which he could get support, or had property which could be converted into means of support, then he would not be dependent, or if the defendant James A. McHugh was able to support himself by physical labor, irrespective of means or money. Suppose he had no lands and no money; is he physically in such a condition that he could support himself and family, together with the help of other members of the family, without John Edward McHugh's support—such members of the family as the testimony discloses?

The exemption provision made in this statute is for the purpose of not depriving an indigent person of means of support, not the particular means of any person; and in considering the dependency of the defendant James A. McHugh you will take into consideration all the testimony which has been offered and admitted with relation to his status and what he owns. The government's witnesses have testified that he owns several different tracts of land—you will bear in mind what the testimony was—and have placed values upon the respective tracts. Those values you will recall from the evidence. It is also admitted in evidence that the defendant James A. McHugh owns 28 cows, 4 horses, and some farming implements and utensils; the value, I believe, admitted to be $2,460, or in excess of $2,400. The amount you will take from the admission that was made or from the evidence. The defendant James A. McHugh admits that he has on deposit money amounting to something over $7,000, I believe. You will remember what the testimony discloses. But he states that this is all held by him in trust—$7,000 in trust for his little boy Peter, $300 as guardian for one party, and $600, I believe, as guardian for another party. He says he is entitled to receive the income from the $7,000; but, of course, he is not entitled to receive any income from any trust funds held by him as guardian. Now, if you believe, or if it raises a reasonable doubt in your minds, as to whether he holds this money in trust, then you cannot consider the amount held in trust in arriving at his means of support. You can only consider the income upon the $7,000, whatever that may be, as disclosed by the evidence. In determining whether these funds are trust funds, you will take into consideration all the evidence which has been received, and weigh that evidence by the same rule that you will weigh the other testimony in the case, and to which I will refer later in these instructions.

[6] You are instructed further, with reference to the trust funds referred to, that the defendant James A. McHugh is not on trial for the misuse or misapplication of trust funds in this case. Such liability would only arise and could only be presented in a state court, and after demand had been made for the money; and you will not consider this matter of trust funds in any relation of accounting, or as a matter of default in the performance of duty as a guardian of public funds, as stated, and you will only consider the trust funds matter with relation to the matters bearing upon the income.

You are further instructed that, as to the income from the lands, cows, and horses which he owns, you must determine from the evidence; but you are instructed that the law does not contemplate that a man can hold property which he does not use himself, and the value of which can be utilized for the support of himself and family, and not use it for that purpose, and claim that he is dependent. Before the defendant James A. McHugh can be dependent for support upon John Edward McHugh, he must exhaust his own resources. By that I mean his property in excess of what he needs to properly house his family, and such as his family can cultivate for their own use and for the purpose of pasturing such cows as may give milk for his family and supply the family with butter for their home consumption. He cannot

operate a dairy ranch at a loss, and claim the son's labor as exempt to pay the expenses of such ranch, or for his support, when he has other property of value which can be utilized for his support.

Much evidence has been received and comment made with relation to income for the year previous to the time of the charge made. That was permitted to go before you, so that you would have all of the facts and circumstances before you. If you find that the defendant James A. McHugh was dependent upon John Edward McHugh for support, and believe or have any reasonable doubt as to whether this statement was made ignorantly as to income, even though you believe it was wrong, then, of course, the defendants would not be guilty upon that charge.

Evidence was likewise received upon the physical infirmities of the defendant James A. McHugh, and that condition is a fact to be established by the evidence in the case, and need not be established by medical expert or physician testimony, where the facts presented to the jury are convincing or sufficient to raise a reasonable doubt in the minds of the jury; but when the defendant had consulted a doctor with relation to the illness complained of, and has not consulted him for six years, the jury must consider such fact in connection with all the evidence bearing upon the matter of physical infirmity. The jury also has the right to take into consideration their observation of the defendant before the jury—his appearance—and consider that with his testimony, and all other testimony presented, and conclude with relation to his physical infirmity. Upon this phase of the case you are instructed, however, that if you are convinced by the evidence that the defendant is not dependent, and that he has means of support of his own, then his infirmities would not be material.

You are further instructed that evidence has been presented in this case of reputation as to truth and veracity in the community in which he resides, and likewise as to being a law-abiding citizen. You are instructed that such evidence is competent in a criminal case. It is the only instance where hearsay testimony can be received. Character or reputation testimony is necessarily hearsay. It is testimony as to what the people—the man's neighbors or the people residing in the community where he lives—think about him or say about him with relation to his truthfulness or with relation to his being law-abiding; and it is based upon the presumption that, when a man has lived in a community a long time and has earned a reputation, he is entitled to it, and that what his neighbors, what people in the community, say about him, should be considered by the jury. You will give consideration to this testimony that was presented, for it was presented on both sides. Now, this evidence is only valuable when the witnesses disclose to you that they have a basis upon which to base their conclusion; and you will approach that testimony from that viewpoint, and give the weight to those witnesses who you believe are the better qualified to testify with relation to reputation for truth and veracity and for being law-abiding. You will weigh that testimony by the same rule as you will all of the other evidence in the case.

You will try this case fairly and impartially, bearing in mind that

you are the sole judges of the facts. The responsibility of finding what the fact in this case is rests solely upon you, and you will appreciate that the United States does not want an innocent man convicted, nor does it want a guilty man to escape after he has been proven guilty beyond a reasonable doubt. The issue in this case is of great importance to the government and to the defendants. The government can only be maintained by the enforcement of law. You, as jurors, are not concerned with the policy of the law. You are simply concerned with the facts in this case as applicable to the law which has been passed by Congress. You may personally believe the law to be bad, and one which should be repealed; but that is not a matter of your concern, nor mine. That is a matter for the Congress of the United States, and it is the lawmaking body provided by the Constitution; and if officers neglect to enforce the law, or jurors decline to fairly and honestly discharge their duty, and law enforcement should thereby fail, it would be only a short time until a condition of anarchy would obtain, and no stable government could be maintained.

The defendants are clothed with the presumption of innocence, which prevails throughout the trial and until it is overcome by evidence in this case which shows to your satisfaction beyond every reasonable doubt that both of the defendants are guilty. In this case you cannot find one of the defendants guilty and the other not guilty. One man cannot conspire with himself. It takes two to conspire; and the testimony, as I told you a moment ago, does not show that Mr. Gordon knew anything about this, except as he was requested by the defendant James A. McHugh to come in and sign an affidavit. Now, what he did there was wrong. He signed something which he says that he knew nothing about. Of course, if he knew nothing about it, he could not have conspired, and the testimony of the witnesses on the part of the government is not of such a character as to overcome the presumption of innocence, and not enough to connect him with a conspiracy, more than the act of signing the affidavit. The defendants James A. McHugh and John Edward McHugh, therefore, are either both guilty or both innocent of this offense.

[7] Now, a reasonable doubt is just such a doubt as the term implies. It is a doubt for which you can give a reason. It is such a doubt as would make a man of ordinary prudence and sensibility and decision, in determining an issue of like concern to himself as that before the jury to the defendants, pause or hesitate in arriving at his conclusion. It is such a doubt as would be created only by the want of evidence or a doubt which is raised by the evidence itself, and must not be merely speculative, imaginary, or conjectural. A juror is satisfied beyond a reasonable doubt if, from a candid consideration of all the evidence, he has an abiding conviction of the truthfulness of the charge. When a juror is satisfied to a moral certainty of the truthfulness of the charge made, then he is satisfied beyond every reasonable doubt.

In this case each party has examined you with relation to prejudice, or preconceived notions of the issue, or knowledge of the facts, and you have convinced both sides that you are free from any prejudices

or opinions, and can determine this issue solely upon the evidence which has been presented. Both sides have a right to rely upon this conception of your qualifications, and I have no doubt you will eliminate from your minds every influence which would have a tendency to detract from the issue, and will concentrate your thought alone upon the determination to do justice and right as your quickened conscience, aroused by the serious duty before you, may dictate your every thought and effort, being divorced from passion, prejudice, or sense of relation to things which might detract your thought from the real issue in this case, and that is the guilt or innocence of these defendants, and by a fair and honest consideration conclude, so that the government and the defendants may feel that a fair, honest, and conscientious consideration has been given to the matter in hand.

As I have intimated a moment ago, you are the sole judges of the facts in this case, and you must determine what they are. Any reference that I may have made to any fact in this case, or expressions used to convey to you some idea, was not done with the purpose of expressing any opinion which I may have of a fact; and I desire you to eliminate from your mind and from your consideration any such thought that you may have received as to any opinion of mine with relation to any fact, and determine this yourself solely upon the evidence which has been presented.

You are likewise the sole judges of the credibility of the witnesses who have testified before you, and in determining the weight or credit you desire to attach to the testimony of any witness you will consider the demeanor of the witness upon the witness stand, the opportunity of the witness for knowing the things about which he has testified, his interest or lack of interest in the result of this controversy, and the reasonableness or unreasonableness of the story of the witness, and from all of these determine where the weight of the evidence is, and where the truth in the case lies. You will attach to the testimony of every witness who has testified before you the same test that you would apply to any other person in the ordinary affairs of life whose truthfulness or falsity may be under consideration by you. From your conclusions there is no appeal. I merely suggest this, so that you may be impressed with the responsibility that rests upon you. If you find that any witness has willfully testified falsely concerning any material fact in this case, you have a right to disregard the testimony of such witness entirely, except in so far as it may be corroborated by other credible evidence or circumstances developed upon the trial of the case.

It will require your entire number to agree upon a verdict, and when you have concluded you will cause the verdict to be signed by your foreman, whom you will elect immediately upon retiring to the jury room. The form of the verdict will be: "We, the jury in the above-entitled cause, find the defendants John Edward McHugh and James A. McHugh ——— guilty." If you find them guilty, you will write in the word "are." If you find them not guilty, you will write in the word "not." The other form will be: "We, the jury in the above-entitled cause, find the defendant James Gordon not guilty." You will have these three with you.

After numerous exceptions taken by counsel for defendants, the court added the following:

Where there are two inferences possible, one of guilt and one of innocence, that of innocence should be adopted by the jury, and that every reasonable doubt upon any fact disclosed in the testimony should likewise be resolved in favor of the defendants.

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## UNITED STATES v. OLSON.

## SAME v. SURANSKY.

(District Court, W. D. Washington, N. D. November, 1917.)

No. 3785.

1. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—INDICTMENT—SUFFICIENCY.
   An indictment alleging a failure to register as required by the Selective Service Act, etc., is not faulty because failing to set out in full the President's proclamation as to registration, where the statement with reference to the proclamation was sufficient to furnish the defendant notice and information required for every purpose.
2. WITNESSES ⟸293—PRIVILEGES—BEARING WITNESS AGAINST SELF.
   Those provisions of the Selective Draft Act which require registrants to exhibit registration cards, etc., are not invalid, as violating Const. Amend. 5, providing that no person shall be compelled to be a witness against himself.
3. ARMY AND NAVY ⟸20—SELECTIVE SERVICE ACT—VALIDITY.
   In view of the revolutionary practice of raising armies by draft, and of the provisions found in Const. art. 2, § 2, etc., and despite Amendments 5 and 13, *held*, that the Selective Service Act is valid; the government having power to raise armies by draft.
4. CONSTITUTIONAL LAW ⟸275(1)—INHIBITIONS—DEPRIVATION OF PROPERTY.
   The Selective Service Act, providing for the drafting of registrants into the National Army, is not in violation of Const. Amend. 5, forbidding the deprivation of property without due process of law, for no one has, in a just sense, a property right in his office or employment.
5. CONSTITUTIONAL LAW ⟸62—SELECTIVE SERVICE ACT—DELEGATION OF LEGISLATIVE POWERS.
   The Selective Service Act is not invalid, as delegating legislative powers to the President, for it merely grants power to him to regulate the execution of the law.

Peter Olson and Abraham Suransky were indicted for failing to register as required by the Selective Service Act, and for failing to exhibit their registration certificates when called upon by a police officer. On demurrer to the indictment. Demurrer overruled.

Clay Allen, U. S. Atty., and Ben. L. Moore, Asst. U. S. Atty., both of Seattle, Wash.

Mark M. Litchman, of Seattle, Wash., for defendant Olson.

Jacob Kalina, of Seattle, Wash., for defendant Suransky.

NETERER, District Judge. Indictments were returned against each of the above-named defendants in three counts: First, charging that defendant refused to present himself for registration, being

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

within the ages of 21 and 31 years; second, charging that defendant "did willfully * * * fail * * * to present himself for registration and submit thereto as provided in the said act * * *"; and, third, charging that the defendant "did willfully * * * fail * * * to perform a duty required of him * * * in the execution of said act," by failing to exhibit his registration certificate when called upon by a police officer. Demurrers were filed to each count in the indictment: First, "that they do not state facts sufficient to constitute a crime;" second, "that the act is unconstitutional, contrary to the Constitution and Amendments 1, 2, 5, and 13." With the consent of all parties, the issues thus raised, being the same in both cases, were submitted together.

[1] The technical objection raised in argument that the indictment is faulty, because the President's proclamation provided for in Selective Service Act May 18, 1917, c. 15, 40 Stat. 76, is not set out in full in the indictment, is overruled. The statement in the indictment with reference to the proclamation is sufficient to give the defendant all the notice and information required for every purpose.

[2] Nor is the contention that the provisions of the act requiring a person to exhibit his registration card, as charged in count 3, in contravention of the Fifth Amendment, which provides that "no person shall be compelled to be a witness against himself." This provision is analogous with section 3239, Revised Statutes, Internal Revenue Act, as amended February 27, 1877, c. 69, 19 Stat. 248 (Comp. Stat. § 5962), which requires that all persons liable to a special tax "* * * shall place and keep conspicuously in his establishment or place of business all stamps denoting the payment of said special tax. * * *" This has long been recognized as within the sphere of proper legislation. Justice Field, in Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366, sustains the doctrine that Congress can undoubtedly prescribe rules for civil conduct to which persons within the jurisdiction must conform. This case, while cited by defendants, cannot afford comfort to them. The issues in that case and this are not analogous. The court, in that case, at pages 379, 380 of 4 Wall. (18 L. Ed. 366), said:

"The Legislature may undoubtedly prescribe the qualifications for the office, to which he must conform, as it may, where it has exclusive jurisdiction, prescribe qualifications for the pursuit of any of the ordinary avocations of life. The question, in this case, is not as to the power of Congress to prescribe qualifications, but whether that power has been exercised as a means for the infliction of punishment, against the prohibition of the Constitution. That this result cannot be effected indirectly by a state under the form of creating qualifications we have held in the case of Cummings v. State of Missouri, 4 Wall. 277, 71 U. S. 356 [18 L. Ed. 356], and the reasoning by which that conclusion was reached applies equally to similar action on the part of Congress."

The issue in Cummings v. Missouri, supra, was whether, under the form of creating a qualification or attaching a condition, a state can in effect inflict punishment for a past act which was not punishable at the time it was committed, and it was held that it could not be done. Again, at page 380 of 4 Wall. (18 L. Ed. 366), the court, in Ex parte Garland, said:

"This view is strengthened by a consideration of the effect of the pardon produced by the petitioner, and the nature of the pardoning power of the President. The Constitution provides that the President 'shall have the power to grant reprieves and pardons for offenses against the United States except in cases of impeachment. * * *' The power thus conferred is unlimited, with the exception stated. It extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. This power of the President is not subject to legislative control. Congress can neither limit the effect of his pardon, nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restrictions. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offense. If granted before conviction, it prevents any of the penalties and disabilities, consequent upon conviction, from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity."

It will thus be seen that this case has no application.

[3] The next contention, that the Selective Service Act of May 18, 1917, is unconstitutional, is equally unfounded. The contention that the President has not power to raise and support an army by the selective method cannot be sustained. For the purpose of creating a strong national government, instead of a weak and ineffective confederation of states, the Constitution conferred upon the Congress the power:

"To provide for the common defense and general welfare," "to declare war," "to raise and support armies," "to provide and maintain a navy," "to make rules for the government and regulation of land and naval forces," "to provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by the Congress."

Article 2, § 2: "The President shall be commander-in-chief of the army of the United States, and of the militia of the several states, when called into the actual service of the United States."

Amendment 5: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger."

The distinction between the National Army and state militia is pointed out by Attorney General Wickersham, in his opinion of February 17, 1912 (29 Op. Attys. Gen. 322), in which he said:

"When the Constitution gives to Congress the power 'to raise and support armies,' and 'to provide for calling of the militia to execute the laws of the Union, * * *' and makes the 'President the commander-in-chief of the army and navy of the United States, and of the militia of the several states, when called into actual service of the United States,' it is speaking of two different bodies—the one the Regular Army, in the continuous service of the government, and liable to be called into actual service at any time, or in any place where an armed force is required; and the other a body for domestic service, and liable to be called into the service of the government only upon the particular occasions named in the Constitution."

It is not contended that power to draft an army is expressly withheld, but that it is not expressly conferred. The liability of all inhabitants of the United States to be drafted into military service in time of war, it appears, cannot be questioned. It results from the sovereignty of the nation, and the power conferred upon Congress must carry with it the necessary means of carrying out the power. The validity of the draft acts of the Civil War in the North and the South was contested in the courts and sustained.[1]

Nowhere in the Constitution is there a limitation as to the means by which Congress shall raise an army, and, guided by the history of the times, the draft method of raising an army was not foreign to the Constitution makers or the "fathers of our country." The General Assembly of Virginia in May, 1777, passed a conscription act which had been drafted by Thomas Jefferson. Writings of Thomas Jefferson, vol. 2, page 123 (Ford's edition). In 1777 New York adopted a Constitution which declared:

"It is the duty of every man who enjoys the protection of society to be prepared, and willing, to defend it."

The Continental Congress, of February 26, 1778:

"Resolved, that the several states hereafter named are required forthwith to fill up by drafts from their militia, or any other way that may be effectual, their respective battalions of continental troops, according to the following arrangement, viz. [naming 11 states]. * * * That all persons drafted shall serve in the continental battalions * * * for the space of nine months; * * * and

"Resolved, that no prisoners of war or deserters from any alien army be enlisted, drafted, or returned to serve in the continental army."

2 Journals of Congress, 458–495.

At the session of August 31, 1778, appears the following:

"Letters of the 27th, from the Committee on Arrangements, that camp was ready, informing that a great spirit of enlistment had taken place among the soldiers who were brought into the army as drafts. * * *" 3 Journals of Congress, 38; 45 Wash. Law Rep. No. 25, June 22, 1917.

On November 15, 1777, delegates of the United States of America did agree to certain articles of confederation. These were approved by Congress July 9, 1778, and signed on behalf of nearly all the states during that year; the last to sign being Maryland, March 1, 1781. On September 17, 1787, by unanimous consent all states present adopted the Constitution. 1 U. S. Stat. at Large, 1–20. Into the very fabric of the Constitution of the United States was woven the sentiment of draft with relation to armies, and, no intimation against draft being expressed in the Constitution, the power is as plainly implied as though expressly given.

[1] McCall's Case, 5 Phila. 268, Fed. Cas. No. 8,669; Kneedler v. Lane, 45 Pa. 238; In re Spangler, 11 Mich. 298; In re Griner, 16 Wis. 423; Jeffers v. Fair, 33 Ga. 347; Barber v. Irwin, 34 Ga. 29; Ex parte Hill, 38 Ala. 429; Burroughs v. Peyton, 57 Va. 470; Lanahan v. Birge, 30 Conn. 438; Ex parte Coupland, 26 Tex. 386; Druecker v. Salomon, 21 Wis. 621, 94 Am. Dec. 571; Allen v. Colby, 47 N. H. 544; Parker v. Kaughman, 34 Ga. 136; Ex parte Bolling, 39 Ala. 609.

Chief Justice Marshall, in McCulloch v. State, 4 Wheat. 406, at page 421 (4 L. Ed. 579), in discussing the power of incorporating a Bank of the United States (Act April 10, 1816, c. 44, 3 Stat. 266), said:

"Among the enumerated powers, we do not find that of establishing a bank or creating a corporation, but there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described."

At page 407 of 4 Wheat. (4 L. Ed. 579), he said:

"The Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."

And again, on the same page:

"It is also in some degree warranted by their having omitted to use any restricted term which might prevent its receiving a fair and just interpretation."

Again:

"But it may, with great reason, be contended that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is to the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means.

At page 409 of 4 Wheat. (4 L. Ed. 579), he said:

"*The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.*" (Italics are ours.)

All that was said in that case can with equal force and propriety be applied to the instant case. Mr. Justice Field, in Tarble's Case, 13 Wall. 397–408, 20 L. Ed. 597, said:

"The execution of these powers falls within the line of its duties; and its control over the subject is plenary and exclusive. It can determine, without question from any state authority, how the armies shall be raised, whether by voluntary enlistment or forced draft, the age at which the soldier shall be received, * * * the compensation he shall be allowed, and the service to which he shall be assigned."

In Jacobson v. Massachusetts, 197 U. S. 11, at page 29, 25 Sup. Ct. 358, at page 362 (49 L. Ed. 643, 3 Ann. Cas. 765), the court, in discussing the freedom or restraint of the individual on the part of the government, said:

"He may be compelled, by force if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense. Is it not, therefore, true that the power of the public to guard itself against imminent danger depends in every case involving the control of one's body upon his willingness to submit to reasonable regulations established by the constituted authorities

under the sanction of the state, for the purpose of protecting the public collectively against such danger?"

Nor can the Thirteenth Amendment give to the defendants any consolation. The defendants have called our attention to the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, and quote from the opinion as follows:

"That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings. The exception of servitude as a punishment for crime gives an idea of the class of servitude that is meant. The word 'servitude' is of larger meaning than 'slavery.'"

On page 72 of 16 Wall. (21 L. Ed. 394) Mr. Justice Miller said:

"But what we do say, and what we wish to be understood, is that in any fair and just construction of any section or phrase of these amendments it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy, and the process of continued addition to the Constitution, until that purpose was supposed to be accomplished, as far as constitutional law can accomplish it."

The Supreme Court, in Butler v. Perry, 240 U. S. 328, 36 Sup. Ct. 258, 60 L. Ed. 672, in passing upon the validity of an amendment to a state law requiring able-bodied male persons between certain ages, resident in the state for a fixed time, to work on the roads and bridges a prescribed time each year, said:

"This amendment was adopted with reference to conditions existing since the foundation of our government, and the term 'involuntary servitude' was intended to cover those forms of compulsory labor akin to African slavery, which in practical operation would tend to produce like undesirable results. It introduced no novel doctrine with respect to services always treated as exceptional, and certainly was not intended to interdict the enforcement of those duties which individuals owe to the state, such as services in the army, militia, on the jury, etc. The great purpose in view was liberty under the protection of effective government, and not the destruction of the latter by depriving it of the essential powers."

[4] Nor are the defendants deprived of any rights granted by the Fifth Amendment. In Taylor v. Kercheval (C. C.) 82 Fed. 499, the court said:

"* * * And it is clear that complainant has in no just sense a property right in his office or employment. * * *"

[5] Nor does the Selective Service Act delegate legislative power to the President. It merely grants power to regulate the execution of the law, and is therefore not open to attack. In re Kollock, 165 U. S. 526, 17 Sup. Ct. 444, 41 L. Ed. 813. The Circuit Court of Appeals of the Second Circuit, in Angelus v. Sullivan et al., 246 Fed. 54, 158 C. C. A. 280, sustained the constitutionality of the Selective Service Act.

What has been said disposes of all contentions raised, and an order may be taken overruling the demurrers.

UNITED STATES v. GOULED et al.

(District Court, S. D. New York. August 31, 1918.)

1. INDICTMENT AND INFORMATION ⟸121(5)—"BILL OF PARTICULARS."
The office of a "bill of particulars" is to advise the court, and more particularly the defendant, of what facts he will be required to meet; and when a bill of particulars is made and served, it concludes the rights of all parties, and the prosecution must be confined to the particulars specified.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bill of Particulars.]

2. INDICTMENT AND INFORMATION ⟸121(2)—BILL OF PARTICULARS—GRANT OF MOTION FOR.
Motion for a bill of particulars should be allowed only where charges are so general that they do not advise defendant of specific acts of which he is accused, and a bill of particulars should never be granted where it will unduly limit the evidence of the prosecution.

3. INDICTMENT AND INFORMATION ⟸71—PARTICULARITY.
While the rules of criminal procedure require that one accused shall be fully apprised of the charge against him, yet the object is to convict the guilty, as well as to shield the innocent, and no impracticable standard of particularity should be set up.

4. INDICTMENT AND INFORMATION ⟸121(2)—BILL OF PARTICULARS—RIGHT TO.
It is a settled rule that, while an indictment may be sufficient in itself, if it charges an offense in the words of the statute, it is not sufficient as against a motion for bill of particulars, but the court, upon motion, may in its discretion require the pleader in such case to descend to particulars.

5. CONSPIRACY ⟸43(1)—INDICTMENT—PARTICULARITY OF ALLEGATIONS.
There is a distinction between the particularity required in the allegation of a conspiracy and that where a substantive offense is charged; less being required in the first case.

6. CONSPIRACY ⟸43(10)—INDICTMENT.
Indictment charging a conspiracy to defraud the United States, between an army officer, defendant, and another, averring that conspiracy contemplated contracts should be submitted to and passed on by the army officer, etc., *held* to sufficiently inform the defendant of the facts.

Felix Gouled and others were indicted for conspiracy to defraud the United States. On motion by defendant Gouled for a bill of particulars. Motion denied.

See, also, 253 Fed. 242.

Francis G. Caffey, U. S. Atty., and Joseph A. Burdeau, Asst. U. S. Atty., both of New York City.

Martin W. Littleton, of New York City, for defendant Gouled.

Max Steuer, of New York City, for defendant Podell.

HUTCHESON, District Judge. The defendant Felix Gouled has moved for an order for a bill of particulars. The government insisting on the first count only, this opinion is based on that count alone.

[1] "The office of a bill of particulars is to advise the court, and more particularly the defendant, of what facts, more or less in detail, the defendant will be required to meet, and the court will limit the government in its evidence to those facts, so set forth." United States

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

v. Adams Express Co. (D. C.) 119 Fed. 240. When a bill of particulars is once made and served, "it concludes the rights of all parties to be affected by it, and he who has furnished the bill of particulars under it must be confined to the particulars he has specified as closely and effectually as if they constituted essential allegations in a special declaration." Commonwealth v. Giles, 1 Gray (Mass.) 466, cited and approved in Dunlop v. United States, 165 U. S. 486, 17 Sup. Ct. 375, 41 L. Ed. 799. Refusal of bill of particulars rests in the sound discretion of the court. Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; Dunlop v. United States, supra; Knauer v. United States, 237 Fed. 13, 150 C. C. A. 210 (C. C. A.).

[2] This being the purpose and scope of the bill prayed for, and the duty and function of the court, it is clear that the motion should only be allowed where the charges of an indictment are so general that they do not advise the defendant of the specific acts of which he is accused, and the court feels that the bill should be furnished him, so that he may properly prepare his defense. Kettenbach v. United States, 202 Fed. 377, 120 C. C. A. 505. It is equally clear that the bill of particulars should never be granted where its result would be to limit the government unduly, by confining its evidence so narrowly as that it may shut out proper and material evidence of which the government may not now be advised.

[3] Whatever may now be the rule in other courts, or whatever may have been the rule in the courts of the United States, it is certainly the present rule that the trial of a criminal case is not a play of thrust and parry, but is the functioning of the machinery of justice to fairly determine the guilt or innocence of an accused, and only those requirements should be made of prosecution and of defense which fairly and properly, in a reasonable and common-sense way, will produce in a court of justice a full and complete disclosure of the facts upon which guilt or innocence rests, with as little as possible of the technicalities and the dry rules which hamper and impede the course of justice. As was well said by Mr. Justice Brown in Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830:

"While the rules of criminal pleading require that the accused shall be fully apprised of the charge made against him, it should, after all, be borne in mind that the object of criminal proceedings is to convict the guilty, as well as to shield the innocent, and no impracticable standards of particularity should be set up, whereby the government may be entrapped into making allegations which it would be impossible to prove."

Again, in Mark Yick Hee v. United States, 223 Fed. 733, 139 C. C. A. 262 (C. C. A. 2d Circ.), Rogers, J., speaking for the court, says:

"Under the Constitution of the United States a person accused of a criminal offense is entitled to be informed of the nature and cause of the accusation against him. There must therefore be such particularity of allegation in an indictment as will enable the accused to understand the charge which is preferred and to prepare his defense. But the principle is well established that, while all the elements of the crime charged, or facts necessary to make out the offense, must be fully and clearly set out, it is not necessary to allege matters in the nature of evidence, or to set out the means by which the crime is accomplished, unless the act is one which may be criminal or not according to the circumstances under which it is done."

[4-6] In what has been said or will be said there is not the slightest intention to avoid the force of the settled rule that it is not sufficient to charge the commission of an offense in the words of the statute, but that the pleader must descend to particulars. This is conceded without in any manner diminishing the force of the fact that the indictment in this case is of itself sufficient, and that no bill of particulars is necessary to apprise the defendant, so as to enable him properly to meet the government's case and prepare his own defense. The indictment is not only not wanting in specification, but is in reality fuller and in more detail than was required of the government, and, if subject to any criticism, it is that of much greater fullness than the nature of the offense charged requires. As was said by Thomson, D. J., in United States v. United States Brewers' Ass'n (D. C.) 239 Fed. 165, ruling on demurrers to an indictment:

"It must be borne in mind that the government has not charged as a substantive offense that the defendants actually within the time set forth made money contributions in connection with the elections set forth in said indictments. On the contrary, they are charged only with conspiracy to commit that offense. In such case, the authorities all show that the offense which is intended to be committed as a result of the conspiracy need not be described with the particularity required in an indictment in which such matter was charged as a substantive crime. * * * The decisions agree that certainty to a common intent is all that is necessary. The conspiracy or unlawful combination is the gist of the offense, and certainty to a common intent, sufficient to identify the offense which the defendants conspired to commit, is all that is requisite in stating the object of the conspiracy. Williamson v. U. S., 207 U. S. 425 [28 Sup. Ct. 163, 52 L. Ed. 278]. The indictment is sufficient if it advise the defendants of the nature and cause of the accusations against them, with such particularity as to enable them to prepare the defense. The elements which constitute the crime are facts which must be fully and clearly set out. But matters in the nature of evidence need not be alleged, nor the means by which the crime was to be accomplished, unless the act is one which may or may not be criminal according to the circumstances under which it is done."

In the case of Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465, 15 Ann. Cas. 392, a conspiracy case, the court held that it was not necessary to set out the particular manner in which the defendants were to commit fraud upon the government, but that the indictment was sufficient where it set out an agreement to defraud the United States, and facts showing that the parties charged were in a position (in that case as in this in the employ of the government), to commit fraud, followed, of course, by the allegation of the overt act or acts.

There is another element which always enters into the consideration of motions for bills of particulars in matters of this kind, and that is, where the offense charged is one which is grounded upon the acts and the conversations of the party charged, and with and of which he must be in position to have as much information as anybody could have as to whether they did or did not occur, it is never essential to set out with particularity the things which he is supposed to have said or done. As was said in the Pierce Case (D. C.) 245 Fed. 890, on motion for bill of particulars:

"It is not to be presumed the United States would offer false or perjured testimony on the trial, and, in view of the nature of the case and of the charges made, it may be assumed the defendants know when and where they made speeches, if any, solicitations, if any, and the nature and character thereof, and also the names of the persons solicited, if any particular person was solicited."

The offense charged in this case being conspiracy to defraud the United States government, entered into between an officer in the United States army, the defendant Felix Gouled, and another, and the allegations of the indictment charging specifically that the conspiracy provided for its accomplishment the procuring of contracts which were to be submitted to and passed upon by Vaughan, the defendant officer, he at the time having a pecuniary interest in the same through the arrangements to be made in pursuance of the conspiracy, and the indictment further charging that the said Vaughan was to receive money "with the intent of influencing his decision and action, and that of other officers in question, in the consideration and acceptance, the letting and awarding contracts for the manufacture of garments for the United States army," the criticism to which the indictment is subject is not that of too little, but perhaps of too great, particularity. Certainly it would have been a sufficient indictment, had it merely alleged an agreement that Vaughan was to obtain an interest in garment contracts which it was his duty to pass upon as a representative of the government. The fact that the indictment, in much greater detail than the law requires, sets up the procedure which the conspirators agreed to adopt, and with far greater minutiæ than necessary sets out the series of overt acts by which the conspiracy was to be effected, cannot enlarge the rights of the defendant.

Certainly it cannot be claimed that, because the government has been more liberal than necessary in laying its indictment, it must therefore disclose its entire evidence in advance of the trial; but this would be in effect what the court would be holding, if the motion for the bill were sustained.

The motion will be in all things denied.

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UNITED STATES v. GOULED et al.

SAME v. GOULED.

(District Court, S. D. New York. September 16, 1918.)

1. INDICTMENT AND INFORMATION ⟸196(1)—MOTION TO QUASH—WAIVER.
After a defendant has pleaded to the indictment, subsequently moved for a bill of particulars, and the case has been set for trial, the court will not entertain a motion to quash on grounds personally known to defendant from the first.

2. CRIMINAL LAW ⟸627½—INSPECTION OF MINUTES OF GRAND JURY.
Examination by the court of grand jury minutes of proceedings upon which an indictment was returned is justified only in extreme cases, where it is shown by positive allegation that the indictment was the result of fraud or corruption, or of caprice, and was not the expression of a fair judgment on the facts.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. INDICTMENT AND INFORMATION ⟸137(3)—MOTION TO QUASH—GROUNDS—REGULARITY OF PROCEEDINGS OF GRAND JURY.
The use in evidence before the grand jury of papers seized under a valid search warrant is not ground for quashing the indictment.

4. SEARCHES AND SEIZURES ⟸7—EXEMPTIONS—WAIVER.
The purpose of the constitutional provision against unreasonable searches and seizures is to protect the citizen against arbitrary and tyrannical power, and a defendant may waive the manner and method of acquisition of his papers, and thereupon the constitutional objection is removed.

Criminal prosecutions by the United States against Felix Gouled, Aubrey W. Vaughan, and David Podell, and against Felix Gouled. On motion to quash indictments. Denied.
See, also, 253 Fed. 239.

Francis G. Caffey, U. S. Atty., and Joseph A. Burdeau, Asst. U. S. Atty., both of New York City.
Martin W. Littleton, of New York City, for defendant Gouled.
Max Steuer, of New York City, for defendant Podell.

HUTCHESON, District Judge. This is a motion that the court examine the stenographer's minutes of the evidence taken before the grand jury which returned the indictments in this cause, and that said indictments be quashed, on the ground that, as claimed by affidavit on information and belief supporting the motion, certain private papers belonging to the defendant had been unlawfully seized and detained by the United States district attorney, and had formed the main, if not the sole, basis of the action of the grand jury. Of the truth of this charge the court is asked to satisfy itself by an examination of the minutes, and, upon becoming so satisfied, to quash the indictments. On the part of the United States it is urged that the motion should be denied, because not timely, and with this view of the matter I concur.

[1] Action upon a motion to quash rests in the sound discretion of the court, and this case is clearly one in which that discretion should be exercised against the motion. The record in this case shows that the papers, the use of which is made the basis of this motion, were seized as the result of two separate seizures. Both of these seizures were made under search warrants lawfully and properly issued and executed. See the opinion of Judge Manton in United States of America v. Felix Gouled et al., 253 Fed. 770. On July 22, after the papers had been seized, the defendant admitted that he knew the government was in possession of his books and papers, and further stated:

"If there is anything the government wishes to know, my papers are all here. After my search in my business two days later, I came to see Dr. De Mund with my papers (Dr. De Mund being special agent). My package of papers to show Dr. De Mund, to show him all the details; my books and all my papers are open to the government."

The grand jury returned indictments on July 30, and on July 31 defendant, being represented by counsel, pleaded to the indictments, entering the plea of not guilty, and reserving 10 days to withdraw

his plea should he be so advised. The time for such action expired on August 10, 1918, but neither at that time, nor at any later time, was it sought by him to withdraw his plea. On the contrary, on September 3, 1918, a motion for bill of particulars was filed, and neither in this motion, nor in any argument upon it, was it suggested that there was any fault to be found with the indictment, or the proceedings out of which it grew, or that the constitutional rights of the defendant had been invaded, though at that time the facts now alleged were all within the personal knowledge of the defendant. It is further a pertinent fact that at the time of the argument on the motion for bill of particulars, this case was in open court set for trial for the 17th of September, and, though the motion for bill of particulars was shortly thereafter overruled, no suggestion was made at that time, nor until this the 16th day of September, the day before the trial, that any other relief in the matter of the indictment was sought or asked than that included in the request for bill of particulars, which request accepted the basic indictment and merely asked an elaboration of the particulars of its charges. Under these circumstances, that the right of the defendant, if it existed, to move to quash the indictment, has been waived, and that the motion should be held too late, needs citation of but few authorities. Matters v. United States, 244 Fed. 736, 157 C. C. A. 184; United States v. Perlman (D. C.) 247 Fed. 158, and cases cited.

[2] While these considerations serve to dispose of the motion, I think it not inappropriate to say that it seems clear that, had the motion been timely presented, it should also have been overruled. As to that request in it that the court cause the minutes of the grand jury to be examined, I think it clear that Judge Manton, in United States v. Perlman (D. C.) 247 Fed. 158, certainly goes far enough in setting the limits to the exercise of the right of judicial review of the action of the grand jury, and I have no disposition to extend them. While I have no difficulty in declaring that in extreme cases of positive allegations or fraud or corruption, or positive allegations that no evidence of any kind had been admitted, and therefore the indictment was the result of caprice, and not the expression of a fair judgment on the facts, it would not only be proper, but incumbent upon the court, to examine the grand jury minutes, so as to protect the citizen from oppression, I think the policy of the law is unalterably opposed to fishing expeditions into grand jury minutes, conducted by the court at the request of defendants on affidavits upon information and belief, and there is no reason shown in this case why such an expedition should be entered on.

[3] Should, however, it be admitted that the grand jury did consider some of the papers seized, there would still be no ground for quashing the indictments, first, because the record made on the hearing of the motion before Judge Manton showed that there were many papers seized which could not in any event have a claim of privilege asserted for them, and it does not appear in any way that the grand jury did not have before it ample competent matter. Further, the papers having been seized under a valid search warrant, their

use could not be made the basis of an attack upon the grand jury indictment, unless the fundamental point is conceded that a search warrant could not issue in such cases. I think the contrary is clearly established by the authorities and upon reason.

With reference to the claim on the motion of the constitutional right of the defendant, which protects him against being compelled to give evidence against himself, it is sufficient to say that that question will be decided when reached, as no invasion of that right could occur until the defendant was put upon the stand on the trial of the cause, or until some use was attempted to be made on the trial which clearly contravened the Constitution.

[4] There is still another ground on which this motion should be overruled, and that is the ground of consent and acquiescence. While it is of the highest importance that the right of the individual guaranteed by the Constitution should be in no manner invaded, it is of equal importance that the claim for constitutional protection be viewed in the light of reason and so applied. As was said by Judge Batts, in Whitehead v. United States, 245 Fed. 392, 157 C. C. A. 554:

> The defendants "are entitled to be tried in accordance with law. They are entitled, however, to no more than a trial by law as the law is. They cannot invoke the law as it might have been, if the tendency to permit absurd technicalities to defeat the purposes of the law had not been checked by persistent public protest and stopped by tardy, but wise, legislation."

The purpose of the constitutional provision invoked was to protect the citizen against arbitrary and tyrannical power, and not to furnish him a shield with which to shift according to the different aspect in which his case presented itself to his mind as time went on. And so it is recognized clearly that, while the law protects against unlawful seizures and searches, the defendant may waive, if he thinks it to his advantage, or for any reason, the manner and method of the acquisition of his papers, and thereupon the constitutional objection is removed. In Linn v. United States, 234 Fed. 543, 148 C. C. A. 309 (opinion by Circuit Court of Appeals for the Seventh Circuit), the papers had been seized by a post office inspector in violation of the right of Linn to protection against unlawful search and seizure. The court said:

> "It appears from the uncontradicted testimony of witness [the inspector] that he showed these letters to Linn and asked him if he * * * might have them, and that Linn said he might. Under these circumstances, no question of improper search and seizure can be said to arise."

It is familiar law that a man waives even his protection against incrimination by voluntarily testifying, and this whether he knew of the principle or not. See United States v. Bryant (D. C.) 245 Fed. 682.

For all of the above reasons, the motion should be in all things denied.

## EVERGLADES DRAINAGE LEAGUE et al. v. NAPOLEON B. BROWARD DRAINAGE DIST. et al.

(District Court, S. D. Florida. July 29, 1918.)

1. COURTS ⟸299—FEDERAL COURTS—JURISDICTION—FEDERAL QUESTION—PLEADING.
   Although bill to restrain collection of drainage tax, imposed pursuant to Laws Fla. 1917, c. 7430, § 7, did not specifically attack section 7, where it contained allegations that said section deprived complainants of their property, without due process of law, it raised a federal question, vesting federal court with jurisdiction, provided matter in controversy exceeded $3,000, exclusive of interest and costs.

2. COURTS ⟸329—FEDERAL COURTS—JURISDICTION—AMOUNT—PLEADING.
   In suit to restrain collection of drainage tax, complaint alleging generally that amount exceeds $3,000, and making Exhibit A, attached to bill, a part of the same, and praying reference, *held* to sufficiently show that amount in controversy was over $3,000, exclusive of interest and costs, so that federal court had jurisdiction.

3. EQUITY ⟸152—EXHIBITS—INCORPORATION BY REFERENCE.
   Making exhibit attached to bill a part thereof, and praying reference, had the same effect as though the facts set out in the exhibit were alleged in the body of the bill.

4. COURTS ⟸326—FEDERAL COURTS—JURISDICTION.
   Where bill showed jurisdictional amount in controversy in B. county, between one of complainants and all defendants, except tax collector of D. county, joinder of other parties complainant and said tax collector defendant ceases to be a jurisdictional question, and bill will not be dismissed for want of jurisdiction of federal court.

5. COURTS ⟸347—EQUITY RULES—MULTIFARIOUSNESS.
   In suit by voluntary association of landowners against a drainage district and the respective tax collectors of two counties, to restrain collection of drainage tax imposed pursuant to Laws Fla. 1917, c. 7430, contention being that act is in violation of Const. U. S. Amend. 14, bill *held* not multifarious, in view of equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix), as to one or more of a class suing or defending for the whole; each complainant being interested in the subject-matter, but in different amounts, and each defendant being connected, though differently, with the whole dispute.

6. EQUITY ⟸147—MULTIFARIOUSNESS.
   That complainants prayed for relief to which they were not entitled, or alleged facts not material to relief, would not make bill multifarious.

7. STATUTES ⟸3—ENACTMENT—LEGISLATURE DE FACTO.
   That there had been no compliance with Const. Fla. art. 7, §§ 3–5, which requires Legislature every 10 years to apportion representation, would not make invalid laws passed by a subsequent Legislature; a Legislature regularly organized and recognized as the existing Legislature being the "Legislature de facto."

8. DRAINS ⟸13—RECLAMATION—SUBDISTRICTS—AUTHORITY TO CREATE.
   It is within the authority of the Legislature to create a subdistrict for reclamation of a larger district theretofore created.

9. COURTS ⟸351½—FEDERAL PROCEDURE—MOTION TO DISMISS—FUNCTIONS.
   A motion to dismiss under equity rules takes place of a demurrer, and admits the facts alleged.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

10. DRAINS ⊂=2(1)—STATUTE—VALIDITY.
Laws Fla. 1917, c. 7430, does not violate Const. Fla. art. 6, § 7; it not creating the office of drainage supervisors for a greater period than four years.

11. DRAINS ⊂=88—COLLECTION OF TAXES—FAILURE TO MAKE DELINQUENT RETURNS.
That drainage supervisors, instead of having tax collectors return books as delinquent, authorized books to be retained and tax continued to be collected, would not invalidate tax, although such action was unauthorized.

12. DRAINS ⊂=69—TAXES—VALIDITY.
That uniform acreage tax of 25 cents per acre, instead of 24½ cents, imposed by drainage board, pursuant to Laws Fla. 1917, c. 7430, § 7, would produce a surplus over estimated expense, would not invalidate tax.

13. EQUITY ⊂=264—MOTION TO STRIKE—SUFFICIENCY.
Motion, undertaking to reach certain parts of bill by setting out effect of portions to which it refers, will not be considered, as court cannot be required to go through the entire pleading to find what portion is attacked by motion to strike.

In Equity. Bill by the Everglades Drainage League and others against the Napoleon B. Broward Drainage District, and A. B. Lowe and others, as supervisors thereof, W. O. Berryhill, Tax Collector of Broward County, and R. B. McLendon, Tax Collector of Dade County. On motion to dismiss bill and to dismiss certain portions of the bill. Motion to dismiss bill denied, and motion to dismiss portions of the bill granted in part and denied in part.

Clair D. Vallette, of Washington, D. C., for complainants.
Glenn Terrell, of Tallahassee, Fla., special counsel for Internal Improvement Board.
Atkinson & Burdine, of Miami, Fla., for defendants.

CALL, District Judge. This cause came on to be heard before Circuit Judge WALKER, and District Judges CALL and CLAYTON, at Birmingham, Ala., on the application of the complainants for an interlocutory injunction under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162 [Comp. St. 1916, § 1243]), restraining the board of drainage commissioners of the Napoleon B. Broward drainage district and the tax collectors of Broward and Dade counties from collecting the uniform acreage tax of 25 cents per acre imposed by the board of drainage commissioners of said drainage district, pursuant to section 7 of chapter 7430 of the Acts of the Florida Legislature, approved May 26, 1917.

The bill was filed by the Everglades Drainage League, a voluntary association claiming more than 1,000 members, owning lands in the Everglades Drainage District, a certain Florida corporation, for themselves and all others in like interest. They claim to own lands included in Everglades patent No. 137, issued by the United States to the state of Florida, pursuant to the grant of the swamp and overflowed lands act of 1850, which lands are included in the Everglades drainage district, established by the Legislature of said state, for the pur-

pose of reclaiming them, and also within the limits of the Napoleon B. Broward drainage district; that a majority of the members of the league acquired their lands prior to 1911, by purchase for value.

The bill then sets out the substance of chapter 7430, Acts of the Florida Legislature, and the fact that the board of drainage commissioners of the Broward drainage district met and organized by the election of one of its members as chairman and levied an acreage tax of 25 cents per acre on the lands within the district. It then proceeds to set out certain provisions of the Constitution of Florida, as to the apportionment of the Senate and House of Representatives, and alleges a failure of the Legislature to obey these provisions, and that such failure constitutes such Legislature an illegal body, whose acts are not entitled to respect and obedience, except in such matters where the court decides them to be just and equitable, and that taxes levied by such illegal body is a denial of equal protection of the laws, and a deprivation of property without due process of law.

It further alleges that the uniform tax of 25 cents per acre was levied before any estimate of the expenses of survey, etc., provided for by the act, which expenses were to be paid by said levy; that subsequent to said levy an estimate was made, and thereafter a resolution was adopted by said board, ratifying and approving said levy, and books containing the description of the lands in said Broward drainage district were prepared and certified according to the act, and filed with the tax collectors of Dade and Broward counties for the collection of said acreage tax, and that said tax collectors are proceeding to collect the same; that persons owning lands in said district have paid said tax, some under protest and some without protest; that under said chapter 7430 said tax is made a lien upon the lands upon which it is assessed.

Thereupon the bill sets out certain proceedings of the board of commissioners in the levy of the uniform acreage tax of 25 cents per acre, and extensions of the time for payment of the same, and claims all such actions illegal and the tax void.

The bill next claims that the term of office created by the Legislature for Kyle, chairman of the board, is longer than four years, and therefore Kyle is not a member of the board, and the attempted organization of June 15, 1917, was illegal and void, and, the time having passed for such organization, no legal board exists, and the levy of the tax is illegal.

Section III of the bill alleges the passage of the swamp and overflowed lands act by Congress (Act Sept. 28, 1850, c. 84, 9 Stat. 519 [Comp. St. 1916, §§ 4958–4960]); that the Legislature by appropriate legislation vested the title to said lands in the trustees of the internal improvement fund in trust, for the purposes of reclaiming said lands; that in 1905 the trustees, for the purpose of selling said lands, adopted a map or plat of the same, by projecting the township and section lines from the surveyed lands surrounding the Everglades, and had the same recorded in the counties of Dade and Palm Beach; that in 1911, upon actual survey of the lands, a different location was given to the lands, although the same numbers and descriptions were re-

tained; that complainants bought lands by the first maps and by the adoption of the maps of 1911 they are unable to pay taxes on the lands owned by them.

Section III then proceeds to allege the adoption of legislation creating the Everglades drainage district for the purpose of reclaiming the entire body of the Everglades lands, the creation of the board of commissioners of the Everglades drainage district, and enumeration of their duties and powers, and the right to levy taxes for the purpose of carrying out the purposes and duties imposed; that all the lands included in the Napoleon B. Broward drainage district are included within the boundaries of said Everglades drainage district; that the taxes levied by reason of the acts prior to chapter 7430 are made liens on all of said lands; that in all deeds made by the trustees to purchasers, between 1907 and 1911, reservations for rights of way, canals, and other works necessary for the reclamation of said lands were contained; that the taxes assessed under chapter 7430 are in part to pay damages and costs of rights of way already reserved, and are therefore the taking of property under the guise of taxation—a taking of property without just compensation, within the Fourteenth Amendment of the Constitution of the United States, and this denies to the owners of the lands within the Broward drainage district the equal protection of laws, and deprives them of property without due process of law; that said Everglades were appropriated to drainage purposes by the United States and state of Florida, and was a trust, and that 1,500,000 acres of said lands are still held by the trustees; that the trust property is not exhausted; that the levy and assessment of the drainage taxes and liens created as provided in the acts creating the Everglades district constitute a second appropriation, nullifying the first appropriation, although the first is not exhausted; that by chapter 7430 there is a third appropriation for the same purpose; that this act is an unwarranted abuse of legislative power, and is not due process of law, etc.

Section IV then proceeds to set out that the trustees, under the act establishing the Everglades drainage district and acts amendatory thereof, were carrying out the reclamation of said lands, and that by reason of the sale of lands by the trustees after undertaking their reclamation, and the purchase of said lands by persons between 1905 and 1911, and the payment of purchase money applicable to such project, said purchasers and their grantees acquired a vested right in and to the application of said lands and proceeds of sale to the drainage and reclamation of their lands.

Section V alleges that the board of supervisors have incurred debts and liabilities to a large amount, and have received large amounts of said uniform tax paid under protest, and other large amounts paid not under protest, which amounts ought in justice to be returned to the parties paying same, because said uniform tax is illegal; that the board has no means of paying the liabilities, except this uniform tax, and therefore a receiver ought to be appointed to pay the liabilities and return the balance to the parties paying said tax in the proportion the same was paid.

Then follows the prayer, section VI, praying for 11 specific reliefs: That Kyle was not a member of the board; that said board was illegally organized, and all proceedings had under the attempted organization are void; that the levy of the uniform tax before the estimate of the amount necessary was void; that the assessment of said uniform tax was excessive, without warrant of law, and void; that the uniform tax was assessed upon lands wrongfully described, and is void; that the uniform tax was levied for the same purposes as the Everglades drainage district taxes, and is void; that sufficient funds are on hand and available to carry out the purposes for which the uniform tax is assessed, and said tax is void; that the levy of all Broward drainage district taxes are illegal and void; that all forfeitures of lands within said last-named district by reason of the nonpayment of said taxes are void; that all deeds, tax certificates, and other evidences of unpaid district taxes are void; and, lastly, that the matters complained of in the bill deny the landowners in said district the equal protection of the laws and deprive them of property without due process of law.

Section VII prays in addition that said chapter 7430, and the taxes and liens authorized thereby, and the proceedings of the board of supervisors, may be by the order of this court declared null and void, and the defendants be enjoined from proceeding to levy and collect all taxes against the complainants, and others similarly situated; that the uniform taxes paid under protest be restored to the persons paying the same; that the legal debts of said district and the board be paid, and the balance, if any, be distributed to persons who paid same without protest; that a receiver be appointed for all moneys and property of said board and account for the same to this court; that each of the defendants be restrained from collecting the uniform tax; that the defendants be restrained from forfeiting or selling lands within the district or issuing tax certificates, etc., for the nonpayment of taxes; that a temporary restraining order be issued against the defendants, enjoining them from executing any of the provisions of chapter 7430, and upon final hearing said injunction shall be made permanent.

April 26th application was made for a temporary restraining order. May 1st a motion to dismiss the bill was made by the defendants on various grounds. They may be succinctly stated as follows: (1) This court is without jurisdiction, because the jurisdiction is based upon a federal question being involved, and the bill shows no federal question. (2) That the bill is multifarious, in seeking relief against the defendants for distinct matters and causes of action.

The motion seeks dismissal of certain portions of the bill: (1) That portion of the bill which seeks to have the court declare a part of the uniform acreage tax void, because no part of the tax was tendered, and does not offer to do equity. (2) That part of the bill seeking to have this court declare W. C. Kyle not a member of the board, and praying to have him removed from office. (3) That part of the bill seeking to have a receiver appointed for the said drainage district. (4) That part of the bill assailing the act, because the Bro-

ward drainage district is contained within the Everglades drainage district, and that sufficient funds are on hand to complete the work outlined by the prior acts. (5) Paragraph II of the bill, because complainants seek to have a law declared invalid because of irregularities in proceedings of the board. (6) Paragraph III of the bill, because no federal question is involved, and complainants cannot be heard to complain of the matters therein set out. (7) Paragraph IV of the bill, because the Legislature acted within its powers in the creation of the drainage district. (8) Certain portions of the bill, setting out the constitutional provisions of the state of Florida, bearing upon the representation and apportionment of the Senate and House of Representatives.

As to the application of the complainants for a temporary restraining order, what was said on the application for an interlocutory injunction in this case applies to and disposes of the application. Equity rule 73 (198 Fed. xxxix, 115 C. C. A. xxxix).

[1] I now come to the motion to dismiss the bill. Is there a federal question raised? The bill, while voluminous, containing many matters, still a careful study of it shows that, while the pleader's main idea was to have the court declare the entire act unconstitutional, without any specific attack upon section 7, under which the tax was levied, does contain allegations that said section of the act deprives them of their property without due process of law. The Supreme Court of Florida, in a recent case, decided that said section was unconstitutional and the taxes levied thereunder void. A. C. Redman v. W. C. Kyle et al., as Board of Supervisors of Broward Drainage District (not yet officially reported) 80 South. 300. This decision was based upon the want of notice to the taxpayer by reason of the restriction of defenses contained in section 21 of the act. The tax authorized by this section 7 is therefore violative of the Fourteenth Amendment to the Constitution of the United States, as well as the Constitution of the state of Florida, and I think is a federal question, and vests this court with jurisdiction, provided the matter in controversy exceeds $3,000 in value, exclusive of interest and costs.

[2-4] The bill alleges generally that the amount in controversy exceeds $3,000, exclusive of interest and costs, and makes Exhibit A, attached to the bill, a part of the same, and prays reference. This has the same effect as though the facts set out in Exhibit A were alleged in the body of the bill. By this exhibit the Everglades Sugar & Land Company own some 17,000 acres of land in Broward county, in the confines of the Broward drainage district, upon which the tax of 25 cents per acre was assessed. This exhibit therefore shows the jurisdictional amount in controversy in Broward county between one of the complainants and all the defendants, except the tax collector of Dade county. This being so, the joinder of the other parties complainant and the tax collector of Dade county as defendant ceases to be a jurisdictional question, and the motion to dismiss the bill for want of jurisdiction will be denied.

[5, 6] The next general ground for the dismissal of the bill is that it is multifarious. A bill is not multifarious, if it be single as to

the subject-matter and object thereof and the relief sought, if all the defendants are connected, though differently, with the whole subject of dispute. In the instant case the main object of the bill is to have chapter 7430 declared violative of the Fourteenth Amendment to the Constitution of the United States, and the tax authorized therein void. Each of the complainants are interested in the subject-matter, although in different amounts, and each of the defendants are connected, though differently with the whole dispute. Rule 38 of the Equity Rules (198 Fed. xxix, 115 C. C. A. xxix) provides that when the question is one of common or general interest to many persons, constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole. The bill in this case is filed by the complainants representing a class under said rule. I do not understand that, because the complainants may pray for relief to which they may not be entitled, the bill thereby is made multifarious; nor would the allegations in the bill of facts that may not be material to the relief that will be granted have this effect. I am therefore of opinion that the motion to dismiss on the ground that the bill is multifarious is not well taken.

Motions were made to strike certain portions of the bill. These portions are not specifically pointed out, except as to paragraphs II, III, and IV, and pages 18 b, c, and d of the bill.

[7] Taking up the first motion to strike pages 18, c and d, these pages are amendments to the first paragraph of the bill, and set out sections 3, 4, and 5 of article 7 of the Constitution of the state of Florida, which require the Legislature every ten years to apportion the representation and for taking a census, and then alleges the refusal of the Legislature to do this, and therefore this refusal to obey this constitutional requirement makes void the taxes levied pursuant to laws passed by a Legislature elected subsequent to such refusal. If this contention is correct, it would upset all the laws passed subsequent to 1897. The statement of the effect of the court undertaking to declare invalid a law passed by a Legislature regularly organized and recognized as the existing legislative body by the executive of the state, because a census had been taken, but no apportionment of representation made, seems to me sufficient to condemn the contention of the bill. But the Legislature passing chapter 7430 was the Legislature de facto, and its acts are therefore binding. This I understand from the authorities to be the law, and no authority contra has been cited to me. The motion to strike pages 18 b, c, and d will be granted.

Taking up next the motion to strike paragraph IV of the bill, this paragraph, as I understand it, contends that the state took the swamp and overflowed lands under the act of 1850, with a trust affixed, to use these lands and the proceeds of sale for the purpose of reclaiming them, and in the execution of the trust conveyed them to the trustees of the internal improvement fund; that subsequently the Everglades drainage district was formed, and a board of commissioners appointed therefor. Power to levy taxes, etc., was granted for the purpose of reclaiming the lands, and lien of such taxes de-

clared; that subsequent to the formation of this Everglades drainage district chapter 7430, creating the Napoleon B. Broward drainage district, was passed. The boundaries defined, and the powers given for the purpose of reclamation, and the lands contained in this last-named district are included also in the Everglades drainage district.

There seem to be two main contentions in this paragraph: (1) That there is a trust attaching to these lands under the act of 1850, that they and the proceeds of the sale of same shall be devoted to their reclamation until all shall have been exhausted; and (2) that, the Everglades drainage district having been established, it was not in the power of the Legislature by a special act to carve out of the territory covered by the Everglades drainage district the Broward drainage district. The first contention seems to be authoritatively decided against the complainants' contention, by the case of Hagar v. Reclamation District, 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569. The claim of the complainants that as citizens of the United States they attempt to enforce a law of the United States and not the grant is without merit, it seems to me.

[8] The second contention is, it seems to me, equally without merit. Under the authorities, as I view them, it is within the authority of the Legislature to create a subdistrict for reclamation of a larger district theretofore created. The distinction between ordinary taxes levied for general governmental purposes and assessments for improvements has been pointed out in a number of cases. It is for the Legislature to decide the question of the necessity for such improvements and the area and manner of making same, unless there is such a flagrant abuse of the power, because of arbitrary and wholly unwarranted legislative action, as would authorize a court of equity to intervene to protect a constitutional right of the landowner. The motion to strike the fourth paragraph of the bill will be granted; the facts therein stated not being a basis for relief by this court.

Paragraph III of the bill alleges in substance that the trustees of the internal improvement fund in 1905, in order to sell said lands, adopted a map or plat of the Everglades, dividing said lands into sections and townships by projecting the lines of the United States surveys of the surrounding lands, and filed the same for record in the recording offices of Dade and Palm Beach counties, as well as recording same in the records of the trustee; that in 1907 amendments were made to this map, and copies of same duly filed in Dade and Palm Beach counties; that said trustees in 1911 made a new division of all the Everglades land, and substituted arbitrary and different lines for the division of 1905 and 1907, changing the location of the section, township, and range lines, thereby changing the sections and townships included therein from those made by the maps of 1905 and 1907; that the sections, townships, and ranges shown on the map of 1911 are numbered the same as shown on the map of 1905 and 1907, but in fact describe other and different lands; that complainants and their predecessors in title bought their lands from the trustees under and pursuant to the map of 1905 and 1907; that certain areas of land in the Everglades are not included in any section under

the division of 1911, but townships and ranges were widely separated by such areas; that no map of the division of 1911 has been recorded in Dade, Palm Beach, or Broward counties, but the division of 1911 has been carried out in a new sectional map of Florida authorized by the commissioner of Agriculture, one of the said trustees, and published by the department of Agriculture, which last map includes the Broward drainage district and the lands upon which the uniform tax was levied; that the supervisors of the Broward drainage district are preparing and threatening to survey the lands within said district according to the division of 1911. The section contains copies of the different maps referred to.

[9] The motion to dismiss under the equity rules, as I understand it, takes the place of a demurrer and admits the facts alleged. This suit is primarily to enjoin the uniform acreage tax. The facts that complainants or their predecessors in title purchased land pursuant to one map, and the trustees arbitrarily changed said map, changing the location of the lands purchased, retaining the same designations, but in fact making such designations describe other and different lands than those described by such designations, according to the map pursuant to which the purchase was made, and the taxes being levied according to the last division, are material, it seems to me, to the questions raised in this suit, and without explanation would entitle the complainants to some of the relief prayed. This motion will therefore be denied.

Paragraph II alleges the organization of the board of supervisors on June 15th, the day named in such act for the organization; the passage of the resolution levying the uniform tax, etc.; on August 3d the adoption of a resolution apportioning the estimate of expenses and ratifying the resolution levying the tax adopted June 15th; the report of the secretary of the board and acceptance of same, and instructions to turn over the tax books to the tax collectors of Dade and Broward counties. The section then alleges certain resolutions of the board instructing such tax collectors to retain the books. This section then proceeds to allege the provisions of sections 7 and 14 of article 16 of the state Constitution, and claims that chapter 7430 violates the provisions of section 7, in that it creates the office of drainage supervisor for a period greater than four years, and undertakes to show how; that therefore the board was not legally organized at the meeting in June, and therefore the tax was void; that the levy was made without an estimate first made; that the levy was excessive; that the levy was not made until August 14th, when the secretary made his report; that the tax collectors of Dade and Broward counties did not make delinquent returns as required by the act.

There seem to be three main grounds of attack on the tax by this section:

[10] First. That the act creates an office for more than four years, and therefore there is no board of supervisors, and consequently no legal tax levied. A careful reading of the act convinces me that this ground is untenable. The term of office is fixed at four years from June 15, 1917, by the act itself.

The second ground of attack is because the tax was levied before the estimate of expense; but the paragraph shows the estimate was made and the estimate approved and the resolution of June 15th ratified.

[11] Again, that the board, instead of having the collectors return the books as delinquent, authorized said books to be retained and tax continued to be collected. This action, if unauthorized, would not invalidate the tax.

[12] And also that the tax was excessive, and the estimate contained items not properly expenses. It is true the paragraph shows $19,900 in excess of the engineers' estimate of expense, provided every dollar of the tax was paid. I do not conceive that a tax levy will be declared excessive, and therefore void, because the levied tax of 25 cents per acre, instead of 24½ cents, would produce a surplus over the estimated expenses. The cost of survey, etc., necessary to formulate a scheme of reclamation, must at best be an estimate before the work is done, and this acreage tax was provided by the Legislature to pay such expenses. It would be impossible to tell with mathematical certainty the amount of the expense before the work was done. I am of opinion that such a difference in the amount of the estimate and the amount expected to be raised by the tax would not constitute an excessive levy or invalidate the tax. The motion to strike paragraph II of the bill will therefore be granted.

[13] The twelfth ground of the motion undertakes to reach certain portions of the bill, by setting out the effect of the portions to which it refers. This is not, I think, good practice. As I understand the law, the court cannot be required to wade through an entire pleading to find out what portion is attacked by the motion. For this reason I have not considered the twelfth ground.

This disposes of all matters submitted to me on the hearing. An order will be prepared pursuant to the foregoing memorandum.

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## COMMERCIAL CREDIT CO. v. UNITED DIVERS' SUPPLY CO. (two cases).

(District Court, S. D. Florida. August 13, 1918.)

Nos. 598, 599.

1. PRINCIPAL AND AGENT ⟸100(6)—SPECIAL AGENT.
Money lender's agent, kept at debtor's place of business to direct shipment and disposal of sponges purchased with funds advanced by the principal, had only special agency for special purpose, and could not bind principal by approval of or action upon contract of third person with debtor.

2. CONTRACTS ⟸83—REPUDIATION AS "FAILURE OF CONSIDERATION."
Where consideration moving to plaintiff for release of notes was defendant's agreement to perform certain acts, defendant's repudiation of its agreement would not constitute a "failure of consideration" for the release.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Failure of Consideration.]

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. EVIDENCE ⊜444(6)—ACTION ON NOTE—PAROL EVIDENCE CONTRADICTING WRITTEN INSTRUMENT.

In an action against an indorser on a promissory note, wherein a release was interposed as a defense, evidence of a parol agreement that the release was not to become effective until approved by plaintiff's board of directors was not inadmissible, as contradicting a written instrument.

At Law. Actions by the Commercial Credit Company against the United Divers' Supply Company. On demurrers to pleas to declarations and replies to pleas. Decrees entered.

M. B. Macfarlane, R. E. L. Chancy, and N. B. K. Pettingill, all of Tampa, Fla., for plaintiff.

McKay & Withers, of Tampa, Fla., for defendant.

CALL, District Judge. These suits are similar, the difference being in the amounts of the two promissory notes. The declarations allege the indorsement before maturity and for value of the notes by the payee to the plaintiff. To these declarations several pleas have been interposed, identical in each case. On the first and second pleas issue is joined, and demurrers interposed to the third, fourth, fifth, and sixth pleas, and two replications filed to the seventh, which are the same in both cases, and to these replications demurrers are filed by the defendant.

The third plea sets up that, prior to the indorsement of the promissory note to the plaintiff, the plaintiff and a certain corporation had an arrangement whereby the plaintiff would advance to the corporation moneys with which to buy sponges, and kept an agent at the corporation's place of business for the purpose of directing the shipment and disposal of sponges so purchased with the funds so advanced; that the corporation applied to defendant to purchase sponges of the value of more than $15,000, and agreed to hold said sponges in trust for defendant, and to sell and dispose of the same, and to assign all bills receivable arising from the sale of said sponges; that their proceeds should be applied to the payment of the purchase price; that pursuant to this agreement two promissory notes in different amounts, aggregating the value of sponges, were given by the corporation to the defendant, and that this agreement was approved by the agent of the plaintiff so maintained at the place of business of the corporation; that in pursuance of this agreement the defendant indorsed and discounted said notes with the plaintiff 77 per cent. of their face value; that subsequently the corporation, with knowledge and consent of the plaintiff's agent so maintained as aforesaid, and without the consent of the defendant, confused these sponges with others purchased with money advanced to the corporation by the plaintiff, and the plaintiff through its agents aforesaid undertook the disposal of all of said sponges so confused, with full power to collect the proceeds of said sales; that by this action of the plaintiff in dealing with and appropriating sponges of defendant of a greater value than the amount received on discount of the notes the defendant is relieved of further liability on its indorsement.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The fourth plea makes the third a part, and further alleges that the plaintiff received the proceeds from the sale of the sponges, and did not apply same to the payment of the promissory notes, and that the amount so received was more than sufficient to fully discharge defendant of its liability. The fifth plea incorporates the fourth, and further alleges that plaintiff received the proceeds of the sale of all the sponges delivered by the defendant to the corporation, which amounted to more than enough to discharge the liability of the defendant. The sixth plea repeats the averments of the fourth, and prays judgment for the difference between the value of the sponges so delivered to the corporation and the amount received by the defendant on the discount of the note.

[1] The demurrers challenge the sufficiency of these pleas to defeat plaintiff's recovery. The theory of the defendant in interposing these pleas as defenses seems to be that the plaintiff is responsible for the performance or nonperformance of the agreement between the defendant and the corporation in the delivery of the sponges and giving the promissory notes. This it seems to me is the test to be applied to these pleas. The pleas set out fully the transaction and agreement between the defendant and the corporation, but this agreement does not bind the plaintiff, unless it either was a party to it in its inception or by its acts, with knowledge of same, either estopped itself or adopted same. These pleas seek to make the plaintiff liable under the agreement set out by reason of the fact that it maintained an agent for the purpose of shipping and disposing of sponges bought by the corporation with funds advanced to it by the plaintiff for that purpose, and that this agent approved the contract between the defendant and the corporation. It must be borne in mind that this constitutes the only notice to or participation in the contract by this plaintiff. These allegations in the pleas show a special agency for a specific purpose, outside of which purpose the agent by his acts or knowledge cannot bind the principal. The additional allegations in the fourth, fifth, and sixth pleas rest and depend upon the allegations of the third plea for sufficiency as defenses. If the facts alleged in the third plea do not constitute a defense, the fourth, fifth, and sixth pleas do not. I am of opinion that the third, fourth, fifth, and sixth pleas are demurrable. There are various grounds of demurrer urged to these pleas, but the only ground considered by me is the one above discussed.

The seventh plea alleges that on a date subsequent to the falling due of the notes sued on the plaintiff and defendant, in order to settle their differences, entered into an agreement that the defendant would assume certain indebtednesses to plaintiff, and employ a certain individual for a specified time, in consideration of which acts upon the part of defendant the plaintiff would advance moneys to defendant for the purpose of conducting a sponge business; that pursuant to said agreement defendant entered into the contract with the individual named, and stood ready, able, and willing to fully complete its part of the agreement; also that pursuant to the agreement the plaintiff and its president executed a release to the corporation named in the pleas, and

makers of the notes in suit, acquitting it of all responsibility for the payment of said notes and other amounts claimed to be due the plaintiff from said corporation; that in said release the plaintiff expressly stated that the consideration for said release was the contract theretofore entered into by the defendant with the party named in said pleas; that the plaintiff without just cause refused to carry out its agreement with the defendant, by reason of which agreement and refusal of plaintiff to comply with same and the release given the maker of the notes, defendant is released from its obligation as indorser thereon.

To these pleas the plaintiff files two replications. The first replication denies that the defendant stood ready, able, and willing to perform its agreement, and further denies that plaintiff repudiated the same, but affirmatively alleges that defendant first repudiated the agreement, thereby relieving plaintiff of its obligation under said agreement, and that such repudiation by the defendant constitutes a failure of consideration for the release set up in said pleas. The second replication sets up that the agreement and the release pleaded were entered into on the understanding that said agreement and release should first be approved by the plaintiff's board of directors before either should become binding upon the parties; that plaintiff's board of directors refused to approve of same, and of this the defendant had due notice.

[2] The defendant interposed demurrers to these replications. There are various grounds of demurrer contained in the demurrers. It seems to me the first contains the meat of the objections to the first replication—that:

"The replication does not constitute a reply sufficient in law to bar the defense set up in the seventh plea."

These replications nowhere negative the fact that the consideration moving to the plaintiff in executing the release set out in hæc verba in said plea was the contract between the defendant and the individual named. Nor does it negative the ability of the defendant to perform said contract. These it seems to me are material allegations in said pleas, upon which depend the defense. If this plaintiff, in consideration of the agreement aforesaid entered into by the defendant, released the maker of the notes in suit, then it seems to me it is not in position to demand payment of same by the indorser. There has certainly been no failure of consideration as to such release; and with such release existing the other facts alleged in the replication would constitute no answer to the plea as a whole. I am therefore of opinion that the demurrers to the first replication are well taken.

[3] The second ground of demurrer to the second replication seems to me the main one; i. e., does such replication infringe the rule against altering or contradicting the terms of a written instrument by a former or contemporaneous parol agreement? The allegation in the replication is that the agreement and release were not to become effective until approved by the board of directors of plaintiff. Evidence to establish this understanding or agreement would not, under Burke v. Dulaney, 153 U. S. 228, 14 Sup. Ct. 816, 38 L. Ed. 698, violate this

rule. It would be to the effect that the agreement and release never became effective.

It is my judgment that the demurrer to the second replication is not well taken. It will be ordered accordingly.

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## THE BRIS.

(District Court, S. D. New York. June 7, 1918.)

1. SHIPPING ⊂⊃145—GOVERNMENTAL INTERFERENCE—PREPAID FREIGHT—RETENTION BY CARRIER.
   Where libelant shipped varnishes upon a steamship, prepaying freight and receiving a bill of lading, releasing carrier from loss through restraint of rulers or people, and providing prepaid freight be considered as earned and retained by carrier, "vessel or cargo lost or not lost," and after loading the United States refused the owner license to ship, the carrier could retain prepaid freight.
2. SHIPPING ⊂⊃145—BILLS OF LADING—EARNED FREIGHT LOSS—PUBLIC POLICY—TIME OF WAR.
   Insertion by shipowner of clause in bill of lading providing that prepaid freight be considered earned on shipment and retained by carrier, "vessel or cargo lost or not lost," is not in contravention of public policy in time of war.
3. SHIPPING ⊂⊃145—BILL OF LADING—CONSIDERATION.
   Where a carrier loaded goods on a vessel for shipment, and freight was prepaid, and carrier was forced to unload the goods through shipper's failure to secure license from the United States, such was not a "commercial frustration of the adventure," constituting failure of consideration.

In Admiralty. Libel by the Standard Varnish Works against the steamship Bris. Libelant's exceptions to claimant's answer overruled, and libel dismissed.

Julius J. Frank, of New York City (Everett P. Wheeler, of New Hamburg, N. Y., of counsel), for libelant.

Haight, Sandford & Smith, of New York City (Charles S. Haight, of New York City, of counsel), for claimant.

KNOX, District Judge. This matter is before the court upon exceptions filed by the libelant to the answer of the claimant herein. The facts appear to be as follows:

Upon August 13, 1917, the libelant shipped upon the steamship Bris, then lying at the port of New York, 100 barrels of varnishes, which the libelant desired to have carried to the port of Gothenburg, Sweden. Upon reaching that port the merchandise was to be delivered to the Allmanna Svenska Elektriska A. B., of Westeras, Sweden. The freight charges upon the shipment amounted to $2,383.33, and upon August 17, 1917, the libelant paid to the agents of the Bris the freight money as agreed upon. There was then issued to the libelant a bill of lading.

This document contained a clause releasing the carrier from liability for loss or damage arising through restraint of princes, rulers,

or people; and it also contained two other clauses pleaded in the answer, and frequently referred to upon the argument and in the briefs as controlling, in a large measure, the decision to be made herein. These clauses so far as they are material read as follows:

"(6) * * * Prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere. * * *

"(7) Also in case the ship shall be prevented from reaching her destination by quarantine, blockade, war, ice, unsafe navigation, or the hostile act of any power, or in case blocking up by ice is to be feared, or if the discharging of the goods or any part thereof should be objected to by the authorities, the master or owners may either wait until the navigation is reopened or given free, or discharge the goods into any depot or at any convenient port or bring her cargo back to port of shipment where the ship's responsibility shall cease. This to apply also to goods shipped as through freight beyond the original port of destination of the vessel. In any case the freight and charges are to be paid in full and the shippers and consignees to be responsible for all expenses thereby incurred upon the goods and for demurrage and extra expenses of the vessel to be paid in full along with the freight. * * *

"Owing to conditions of war or hostilities existing or threatened, this shipment is accepted at the sole risk of the owners hereof of arrest, restraint, capture, seizure, detention, or interference of any sort by any Power; and the carrier and its representatives are privileged in its or their absolute discretion, if deemed advisable for the protection of the vessel or any cargo, or to avoid loss, damage, delay, expense, or other disadvantages or danger, either with or without proceeding to or toward the port of discharge, or entering or attempting to enter or discharge the goods there, and whether such entry or discharge be permitted or not, to proceed to any other port or ports or return to the port of shipment, once or oftener in any order or rotation, retaining the goods on board or discharging the same at risk and expense of the owners thereof at any such port or ports at the first or any subsequent call, and full bill of lading freight, together with extra compensation for additional transportation and all other charges, shall be paid by the shipper, consignee, and/or assigns, and shall be a lien on the goods."

At the time this shipment went on board the Bris, there was in force a British system of licensing shipments of goods that were to pass through the war zone. Under the regulations established by Great Britian as to the licensing of shipment of goods from the United States, it was necessary for the exporter to obtain what was called a "navicert," and it was necessary that this navicert should accompany the ship's papers, and, if the same was lacking, the Allies would not permit the shipment to proceed to its destination.

At the time the varnishes for which the freight was paid in this case were delivered to the Bris, the shippers had procured the required license from the British government, and it is admitted that upon the date of delivery to the Bris this license was the only one required. However, upon June 15, 1917 (chapter 30, tit. 7, §§ 1, 2, 40 Stat. 225) an act of Congress of the United States was approved by the President, giving the President authority to regulate exports by proclamation, and imposing penalties of fine and imprisonment for any violation of the act. Thereafter, upon June 22, 1917, July 9, 1917, August 27, 1917, and possibly other dates, proclamations were issued by the President, and various administrative steps were taken, under the provisions of the regulating act of June 15, 1917, until

upon September 18, 1918, the exportation to Sweden of any article of commerce was forbidden, unless a license permitting the article to be exported was procured from the proper authority in the United States.

Some days after the issuance of the President's proclamation of August 27, 1917, which comprehended the shipment in question, the agents of the Bris notified the libelant's agents of the situation as it then existed, and gave formal notice that, unless a license to export the shipment in question was procured on or before September 12, 1917, it would be necessary to discharge the libelant's cargo. Similar notice was given to other shippers whose cargo was on board the Bris.

Owing to the confusion that resulted among shippers by reason of the President's proclamations, and their requirements, and so as to enable the shippers to make appropriate application for licenses, the cargo was not discharged upon September 12th. In the meanwhile libelant made efforts to procure an export license for the varnishes, but was unable to have the same issued. Upon October 2d, the agents again sent a notice to the libelant, and the other shippers of cargo, in which they once more gave formal notice that unless export licenses were received by October 6, 1917, the cargo would be discharged, and upon October 8, 1917, the claimant began the actual discharge of the cargo, and completed the operation about October 22d. About October 11th it was definitely ascertained that no license for the export of the shipment in question would be issued.

The claimant seeks to retain the freight prepaid upon the shipment of the varnishes, upon the theory that it was through no fault of the Bris that the cargo did not go forward, and that under the bill of lading the claimant was entitled to keep the freight paid in advance, in that, under the sixth paragraph of the bill of lading, the prepaid freight was to be considered as earned on shipment, and that under the circumstances herein set out there was no obligation upon the claimant to return the prepaid freight.

It is contended by the libelant: (1) That the articles in the answer to the libel setting forth the foregoing facts are insufficient in law to constitute a defense; (2) that the performance of the contract between the parties became unlawful after the agreement was made, that the consideration therefor failed, and the libelant is entitled to a return of the prepaid freight; (3) that the clauses from the bill of lading hereinbefore set out were without consideration and against the public policy of the United States; (4) that the said clauses, being an attempt to put off the essential duties resting upon every public carrier by virtue of his employment, are accordingly void; (5) that the said clauses are in violation of Harter Act February 13, 1893, c. 105, 27 Stat. 445 (Comp. St. 1916, §§ 8029–8035), and thereby invalid and void.

The naked question before me is, under the circumstances above recited and the bill of lading issued upon the shipment, can the claimant retain the prepaid freight? Fortunately, I am not without a guide in seeking the proper solution of the question. The Circuit

Court of Appeals for this circuit, in the recent case of The Gracie D. Chambers, 253 Fed. 182, — C. C. A. — (decided May 22, 1918), and in its facts somewhat similar to these before me, has held in favor of the claimant. Indeed, the facts which justified the decision in favor of the claimant in the Gracie D. Chambers Case appear to me to be less persuasive in supporting the contention of the claimant than do those in the case at bar.

In that case the schooner began to load a general cargo at this port upon September 14, 1917, and between September 27th and September 29th the libelant paper company shipped on board her 120 tons of print paper. Late in the afternoon of September 28th the Treasury Department at Washington telegraphed the collector at the port of New York to withhold clearances of all sailing vessels in port, and any part of whose voyages would bring them within the danger zone. There was no official publication of the embargo, but upon September 29th it was put in effect by the refusal of clearances to such vessels as applied for them. October 3d the Gracie D. Chambers moved out to an anchorage to save wharfage charges and clearance. On October 4th the libelant paid the freight as against the delivery of the bill of lading. On October 5th the master applied for a clearance, which was refused. He then applied to the authorities at Washington to make an exception in this instance, upon the ground that the Gracie D. Chambers had begun to load cargo before the issuance of the embargo order. Upon October 10th the refusal to make an exception in favor of this schooner was definitely made. Cargo was then discharged, and the owners refused to return the prepaid freight. It will be noted, in passing, that the cause which prevented the execution of the contract of the parties in the Gracie D. Chambers Case arose from an infirmity placed upon the schooner by governmental action.

The bill of lading in that case had excepted "restraints of princes and rulers," and also "freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost." It is said by the libelant in the case before me that the decision in the Gracie D. Chambers Case turned upon the construction of the word "irrevocably" as it was contained in the bill of lading. In other words, that the parties had agreed that the freight should be retained irrevocably, ship and/or cargo lost or not lost. And it is then urged upon me that the bill of lading issued by the agents of the Bris is not the equivalent of that issued by the owners or agents of the Gracie D. Chambers.

[1] It is my judgment that the words, "prepaid freight is to be considered as earned on shipment of the goods and is to be retained by the vessel's owners, vessel or cargo lost or not lost, or if there be a forced interruption or abandonment of the voyage at a port of distress or elsewhere," are for all practical purposes the equivalent of the statement that "freight for the said goods to be prepaid in full without discount retained and irrevocably ship and/or cargo lost or not lost." The effect of the clause in each instance is simply this: That, once the freight money is paid, it is paid for good and may not

FIG. 1.

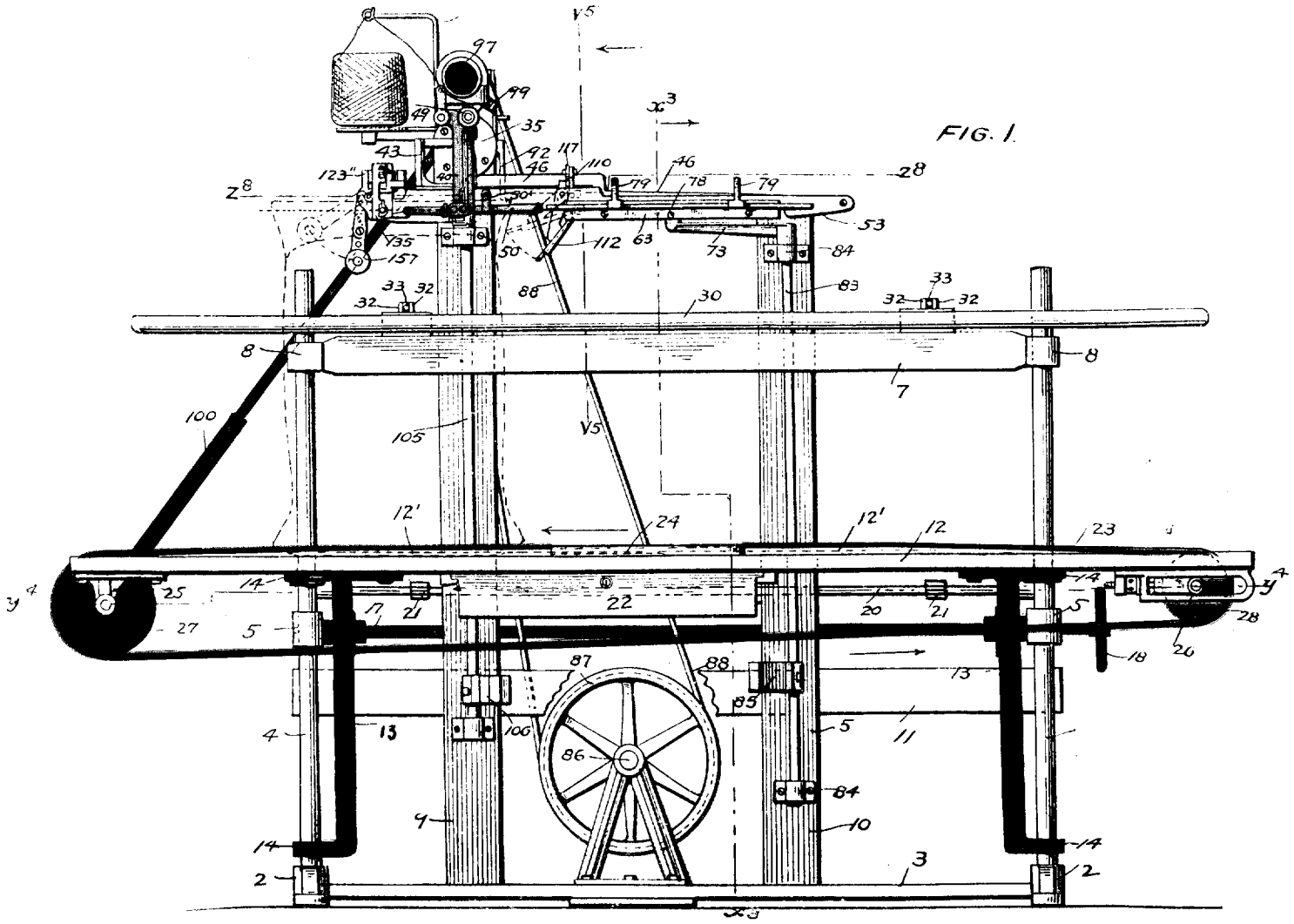


FIG. 3.

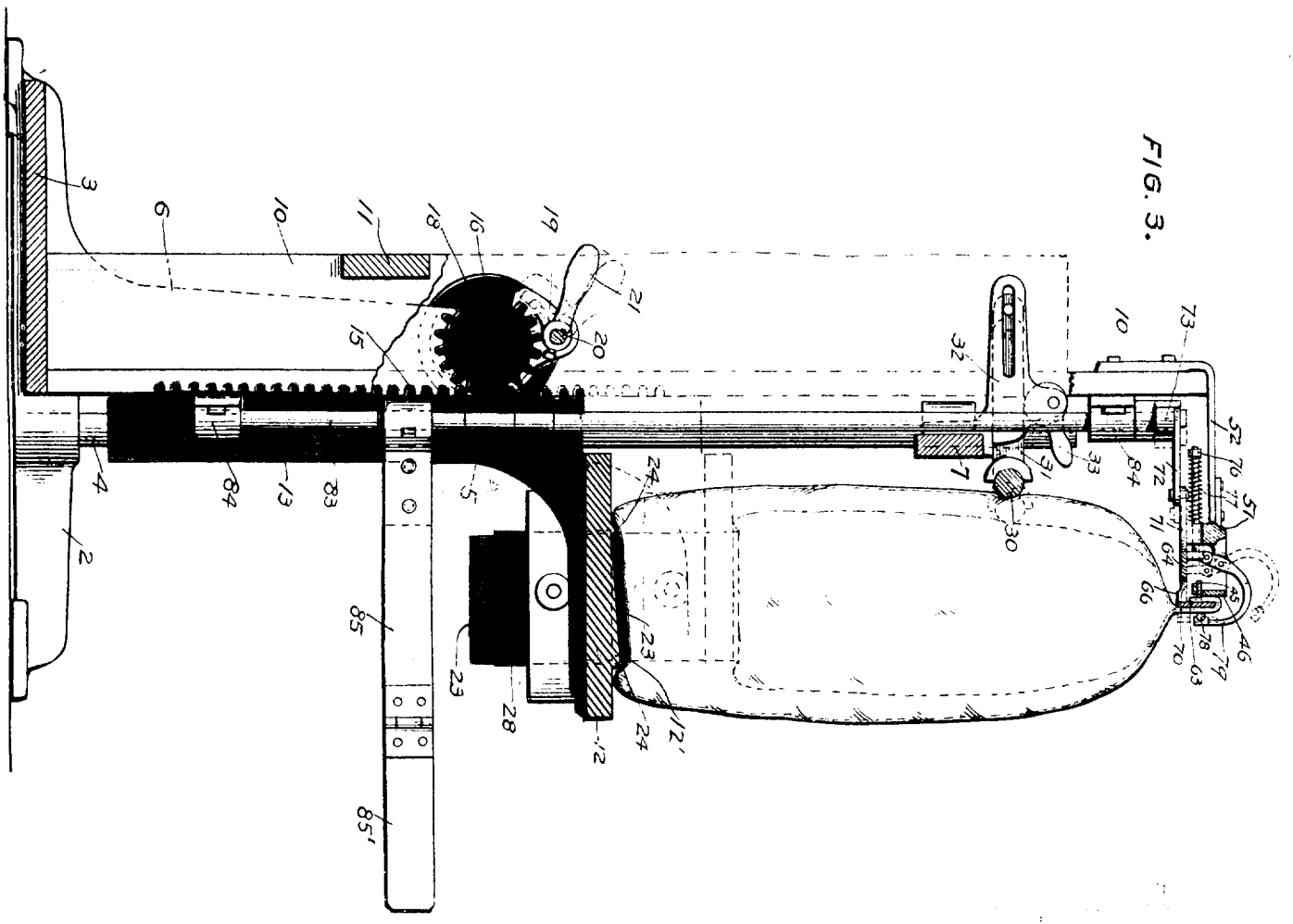


FIG. 4.

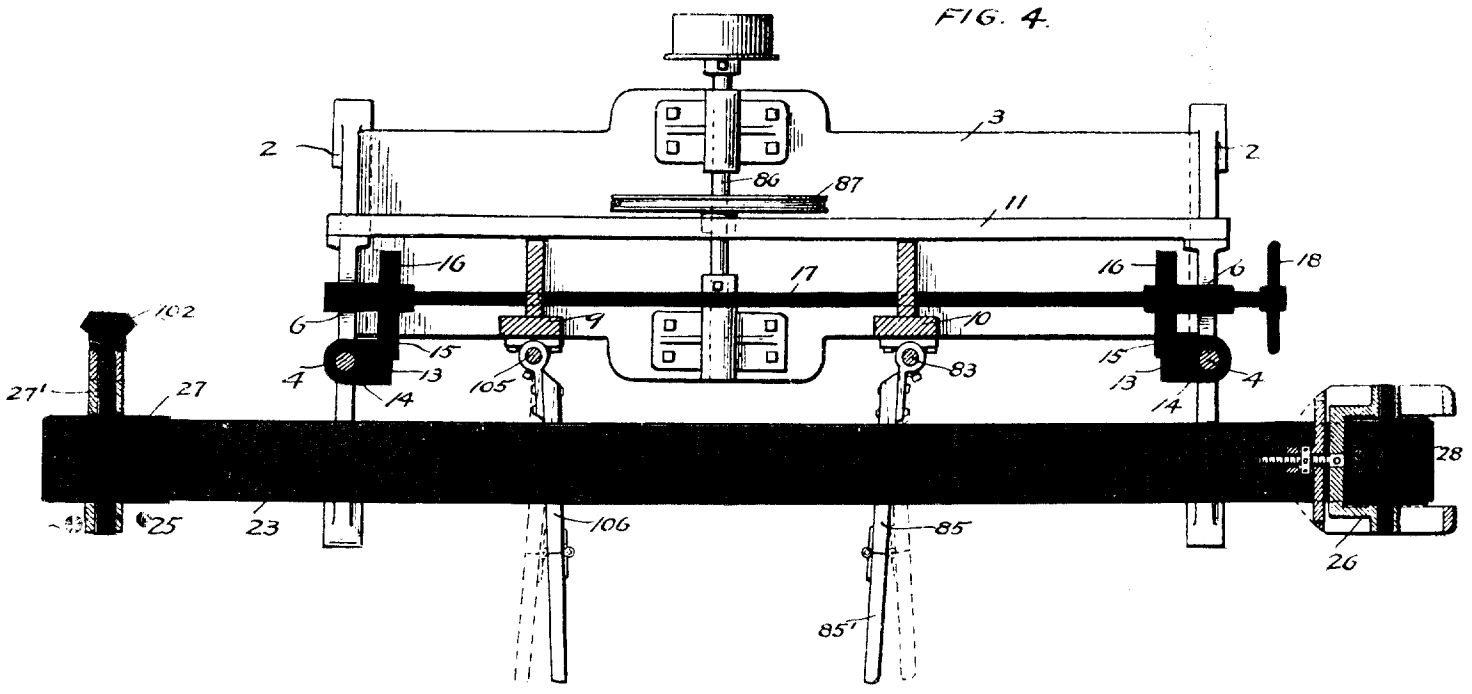


FIG. 5.

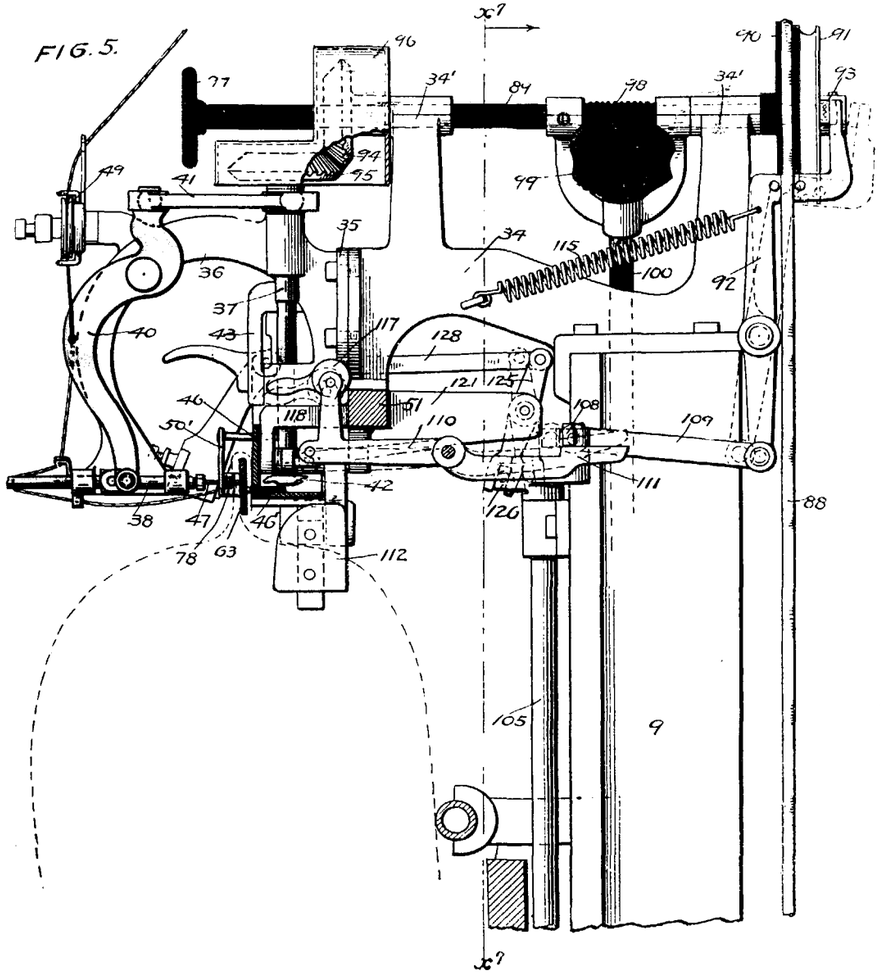
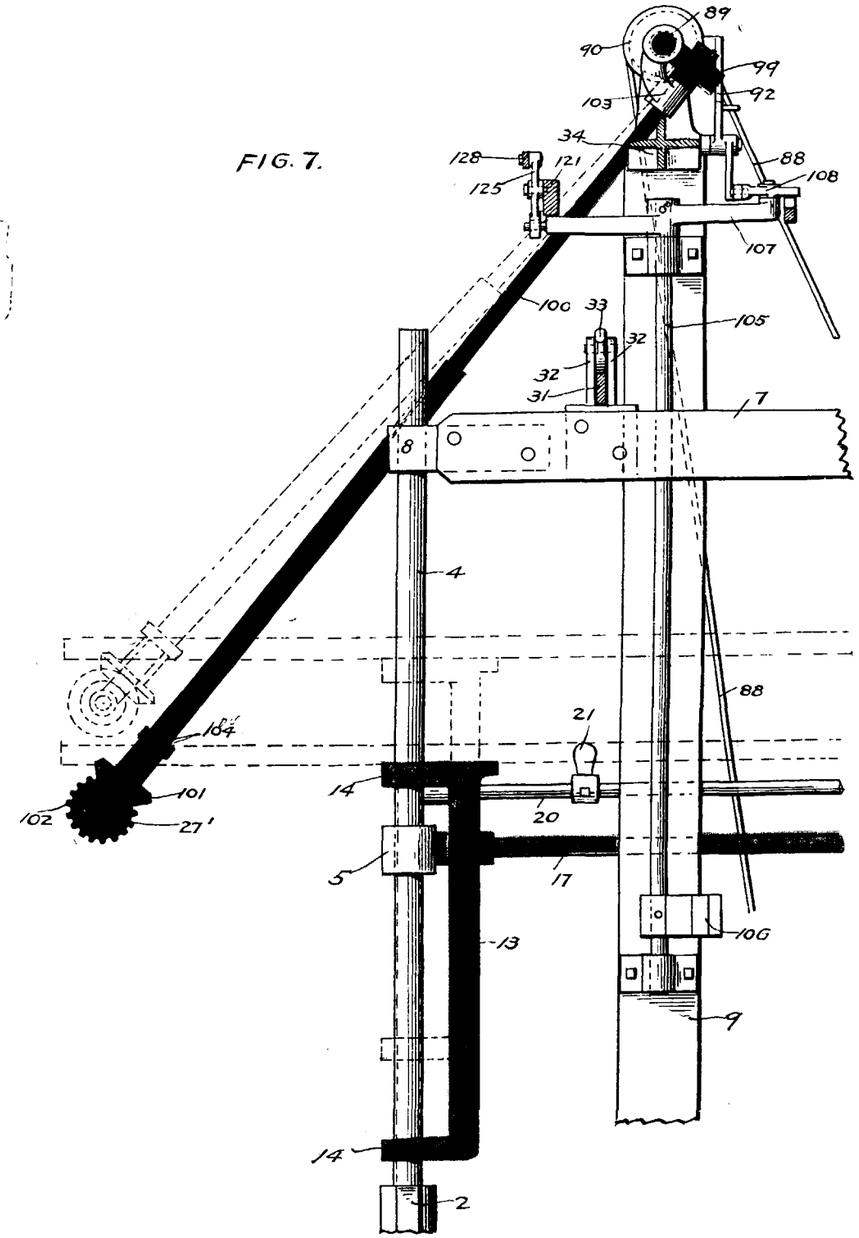

x7
96
77
34'
84
98
34'
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91
93
49
41
94
95
99
35
34
115
100
92
36
37
40
43
117
128
121
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50'
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57
110
108
109
111
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47
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78
63
112
120
88
105
9
x7

FIG. 7.


89
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103
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128
125
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108
107
100
33
105
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2

be recovered. That this holding, in certain aspects, must appear harsh, goes without saying.

[2] It does not appear to me, however, that under the existing circumstances the insertion by shipowners of such a clause in a bill of lading contravenes any sound public policy, if public policy enters into the case at all. It is my opinion that public policy in any given instance depends largely upon the existent conditions and circumstances at the time the public policy is enunciated. At the time the parties here entered into their contract, they and the world knew the hazard with which shipping was being carried on. They likewise knew that what was permitted upon one day might not be permitted the next. Indeed, by act of Congress and presidential proclamation they were notified that regulations governing, and perhaps forbidding, exports, were likely to be issued at any time, and in the face of this knowledge the libelant delivered his cargo to the Bris and prepaid the freight as against the bill of lading. It is not to be wondered at, therefore, that ship's owners, in view of the demand for cargo space, sought to protect themselves (if lawfully they might do so) as against any contingency that might arise. The infirmity here, unlike the Gracie D. Chambers Case, was in the cargo of the libelant, and not in the Bris.

By reason of the foregoing considerations, the cases cited by the proctors for the libelant upon what has been declared to be the law with respect to the ability of a carrier to limit its responsibilities seem to me not in point. My attention is called to the principle announced in Scrutton on Charter Parties, section 10, article 137, 8th Ed., page 321, where it is said advance freight "will be recoverable (from the shipowner) if the goods are not lost by excepted perils, or if the shipowner has not fulfilled the condition precedent of starting, within a reasonable time, of a seaworthy ship on the agreed voyage." The answer to this must be that, in this litigation, the libelant did not perform the conditions precedent to his being permitted to forward his goods, and it appears to me that the burden of not having done so, even though prevention was through the action of the government, must fall upon it.

Again, it is urged that the provision in the seventh clause of the bill of lading is applicable only to a case where the ship has begun her voyage and is "prevented from reaching her destination." This seems to me not to be a valid contention. The prevention of the voyage, interposed by the government of the United States within this port, was, so far as the shipowners were concerned, just as potent a factor, and operated in their favor to the same extent, as would the act of an enemy power once the ship was on her way.

[3] I am likewise unable to agree with the libelant that there was here a total failure of consideration, and that there was a "commercial frustration of the adventure," by reason whereof the libelant is entitled to prevail. The libelant, under his contract, had space for its cargo. For weeks the owner held the Bris to enable the libelant to get his export license. Indeed, the Bris, had she not shown a disposition to act fairly with the libelant, would have been able to take on

another cargo and complete her voyage during the time she lay idle for the purpose of being in a position to sail for Gothenburg, should the libelant procure its license. The adventure was frustrated because of governmental action, and I shall not hold that a frustration of this character dissolved the contract, notwithstanding that the Bris did not "break ground."

Without entering into a discussion, in an opinion already too long, of my reasons for thinking that the Harter Act (27 Stat. 445) has no application to the case at bar, I shall content myself with the mere assertion that it has none.

The exceptions to the answer to the libel are overruled, and the libel dismissed, with costs.

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## THE PORTUGAL.

(District Court, S. D. Florida. May 29, 1918.)

1. SALVAGE ⊂=34—AWARD—AMOUNT.
   Where a bark stranded on a Florida reef, from whence it was towed by a large tank steamer worth about $300,000, *held* that, in view of the service and the imminent danger to the bark, which was found to be worth approximately $90,000, carrying a cargo worth about $45,000, the steamer was entitled to an award of $30,000 as salvage, and to a further award of $2,000 for injury to its cables.
2. SALVAGE ⊂=52—LIBEL—INTERVENTION.
   Where libel was filed for and on behalf of a ship, its owners, and crew, seeking to recover salvage, and members of the crew intervened unnecessarily *held*, that they should bear the costs of the intervention.
3. SALVAGE ⊂=52—COSTS—STIPULATION.
   The claimant of a vessel libeled for salvage service must pay the cost of the stipulation required before the property could be released, even though it was excessive.

In Admiralty. Libel by the Gulf Refining Company against the bark Portugal, in which certain members of the crew of the steamship Gulf of Mexico intervened. Decree for libelant.

Patterson & Harris, of Key West, Fla., for libelant.

George W. Allen and W. Hunt Harris, both of Key West, Fla., for respondent.

Marks, Marks & Holt, of Jacksonville, Fla., for interveners.

CALL, District Judge. On the morning of August 8, 1917, the Portuguese bark Portugal went ashore on Crocker's Reef. This bark was of 1,353.45 gross tons and 1,223.94 net tons, built of steel, in the year 1889, and was bound on a voyage from New Orleans to Lisbon, Portugal, loaded with 128,100 oak staves. The invoice price of this cargo at New Orleans was $39,767.50.

[1] At about 1 o'clock p. m. of that day the steamship Gulf of Mexico, on her maiden voyage to Port Arthur, Tex., in water ballast, sighted the stranded bark and went to her assistance. The steamship was a tanker, built of steel, of 7,807 gross tons and 4,867 net tons, with engines developing in the neighborhood of 3,000 horse power. At

about 5 o'clock p. m. a new 9-inch manilla hawser was made fast to the bark's foremast, and the ship commenced to pull. This pulling continued for some hours, until the hawser parted. A new steel cable, 1¾ inch in diameter, was then passed aboard the bark through the stern chocks, and made fast to the mizzenmast, and again the steamship pulled without freeing the bark. A hawser was then run to the other quarter of the stern and made fast to the mizzenmast of the bark and the steamship by the use of her engines and steam winch acting on her anchor, pulling on the two lines, succeeded about 1 p. m., of August 9th, in floating the bark. She thereupon proceeded to Key West with the bark in tow, arriving in the harbor and anchoring the bark about 7:30 p. m. of August 10th.

During the time the ship was pulling on the bark the stern chock carried away, and the after railing, stern bitts, and the mizzen rigging were destroyed. The steamship's hawsers and cable were broken in one instance, and the rest strained and strands broken in the same. The evidence shows the original value of these hawsers and cable to have been $3,250. There is no proof of the value of same in the condition they were after the salvage service had been rendered. The value of the Gulf of Mexico may be reasonably fixed at $300,000. The value of the bark, after she had been saved, was fixed by appraisers at $60,000, and the value of her cargo at $30,000. I find some difficulty in arriving at the value of the bark. The testimony of the experts taken in New York is not altogether satisfactory. It is a fact, so well known that the court can almost take judicial cognizance of it, that sailing vessels, whether of belligerent or neutral nations, bound for European ports, were denied war insurance on account of the unrestricted submarine warfare inaugurated by the Germans in February, 1917, and this fact and the danger of submarine attack upon such slow-moving craft in my opinion vitally affects the value of such craft. But this consideration did not enter into the estimates of the experts testifying in New York. Again, their testimony was based upon the dead weight carrying capacity of the sailing ship, and the evidence nowhere shows what this capacity of the Portugal was, and it varies with the model of vessel under consideration. Now the testimony shows that the Portugal was built of steel, her decks in bad condition, and her plates badly pitted on the sides and requiring renewal in a short time. I think, taking all the testimony into consideration, that a value of about $90,000 would be a fair valuation to place upon the bark.

The captain of the bark testifies that the invoice value of the cargo was more than $39,000 at New Orleans; that oak staves were more valuable in Lisbon than they were in New Orleans; so I reach the conclusion that the value of $30,000 placed by the appraisers on the cargo was too small. Again, I find myself in a quandary about reaching a conclusion as to the value of this cargo. It was certainly of a greater value on board the bark than the invoice price, but to what extent it is difficult to say. Certainly its value was not less than $45,000. I therefore find the value of the bark and cargo is $135,000. That the bark was hard and fast aground on Crocker's Reef I think

there can be no doubt. Had she been lightly aground at the stern when the steamship made fast the first hawser to the foremast and pulled, she would certainly have been floated with little effort. Had her stern been lightly pounding with the ground swell, which was the only sea running during the salving operations, her anchor being down and holding her, I cannot imagine why she did not float when the steamship pulled on her the first time.

It was contended before me that the damage received by the bark during the salvage operations was due to bad management of the officers of the steamship, but I do not think the evidence bears out this contention. The letter written in Portuguese, and I presume intended for the Portuguese consul at New Orleans, given shortly after the operation was completed, negatives this view expressed at the hearing. Evidently it required extraordinary force to free the bark from the reef. It required the combined force of the engines and the steam winch pulling on the ship's anchor to accomplish the result.

That the service rendered was a salvage service there is no question. The question raised is whether it is a salvage service of a high or low order. That the bark was in an extremely dangerous position there can be no question. It has been said too many times by the courts that a vessel stranded on one of the Florida reefs is in imminent and great danger to admit of question. It is apparent from the testimony of all the witnesses that there was a strong current setting upon the reef, and the existence of this current made it dangerous for any ship approaching the bark to render assistance. I am therefore of opinion that this is a case where the salvage award should be generous. Now, considering the value of the steamship, the value of the salved property, the dangerous position of the bark, the dangers encountered by the steamship in the rendition of the service, the time and effort consumed, and the promptitude, manner, and success of the same, the fact that the steamship was delayed in her voyage to Port Arthur, the time consumed in the salvage service and towing the bark to Key West, I am of opinion that the amount of the award should not be less than $30,000, and in addition the amount of $2,000 for the damage to the ship's hawsers and cable.

[2, 3] There have been three interventions filed by members of the crew of the Gulf of Mexico. I fail to see the necessity of making these additional costs, in a case where the costs are already heavy. The libel was filed for and on behalf of the ship, its owners and crew. The rights of the crew were amply protected under this libel, and the filing of these interventions was unnecessary and simply result in additional unnecessary costs.

There is another matter I wish to advert to, and that is the amount of stipulation required of the claimant before the property could be released. Application was made to the court to reduce it, which the court refused to do, at the time having no light before it, except the value of the property and the amount of salvage claimed in the libel, both of which it now appears to me were excessive. The court having required the stipulation, the cost of same will have to be paid by the claimant. As regards the costs of the three interventions I

deem it nothing but equity that these costs should be borne by the interveners, and not by the claimant.

It will be decreed in this case that the libelant recover from the claimant and his sureties the sum of $30,000 as salvage and the further sum of $2,000 as damages to the hawsers and cable used in the salving operations, and the costs of the main proceeding; the amount of the salvage award to be divided between the vessel and the crew in the proportion of three-fourths to the vessel and one-fourth to the crew, to be paid to each member in proportion to the monthly wage received by him. The costs of the intervention to be taxed against the interveners and their shares in the award.

It will be so decreed.

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## In re UNITED GROCERY CO.

(District Court, S. D. Florida. August 8, 1918.)

1. BANKRUPTCY ⟸342—RE-EXAMINATION OF CLAIM—REFEREE'S ORDER.
   Order of referee in bankruptcy, on petition to re-examine claim, allowing insolvent bank's claim conditionally on receiver making payment to trustee in bankruptcy, is not justified under Bankruptcy Act July 1, 1898, § 57k (Comp. St. 1916, § 9641), providing that claims which have been allowed may be reconsidered for cause, and reallowed or rejected, in whole or in part.

2. BANKRUPTCY ⟸159—VOIDABLE "PREFERENCE"—DEPOSIT IN BANK.
   Deposit of money by receiver of bankrupt in checking account with bank to which bankrupt was indebted, and which subsequently closed its doors, was not a "preference" voidable under the Bankruptcy Act July 1, 1898, § 60b (Comp. St. 1916, § 9644).

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preference.]

3. BANKRUPTCY ⟸178(1)—"CONVEYANCE"—"TRANSFER."
   Deposit of money by receiver of bankrupt in checking account with bank to which bankrupt was indebted, and which subsequently closed its doors, was not a "conveyance" or "transfer," etc., void or voidable under Bankruptcy Act July 1, 1898, § 67e (Comp. St. 1916, § 9651).

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conveyance; Transfer.]

4. BANKRUPTCY ⟸169—RIGHT OF SET-OFF.
   Where, on date of adjudication, bankrupt was indebted to bank, and his receiver, between date of adjudication and date when bank closed its doors, deposited in general checking account sum less than bankrupt's indebtedness to bank, under federal Bankruptcy Act, neither bank nor its receiver could apply deposit to payment of debt to bank, nor could the bankrupt's trustees apply it to discharge pro tanto of the debt.

5. BANKRUPTCY ⟸314(2)—INSOLVENCY—RIGHT OF CREDITOR.
   On bankruptcy, creditor becomes equitable cestui que trust in assets in proportion that his claim bears to total amount, and his right to participate may not be diminished by claims arising subsequently to bankruptcy; right to participate being determined as of date of bankruptcy.

6. BANKS AND BANKING ⟸288—INSOLVENCY—CLAIMS.
   On insolvency of national bank and appointment of receiver, creditor becomes equitable cestui que trust in assets in proportion that his claim bears to total amount, and his right to participate may not be diminished by claims arising subsequently to insolvency; right to participate being determined as of date of insolvency.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

7. BANKS AND BANKING ⊂=119—GENERAL DEPOSIT—RELATIONSHIP OF "DEBTOR AND CREDITOR."

A general deposit of money in a checking account with a bank created simply the relation of "debtor and creditor" between the bank and the depositor.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Debtor and Creditor.]

In Bankruptcy. In the matter of the United Grocery Company, bankrupt. On petition to review an order of the referee. Petition granted, and order modified.

See, also, 239 Fed. 1016.

L. R. Milton, of Jacksonville, Fla., for objecting creditor.
Cockrell & Cockrell, of Jacksonville, Fla., for trustees.

CALL, District Judge. On January 4, 1917, the United Grocery Company was adjudicated a bankrupt, and receiver appointed in said cause. Subsequently the trustees were duly elected by the creditors and appointed by the referee. On January 4, 1917, the bankrupt was indebted to the Heard National Bank in the sum of $30,480.47. The Heard National Bank closed its doors on January 16, 1917, and in due course a receiver to wind up its affairs was appointed by the Comptroller of the Currency. Between the 4th and the 16th of January, 1917, the receiver of the bankrupt deposited with the Heard National Bank to his credit as receiver various amounts which aggregate, after the payment of certain checks against the deposit, the sum of $7,586.04. On January 19, 1917, the receiver of the Heard National Bank filed his proof of claim before the referee in the above stated amount. On March 26, 1917, the trustees of the bankrupt filed their petition before the referee to re-examine the proof of claim of the receiver of the bank, and to strike the same from the files, or to disallow the same, or to cause the same to be modified, or to give such relief in the premises as may be consistent with justice and the acts of Congress.

On March 27, 1917, the referee made an order for a re-examination of the proofs of the bank's claim. On October 26, 1917, a stipulation of facts was filed before the referee, and a hearing had upon the petition to re-examine and such stipulation of facts. On October 31, 1917, an order was entered by the referee, allowing the bank's claim in the sum of $30,480.47, upon the payment to the trustees by the receiver of the bank of $7,586.04, deposited by the receiver of the bankrupt in said bank, prior to January 16, 1917, and after his appointment on January 4, 1917. On November 3, 1917, the bank's receiver filed his petition for a review, assigning three errors as follows:

(1) That the referee erred in allowing the claim of the bank on condition that the deposit should first be paid to the trustees of the bankrupt.

(2) That the referee erred in holding that the trustees were entitled to the payment of the deposit before the bank's claim could be proved.

(3) On the petition to re-examine the claim, the only order the referee could make was an order allowing said claim in whole or in part, or an order rejecting said claim in whole or in part, and the order in this case does neither.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The two first assignments raise the same question and may be considered together.

[1-3] I will take up the third assignment first. Section 57k, of the act (Act July 1, 1898, c. 541, 30 Stat. 560 [Comp. St. 1916, § 9641]) is as follows:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case," etc.

The order of the referee in this case allows the claim conditionally. While it does not specifically disallow the claim on the failure of the bank's receiver to make this payment to the trustees, that seems to me to be its effect. It does not appear to me that the order is justified under section 57k of the act. I do not understand that the order in this case was made under the provisions of section 57g, which authorizes an order of this kind where the creditor had received a preference, etc.; but, if it were so contended I am clearly of opinion that this deposit in the checking account could not be either a preference voidable under section 60b (Comp. St. 1916, § 9644), or a conveyance or transfer, etc., void or voidable under section 67e (section 9651). I am of opinion that the third assignment should be sustained, and the order of the referee should have allowed the bank's claim either in whole or in part.

[4-7] Now, as to the first and second assignments, which question the correctness of the order, as a question of law: There is no dispute as to the facts. It is unquestioned that the bankrupt, on the date of the adjudication on January 4th, was indebted to the bank in the sum of $30,480.47, nor is it questioned that the receiver of the bankrupt deposited in a general checking account with the bank, between January 4th and 16th, the $7,586.04, nor that the bank closed its doors on January 16th, and a receiver was duly appointed by the Comptroller to wind up its affairs and make distribution of its assets according to the laws governing such cases. The decision of the question seems to me to depend upon whether the right to a set-off, either at law or in equity, exists under these facts. As I understand the Bankruptcy Act and the decisions of the courts, neither the bank nor its receiver could have applied this deposit to payment of the debt owed the bank by the bankrupt nor the trustees of the bankrupt apply this deposit to the discharge pro tanto of the debt to the bank, because there is a want of mutuality in the demands, and because, as I understand the law and the adjudicated cases, upon the bankruptcy of an individual, or the insolvency of a national bank and appointment of a receiver to wind up its affairs by the Comptroller, the creditor becomes an equitable cestui que trust in the assets in the proportion that his claim bears to the total amount of the claims, and his right to participate in the dividends arising from such assets may not be diminished by claims arising subsequently to the bankruptcy or insolvency. This right to participate is determined as of the date of bankruptcy or insolvency. The bank's right to participate in the dividends from the bankrupt's estate matured certainly on January 4th, when the adjudication was made, and the right of the trustees to participate in the dividends of the assets of the bank matured on January 16th, when the Comptroller took charge

of the affairs of the bank, and this right could not be taken from the bank's receiver by the subsequent deposit of moneys in the bank to a general account, to which no trust was affixed, and which created simply the relation of debtor and creditor between itself and the depositor.

The fact that the bankrupt may pay in full its creditors, and the bank may not be able to do so, cannot change the principles of law. It may work an apparent hardship in the particular case; but all general rules sometimes do that. I am of opinion, therefore, that the order of the referee should have reallowed the claim of the receiver of the bank in the full amount allowed conditionally.

The petition to review will therefore be granted, and the order of the referee modified accordingly.

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## UNITED STATES v. PAPE.

(District Court, S. D. Illinois, S. D. August 17, 1918.)

No. 15965.

1. WAR ⇐4—ESPIONAGE ACT—CRIMINAL LIABILITY.
A citizen cannot be prosecuted criminally under Espionage Act June 15, 1917, § 3, for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps, and contributing to Red Cross fund, when requested for his reasons in the privacy of his own home, in the presence of nobody but a duly authorized committee, and especially when such reasons are mere matters of opinion, apparently honestly held.

2. WAR ⇐4—ESPIONAGE ACT—CRIMINAL LIABILITY.
A criminal prosecution under Espionage Act June 15, 1917, § 3, cannot be based on the failure of a citizen to subscribe for Liberty Loan bonds or thrift stamps, or to contribute to patriotic funds, so long as he does not endeavor to induce others to do likewise.

Criminal prosecution by the United States against Theodore B. Pape. On demurrer to indictment. Demurrer sustained.

Edward C. Knotts, U. S. Dist. Atty., of Carlinville, Ill.

Graham & Graham, of Springfield, Ill. (Hugh Graham, of Springfield, Ill., of counsel), for defendant.

FITZHENRY, District Judge. The demurrer to this indictment is to its substance. The indictment contains two counts. The first charges that the defendant, on the 18th day of April, 1918, at Quincy, Adams county, Ill., at a time when the country was at war, did, "with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies," in the presence and hearing of divers persons, there state:

"He would not subscribe to the Liberty Loan bonds; that it was a matter of principle with him; that he did not want the war to continue, and that the government was wrong in its position; that he thought that if enough people would act in the way he was acting and withhold their money that the government would be forced to a position where it would make a peace by an agreement with Germany; that he did not want the United States victorious, nor did he want Germany victorious, but wanted the war to end in a draw;

that he believed that, if the United States offered to meet Germany in conference, Germany's position would be such that certain terms of peace could be arrived at; he had not bought any Liberty bonds of any of the series; that he had bought no thrift stamps; that he had not participated in any Liberty bond parades, as he would not buy Liberty bonds; that he would not join the Red Cross, for that would be aiding the war, and he was opposed to the war."

The second count is substantially to the same effect, except that it charges an attempt. Just after counsel for defendant began his argument, he was interrupted by the district attorney, who stated that he wished the court to consider the demurrer in the light of all of the facts surrounding the commission of the alleged crime, and thereupon made the following statement of fact, which was concurred in by counsel for the defendant:

The defendant is a prominent citizen of Quincy, Ill., well educated, a member of the bar, and stands well among his neighbors; that he has not subscribed for any of the Liberty Loan issues, nor for thrift stamps, nor had he contributed to the Red Cross. Upon an examination of the records by the committee in charge of the patriotic activities in Quincy, the absence of the defendant's name from the lists of subscribers and contributors was observed. Members of the committee discussed the matter among themselves, and, nobody being able to explain the reason for the notable absence of defendant's name, it was decided by the meeting to appoint a special committee to wait upon him and ask him his reasons for his omission of patriotic duty. The committee communicated with him and an interview was granted. The committee called at his home, and he was requested for his reasons for failure to subscribe and contribute. He told the committee he would give them his reasons; that it was a matter of principle with him, etc., using the words charged in the indictment. It is not contended that he ever communicated his reasons to any other person or persons than the committee which called upon him for that purpose, and the reasons were given in his own home, in the presence of nobody except the members of the committee. It is stipulated that he never attempted to get anybody else to adopt his views, or to act with reference to these patriotic activities as he was acting; that the words spoken by the defendant were spoken coolly and deliberately, and as an educated man would speak them; that after the interview he presented his views to nobody else, nor endeavored to have anybody else decline to subscribe or contribute.

The part of the act of June 15, 1917 (40 Stat. 219, c. 30, § 3), under which this prosecution was commenced, is as follows:

"Whoever, when the United States is at war, shall willfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies * * * shall be punished by a fine of not more than $10,000 or imprisoned for not more than 20 years, or both."

The issues raised by this demurrer were argued and submitted in the light of the facts admitted by the demurrer, as supplemented by the agreed state of facts. It is apparent from these facts that the defendant was opposed to the war; that he did not subscribe for bonds or thrift stamps, or contribute to the Red Cross funds, etc., with intent to embarrass his country in the prosecution of the war and to force it to negotiate for peace with Germany. However, it is agreed by counsel that he never attempted to prevent anybody else from doing so, and never did anything with reference to the matter, except to give his reasons for his conduct to a duly authorized committee in charge of the patriotic activities, when requested to do

so, and then in the privacy of his own home. Two questions are raised:

[1] 1. Can a citizen be prosecuted criminally for giving his reasons for not subscribing for Liberty Loan bonds and thrift stamps and contributing to Red Cross drives, when requested to do so in the privacy of his own home and in the presence of nobody other than the members of a duly authorized committee, and especially when those reasons are mere matters of opinion apparently honestly held?

2. Can a citizen be prosecuted criminally for a failure to buy Liberty Loan bonds and thrift stamps, and for a failure to contribute to the Red Cross drives?

The entire language charged in the indictment was used in explaining to the committee his reasons for his omission, and at the request of the committee. If the issues came before the court upon the indictment alone, where the criminal intent is well pleaded, a different question would be raised. But in the light of the facts submitted to the court, in connection with this demurrer to the indictment, the facts presumably being the ultimate facts susceptible of proof, the question of intent is entirely disposed of, and without a criminal intent there can be no prosecution in a case of this character.

[2] As to the second question: It is clear to this court that a criminal prosecution cannot be based upon the failure of a citizen to subscribe for bonds, or thrift stamps, or to contribute to patriotic funds, so long as he does not endeavor to get others to do likewise, with intent to interfere with the operation and success of the military establishment, or to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces, or to obstruct the recruiting or enlistment service of the United States, to the injury of the service.

Probably no series of events has done more to mobilize the patriotism of the American people than the Liberty Loan, thrift stamp, Red Cross, and other patriotic drives during the present war, and these great drives and their splendid successes, both in raising funds and intensifying the patriotism of the American people because of them, have furnished opportunities to everybody for voluntary service in the common cause. The citizen's love of the republic has frequently driven him to subscribe and contribute, not the criminal laws.

Congress has the power arbitrarily to take such portions of the property of the defendant, or such portion of his income, as may be necessary to promote the common defense, and has passed laws doing so, and it is about to pass another law greatly increasing the taxes which this defendant and every other citizen will have to pay. The criminal laws are constantly in operation to compel every citizen to do his full duty as a citizen with reference to all revenue measures. The Liberty Loan drives, thrift stamp campaigns, and other campaigns for the creation of funds for the Red Cross, Y. M. C. A., K. of C., and other organizations which are doing a great part in the winning of the present war, are solely opportunities for voluntary service. A citizen has a legal right not to buy or subscribe during the great drives, for any reason that is satisfactory to him,

provided he does not attempt to get others to accept his views, or to follow his acts in line with his views, for the purpose of interfering with the operation of the military establishment of the United States.

For these reasons, it is the opinion of the court that the defendant's demurrer to this indictment, in the light of the ultimate facts submitted, will have to be sustained.

Demurrer sustained. Defendant discharged.

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## THE FORDENSKJOLD.

## THE TAGGERT BROTHERS.

(District Court, S. D. Florida. May 20, 1918.)

1. SALVAGE ⟸30—COMPENSATION—SALVING STRANDED STEAMSHIP.
   A tug, which at the second trial on the next high tide floated a steamship worth, with her cargo, $1,000,000, which was stranded off the Florida coast at a dangerous season, although the weather was fair, the work being efficiently done, *held* entitled to an award of $40,000.
2. SALVAGE ⟸26—ELEMENTS OF AWARD.
   A tug, which anchored her two barges while salving a stranded steamship, and then proceeded alone to a port and remained two days while trying to adjust the salvage, *held* not entitled to recover for damage subsequently suffered by the barges, consequent upon the delay.

In Admiralty. Suit for salvage by Thomas S. Davis and others, owners of the tug Taggert Brothers, against the Norwegian steamship Fordenskjold and cargo. Decree for libelants.

W. Hunt Harris, of Key West, Fla., for libelants.

G. Bowne Patterson, of Key West, Fla., for respondent.

CALL, District Judge. [1] The Fordenskjold, a Norwegian steamer, left the port of Newport News October 22, 1917, loaded with approximately 5,500 tons of coal, bound for Havana. On the evening of October 26 about 5:30 o'clock, she grounded some 14 miles south of Hillsborough Light, on the Florida coast. The American tug Taggert Brothers, bound from Brunswick to Havana, with two barges, Louis H., and Martha T., having encountered heavy weather, and running short of coal, had anchored the Louis H. in the bight south of Cape Canaveral and the Martha T. opposite Palm Beach, and gone into Miami to get coal. On October 27 a fishing boat notified the captain of the tug that the steamer was ashore and the captain had sent him for assistance. There was another tug, the Resolute, in the harbor of Miami, but she declined to go to the assistance of the stranded ship. Thereupon the Taggert Brothers, after receiving her coal, proceeded to the ship and offered to assist, arriving there between 7 and 8 o'clock in the evening, and offering to assist in floating the steamer. This offer was accepted, and upon being informed that the tide was out, and nothing could be

done until high water, the tug lay alongside until next morning, when at high water a hawser was passed to the ship and made fast to the stern bitts, and the tug pulled for something like three hours or more, but could not float her. The only effect was to swing the stern of the ship from west to east; the ship being aground at high water at about hatch No. 2, forward of amidships. About 8 o'clock in the morning of the 28th, the tug, with the consent of the captain of the ship, left to pick up her barges, promising to return for the high water next morning. Finding he could not pick up both barges and return for the morning tide, the tug picked up the Martha T. and returned the morning of the 29th at about 3 o'clock, anchoring the Martha T. a short distance from the ship, and again passed his hawser over the stern of the ship and began to pull, and the ship came off the shoal stern first; the hawser was then passed to the bow and made fast to the forward bitts, and the bow pulled around. After the ship was floated, she grounded again, and was again pulled off, and finally towed into deep water, where the mate of the tug was put aboard and she proceeded to Key West. The tug then picked up the Martha T. and anchored her near Cape Florida, and proceeded herself to Miami.

When the ship first grounded a 2,000-pound anchor was run out about 80 fathoms from the port bow. The officers of the ship claim that the ship first grounded on the 26th at the stern, and by the use of this anchor and the ship's engines she was floated at high tide on the morning of the 27th and took the shore again. However this may be, there is no question that at the time she took the ground the first time she was proceeding at full speed, and that there was deep water to the east of the reef on which it is claimed she first grounded. The claim that she took the ground so gradually and slowly that one did not realize it, in the light of these admitted facts, seems, to say the least, highly improbable.

There is a sharp conflict between the testimony of the libelants and claimant of what occurred. Taking all the testimony, it seems to me that the situation was about as follows: The ship was ashore upon an inner reef, there being sufficient water between to float the ship and a channel through the outer reef to deep water. There was only some 250 feet between the two, and the ship from her position did not have steering room to make this channel, had she been able to float herself by jettisoning her cargo and using her engines. There can be no question that any ship ashore on the Florida Reefs, exposed as this one was to the full force of the sea during the months of September and October, is in great peril. It is true that during the operations the weather was fine and the seas light, so light that the tug could lay alongside the ship; but nevertheless the position of the ship was one of extreme peril, and it is proper that the court should consider this in arriving at a proper award of salvage. The assistance was promptly and efficiently rendered, and without assistance I am satisfied that she would have been unable to extricate herself. She was ashore from the evening of the 26th to the morning of the 29th, and no effective assistance tendered, except that of this tug; and going to show that she

was hard aground is the condition of her plates and the repairs made necessary by this accident.

Stress was laid on the fact that the tug left the ship for about 19 hours to go for the barges, thereby abandoning the ship; but this was done with the consent of the captain of the ship and with the promise to return the next morning, and the tug did return in time for the morning high water, at which time the ship was floated. Testimony was taken of the value of the ship and cargo, and, taking the lowest of these valuations, the value of the property saved was at least $1,000,000; the value of the cargo being about $55,000, and that of the ship $945,000. The value of the tug may be stated at $85,000.

As has been said in numerous cases, salvage is a reward for meritorious service in saving property in peril from the sea, which might otherwise be lost, and is allowed as an encouragement to persons to bestow their utmost endeavors to save vessels and cargoes in peril. The peril from which the salved property is saved is to be considered, as well as the labor bestowed, time consumed, etc. There were no elements of heroism or danger to life in the instant case. The only danger to the tug was such as was incident to going to the ship ashore, which in this case was slight, and no damage was suffered, except such as was incidental to pulling on the tug's hawser.

[2] It is contended that damages suffered by the barges, Louis H. and Martha T. should be compensated for out of the salved property, as being a part of the fleet, as well as the loss of another barge, whose trip was delayed. But all these damages occurred subsequent to the completion of the salving operations, and days after the salved property had reached the port of Key West. Had the tug returned to the Louis H. after the ship was floated and started to Key West with a representative of the salvors on board, it is entirely probable that the damages suffered by the barges would not have occurred. But the tug lay in the harbor of Miami for more than two days, awaiting the return of the captain from Key West, where he had gone to adjust the salvage claim. It does not seem to me that damages suffered by the barges by reason of weather blowing up after this delay should be compensated for by the salved property. The choice lay with the officers of the tug whether it was more important to take care of the barges than settle the salvage claim, and they made the choice, and the damage resulting therefrom must remain where it had fallen.

Guided by the rules stated above announced by many courts, I am of opinion that in this case the sum of $40,000 is a proper allowance in this case, to be paid proportionately by the vessel and cargo, according to the values as found above; this amount to be divided, two-thirds to the owners of the tug, and one-third distributed among the crew in proportion to the wages of each.

It will be so decreed.

## In re EVANS.

(District Court, W. D. Tennessee, E. D. September 27, 1918.)

No. 979.

BANKRUPTCY ⊂=138(1)—PROPERTY PASSING TO TRUSTEE—WAGES EARNED PRIOR TO BANKRUPTCY.

Bankrupt was of a class of railroad employés which had demands for increased wages pending and undetermined when the roads were taken over by the government, and remained in the service on promise of the Director General to consider the claims, and that, if allowed, the increase should date from that time. The increase was allowed and paid after the bankruptcy. *Held*, that so much of it as was earned prior to that time passed to the trustee as part of the estate.

In Bankruptcy. In the matter of W. C. Evans, bankrupt. On review of order of referee. Confirmed.

Appleby & Johnson, of Lexington, Tenn., for bankrupt.

McCALL, District Judge. This case is before me on a certificate of T. A. Lancaster, Esq., one of the referees of this court, for a review of his action in dismissing the petition of the bankrupt filed in this case, to determine the respective rights as between the trustee and bankrupt to certain funds now in the hands of the referee. There is no disagreement about the material facts, which are in substance as follows:

In a voluntary proceeding in bankruptcy W. C. Evans was adjudged a bankrupt on May 18, 1918. A trustee was duly appointed. The money in question, $189.65, is the amount of additional and back pay allowed by W. G. McAdoo, Director General of the Railroads of the United States, to W. C. Evans, the bankrupt, a brakeman and employé of the Nashville, Chattanooga & St. Louis Railway Company, for labor rendered by him from January 1, 1918, to May 18th, the date of adjudication. The order of the Director General was promulgated May 25, 1918, seven days after adjudication. The question for determination before the referee was whether the $189.65 back pay goes to the bankrupt estate, or whether it goes to the bankrupt as after-acquired property. The referee held that it goes to the trustee. For a review of his actions the case has been certified to me.

The question is not free from difficulty. On the one hand, it is urged that the service for which the additional and back pay was allowed was rendered by the bankrupt prior to adjudication, and is therefore a part of the bankrupt estate. On the other hand, it is urged that the additional and back pay was only a possibility, and as such it had no value, and was not transferable, and hence was not a part of the bankrupt estate, within the meaning of the Bankruptcy Act.

Subsection 5, section 70, of the Bankruptcy Act of July 1, 1898 (30 Stat. 565, c. 541 [Comp. St. 1916, § 9654]), provides that the trustee—

"shall * * * be vested * * * with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, to all * * * property which prior to the filing of the

petition he could by any means have transferred, or which might have been levied upon and sold under judicial process against him."

Under subsection 5 the trustee took such title to this fund as was vested in the bankrupt, except it be exempt property. There is no claim of exemption; hence it follows that, if the bankrupt on the date of adjudication was vested with such title to the claim for $189.65 as "he could by any means have transferred," the funds passed to the trustee.

It is a part of the history of the country, and of common knowledge, that just prior to January 1, 1918, a class of railway employés, to which class the bankrupt belonged, made a demand of their employers for an increase of compensation for their services, coupled with a statement that, if the increase was not allowed, they would go out on a strike. This matter was under consideration at the time the railroads were taken over by the government, through the Director General of Railroads. To meet that condition the Director General requested the railroad employés to continue in the railroad service under the management of the government, and that he would take their demand for increased pay under advisement, with a statement, if he decided they were entitled to an increase, he would make the order retroactive, so as to be effective as and from January 1, 1918; so that from January 1, 1918, up to May 18, 1918, the employés were in the service of the United States at the rate of pay which they had theretofore received from the railroad companies, with a demand for increase of pay pending before the Director General of Railroads, and the assurance that, if he found their claim meritorious, he would allow it as and from January 1, 1918. He did so find, and allowed it in accordance with his promise.

The employés, therefore, did have a claim for increased wages pending decision, with the assurance, if allowed, they would receive it as a supplement to the rate of wages in force at the time the railroads went into the hands of the Director General. At the time of bankruptcy in this case, the bankrupt had rendered the service. The claim for increase in pay was pending. As was said by Mr. Justice Lamar, speaking for the Supreme Court of the United States in Williams v. Heard, 140 U. S. 529, 11 Sup. Ct. 885, 35 L. Ed. 550:

"There was at least a possibility of their payment by Congress—an expectancy of interest in the fund; that is, a possibility coupled with an interest."

At the time of bankruptcy was the bankrupt's claim for and expectancy of back pay by any means transferable? This question may be answered by asking another. If, instead of having been adjudicated a bankrupt on May 18, 1918, the bankrupt had died, would the fund in question have passed to his administrator? An answer is found to this latter question in Comegys v. Vasse, 26 U. S. (1 Pet.) 218, 7 L. Ed. 108, when, considering a similar question under Bankruptcy Act April 4, 1800, c. 19, 2 Stat. 19, Mr. Justice Story said:

"It will not admit of question that the rights devolved upon Vasse by the abandonment could, in case of his death, have passed to his personal representative, and, when the money was received, be distributed as assets."

The principles of that case were applied in Milnor v. Metz, 41 U. S. (16 Pet.) 221, 10 L. Ed. 943, to a case of a claim for extra pay for

services rendered by a bankrupt as gauger, which, although presented to Congress prior to his adjudication in bankruptcy, was not recognized by that body, or satisfied, until afterwards; the court holding that the claim passed to the assignee as a part of the bankrupt's estate, and that the doctrine of donation did not apply. Williams v. Heard, supra.

To illustrate: If we assume that, at the time the Director General took charge of the railroads, the employés had said to him:

"We will not continue to work for the rate of pay we have been receiving, but at your request we will continue and work for the government without any stated wage, until you have decided what our services are reasonably worth, and then pay us at that rate in one sum as and from January 1, 1918, less any advancement you may have from time to time made."

Under such circumstances, would the money so earned by the bankrupt have passed to the trustee? It seems that it should. I am inclined to the opinion that the bankrupt on the day of adjudication could have sold and transferred his pending claim for additional pay for services rendered from January 1, 1918, to that date, and the transferee would have been entitled to the amount of increased back pay, if and when granted. It was not a gift, or gratuity, or bonus. The Director General is not authorized thus to dissipate either the earnings of the railroads or the funds of the United States. He ordered it paid because in his judgment the employés had earned it, and it justly belonged to them, which is in effect to say that they had earned and should have received, on each previous pay day, compensation at the increased rate. The authorities cited and relied on by the bankrupt are either not in point or not controlling.

An order will be entered, confirming the action of the referee, with costs, and referring the case to him for further proceedings under the Bankruptcy Act.

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## In re LIBBY.

(District Court, S. D. Florida. May 31, 1918.)

1. BANKRUPTCY ⟸400(4)—PETITION TO REVIEW—RECORD.
   The file marks, showing when the trustee's report setting aside exemptions, and the creditor's exceptions thereto were filed, must be accepted as establishing those dates, where on petition to review the referee's order sustaining the exceptions it was contended they were not filed within 20 days as required by General Order XVII.

2. BANKRUPTCY ⟸396(1)—EXEMPTIONS—PRECEDENTS.
   The bankruptcy court, in allowing exemptions under the state laws, must be governed by the construction and interpretation of the highest court of the state.

3. BANKRUPTCY ⟸399(3)—EXEMPTION—ALLOWANCE.
   A Florida bankrupt *held* not entitled to the full homestead exemption claimed out of his stock, which he undervalued, it appearing that he made preferential payments shortly before his bankruptcy, and that in contemplation of that event he ceased making deposits in the bank and to keep proper accounts; so the referee's reduction of the amount allowed by the trustee was proper.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. BANKRUPTCY ⊂=444—PETITION TO REVIEW—TIME FOR SETTING DOWN.
The District Court has power, upon cause shown, to suspend the rule requiring petitions for review to be set down in 20 days.

In Bankruptcy. In the matter of J. C. Libby, bankrupt. On petition to review the order of the referee. Order affirmed, and petition to review denied.

L. W. Nelson, of St. Augustine, Fla., for bankrupt.
W. T. McCaffrey, of Jacksonville, Fla., for creditors.

CALL, District Judge. This cause comes on upon petition to review the order of the referee made on March 26, 1918, whereby the exceptions of certain creditors to the trustee's report setting aside an exemption was partly sustained. The findings of the referee, which are amply sustained by the testimony, are that the bankrupt appraised his stock, consisting of plumbing supplies, at one-third of the cost price of sale; that prior to the month of December, 1917, regular deposits were made in two banks at St. Augustine of the receipts from the business conducted by the bankrupt; that during the month of December the deposits were small and irregular; that during said month of December the bankrupt turned over to his wife $300 in payment of a loan made some months before, and this payment worked a virtual preference of the wife, and failed to account for the receipts from the business for that month, except for this $300, paid to his wife in an amount in excess of $300; that up to December, 1917, the bankrupt kept books, which, while not technical, yet showed his collections, etc.

The referee allowed the bankrupt to select from the stock an exemption of the value of $500. It is this order the bankrupt seeks to have reviewed. The assignments of error are seven in number.

[1] The seventh assignment is that the referee erred in not granting the motion of bankrupt to dismiss the creditor's exceptions to the trustee's report on the ground that the same had not been filed within 20 days, as required by General Order XVII. The file marks on the papers show this assignment not well taken. Some contention is made in the brief of the attorney for the bankrupt that the report was lodged in the referee's office some days prior to the date shown by the file mark. However this may be, I must be governed by the record before me. The exceptions were filed on the day of the last examination of the bankrupt.

[2, 3] The other assignments challenge the correctness of the referee's order disallowing the bankrupt's claim for exemption in the sum of $500, because of this payment to his wife of $500, and failure to further account for the receipts of the business during the month of December, 1917. The bankruptcy court, in allowing exemptions under the state laws, must be governed by the construction and interpretation of the highest court of the state. Therefore it is to the Supreme Court of Florida we must look for this construction and interpretation.

Decisions of federal courts in other states can be of little assistance,

unless the exemption laws of such states are the same as the provisions of the Florida Constitution. That court, since the case of Drucker v. Rosenstein, 19 Fla. 191, has laid down and maintained the doctrine that the exemption laws should be liberally construed to benefit the family, but such laws should not be applied so as to make them an instrument of fraud or imposition upon creditors. And the further principle was announced in Florida Loan & Trust Co. v. Crabb et al., 45 Fla. 306, 33 South. 523, that a debtor, who conceals or removes beyond the reach of his creditors a part of his personal property as a preliminary to claiming the exemption, will, when the property so remains concealed or removed, be held to have selected such concealed or removed property pro tanto as his exemption. Now, this is exactly what the referee did in this case, as I understand his order.

Up to December, 1917, the bankrupt kept books from which his collections could be ascertained, and made his deposits in the two banks regularly. Commencing with December and until January 10th following, when his petition was filed, this method of conducting his business is changed; accounts are collected, deposits not made as theretofore, and he turns over to his wife in payment of a loan made some 12 months before the sum of $300. He is unable upon the two examinations by the creditors to explain or account for the receipts of the business for the month of December other than the payment of this sum of $300, and it further appears that shortly before filing his petition he pays to his attorney, presumably for services to be rendered in these proceedings, $125, and presents his claim for exemption to the entire stock of goods and collectable accounts.

Is this such a concealment or removal of property, in contemplation of the claim for exemption, as is referred to in the Crabb Case above? In that case money was deposited in the wife's name, the business was exempted and turned over to the wife, and afterwards the exemptor conducted it as agent of his wife. The court in that case announced the doctrine above noticed and applied to the referee in the instant case. It seems to me the conclusion that the act of payment to the wife, failure to conduct his business as theretofore and exhaustion of his bank accounts were all done in contemplation of bankruptcy and claiming the stock of merchandise as exempt on a preposterously low valuation. It is so generally known that the court could almost take judicial cognizance of it that prices of all kinds, especially copper, brass, iron, and the articles usually carried in a plumbing stock, have been rising and are continuing to rise for the last two years. The bankrupt admits such advance in pipe, copper, and brass, but still values his stock for exemption purposes at one-third the cost.

A liberal construction of the homestead laws, for the benefit of the family, has been had in this case, under the order sought to be reviewed.

[4] Something was said in argument that the petition to review should be dismissed, because it was not set down in the 20 days. The court has the power to suspend this rule upon cause shown, and in this case the application was made as soon as the attorney for the bankrupt became aware of the rule. The rule is intended to expedite

business, and, knowing the engagements of the court, a more expeditious hearing could not be had.

The order of the referee will be affirmed, and the petition to review will be denied.

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## UNITED STATES v. SCOTT.

(District Court, E. D. Washington, N. D. January 21, 1918.)

ARMY AND NAVY ⟸20—SELECTIVE DRAFT LAW—FAILURE TO REGISTER—ABSENTEES FROM COUNTRY.

Under Selective Draft Act, § 5, and the regulations thereunder, which require persons subject to registration who were absent from the United States on registration day to register within five days after their return, such a person cannot avoid the duty by again leaving the United States before the expiration of the five days.

Criminal prosecution by the United States against Alban N. Scott. On motion for new trial. Denied.

Francis A. Garrecht, U. S. Atty., of Spokane, Wash.

Louis A. Dyar, of Spokane, Wash., for defendant.

RUDKIN, District Judge. Section 5 of the Selective Service Law, approved May 18, 1917 (40 Stat. 80, c. 15), provides as follows:

"That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him, or by his direction, stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this act; and every such person shall be deemed to have notice of the requirements of this act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall willfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the District Court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered."

The proclamation of the President under date of May 18, 1917, provides, among other things:

"And I do further proclaim and give notice to all persons subject to registration in the several states and in the District of Columbia in accordance with the above law that the time and place of such registration shall be between 7 a. m. and 9 p. m. on the 5th day of June, 1917, at the registration place in the precinct wherein they have their permanent homes. Those who shall have attained their twenty-first birthday and shall not have attained their thirty-first birthday on or before the day here named are required to register, excepting only officers and enlisted men of the Regular Army, the Navy, the Marine Corps, and the National Guard and Naval Militia while in the service of the United States and the officers in the Officers' Reserve Corps and the enlisted men in the enlisted Reserve Corps while in active service. In the territories of Alaska, Hawaii, and Porto Rico a day for registration will be named in a later proclamation."

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Provision is then made for the registration of those who through sickness shall be unable to present themselves for registration and for those who expected to be absent on the date named. Section 65 of the registration regulations promulgated on the same day provides as follows:

"Male persons within the designated ages who, on account of absence at sea or on account of absence without the territorial limits of the United States, may be unable to comply with the regulations herein pertaining to absentees will, within five days after reaching the first United States port, register with the proper registration board or as herein provided for other absentees."

Section 56 of the regulations promulgated November 8, 1917, provides as follows:

"Citizens and persons who have declared their intention to become citizens residing abroad are not required to register, but any such citizen or person may do so by applying to the nearest American consulate to have his registration card filled out."

Section 53 of the regulations of the same date provides:

"Citizens or persons who have declared their intention to become citizens who have not hitherto registered on account of absence without the territorial limits of the United States are required to register within five days after their return to the United States."

The indictment in this case charges that the defendant is a citizen of the United States within the designated ages; that on the 5th day of June, 1917, he was temporarily without the territorial limits of the United States and within the Dominion of Canada; that on the 6th day of December, 1917, he returned to the United States at the port of Laurier, within this district, and proceeded thence to the city of Spokane, where he arrived on the 7th day of December, 1917, and has since remained; and that he thereafter unlawfully and willfully failed, neglected, and refused to register or present himself for registration or submit thereto within the period of five days as provided by the act of Congress and the proclamation of the President. Upon the trial the jury returned a verdict of guilty under the instructions of the court, and the defendant has interposed a motion for a new trial.

There is no controversy over the material facts. The defendant is a citizen of the United States of the age of 25 years. He left the United States about the month of July, 1916, and went to the Dominion of Canada. He resided in the Dominion of Canada from that date until the 6th day of December, 1917, and claimed his permanent residence there. On or about the 6th day of December, 1917, he made certain statements in a hotel at Grand Forks, British Columbia, derogatory to his own country and to the cause of the countries engaged in the present war against the German Empire. He was placed under arrest by the immigration officers of the Dominion and deported to the United States. At the border he was turned over to the United States immigration officers, and was by them in turn turned over to the United States marshal for this district, who placed him in jail in the city of Spokane. The cause of his arrest and detention after entering the United States was apparently based on suspicion that he was

a deserter from the United States Army. Within five days after entering the United States he was requested by a deputy United States marshal to register and was given an opportunity to do so. This request he refused to comply with, and still refuses.

The sole contention now made in his behalf is that, under the regulations promulgated by the War Department, he was allowed the full period of five days to register after entering the United States, and was guilty of no offense until after the expiration of that period; that during the period thus allowed he was at liberty to again leave the United States and return to the Dominion of Canada, or to any other foreign country, without violating the laws of the United States or the regulations made pursuant thereto, and, having been denied the right to thus leave the country because of his imprisonment and forcible detention, he should be acquitted. With this contention I am unable to agree. The court cannot inquire into the lawfulness of his deportation from the Dominion of Canada. He came into the United States on the 6th day of December, and the duty to register within five days thereafter was absolute and unqualified. That duty he could not shirk or avoid by leaving the country before the expiration of five days, any more than any other citizen could avoid the like duty by leaving the country immediately prior to the 5th day of June, 1917.

The motion for a new trial is accordingly denied.

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## In re TIETJE.

(District Court, E. D. New York. July, 1918.)

1. BANKRUPTCY ⇐138(1)—ADMINISTRATRIX—PROPERTY PASSING TO TRUSTEE.
Where an administratrix, without authority from the probate court, continued the mercantile business of decedent, purchasing new goods and contracting new debts, all merchandise on hand acquired by her and all accounts accruing to her after her appointment are property of her estate in bankruptcy, as well as proceeds of accounts made while the business was conducted by her receiver.

2. BANKRUPTCY ⇐143(9)—RECEIVER—COLLECTION OF RENTS.
Where an intestate left real estate which was conveyed by the next of kin to bankrupt, who held it at the time of bankruptcy, and no proceedings for its sale to pay debts of decedent had been taken, a receiver in bankruptcy is entitled to collect the rents.

In Bankruptcy. In the matter of Elizabeth V. Tietje, bankrupt. On motion to require receiver to surrender to bankrupt, as administratrix, certain property. Granted in part.

Joseph M. Gazzam, of New York City, for bankrupt.

Leon Lauterstein, of New York City, for petitioning creditors and receiver.

Morris Kamber, of New York City, receiver.

GARVIN, District Judge. This is a motion to compel the receiver in bankruptcy of Elizabeth V. Tietje, bankrupt, to surrender to said

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Elizabeth V. Tietje, as administratrix of Frederick H. Tietje, deceased, the following property:

(1) Rents received from real estate, including all rents collected by said receiver, and rents collected by said administratrix and paid to said receiver.

(2) Proceeds of sale of horses, wagons, automobiles, and other fixed assets of said estate, sold by J. W. & W. H. Reid, auctioneers.

(3) Proceeds of merchandise sold by J. W. & W. H. Reid, auctioneers.

(4) Proceeds of accounts which accrued prior to the receivership, and which have been collected by said receiver, or paid by said administratrix to said receiver.

(5) Proceeds of accounts which accrued while business was conducted by said receiver.

[1] The receiver was appointed on or about June 13, 1918. Elizabeth V. Tietje was appointed administratrix July 3, 1917. The decedent was engaged in business as a provision dealer. The administratrix continued the business without authority from the Surrogate's Court. The stock on hand at the time of the decedent's death was disposed of by the administratrix before the appointment of the receiver.

I am of the opinion that where an administratrix, instead of proceeding forthwith to liquidate the business of the decedent, continues it, incurs new debts, and creates new accounts due without the authority of the Surrogate's Court, if she is thereafter adjudicated a bankrupt, such merchandise as remains on hand, acquired after she was appointed administratrix, and all outstanding accounts arising after such appointment, are the property of the receiver in bankruptcy. This disposes of the property described in paragraphs (3) and (4).

I have no doubt but that the proceeds of all accounts which accrued while the business was being carried on by the receiver belong to him. This refers to the property described in paragraph (5).

[2] In my judgment, where a decedent leaves real estate which is transferred to the bankrupt by the next of kin, as was the case here, and the bankrupt has title to the real estate when the petition is filed, no proceedings to sell the same to pay decedent's debts having been instituted, the creditors of the decedent have no such interest in the real estate as will justify this court in preventing the receiver in bankruptcy from collecting the debts. The property in paragraph (1) above is affected by this conclusion.

Any personal property belonging to the decedent must be accounted for, if sold by the receiver in bankruptcy, and the proceeds turned over to the administratrix. Property described in paragraph (2) above comes within this class.

This motion must therefore be denied, except that the receiver will be required to pay over to the administratrix the proceeds of sale of horses, wagons, automobiles, and other fixed assets of the estate of Frederick H. Tietje, deceased, sold by J. W. & W. H. Reid, auctioneers.

It follows that this determination requires that the fund created by

a payment by Feltman Bros. under order of this court dated July 24, 1918, be turned over to the receiver, or to the trustee, if elected, forthwith.

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UNITED STATES v. E. ROSENBURG & SONS.

(District Court, S. D. Florida. August 3, 1918.)

CUSTOMS DUTIES ⇐92—AUTHORITY OF SECRETARY OF TREASURY—STAMPS FOR CIGAR BOXES.

Act Oct. 3, 1913, § 4M (Comp. St. 1916, § 5672), allowing the withdrawal for home consumption of tobacco from a bonded warehouse "upon the payment of duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe," does not authorize the Secretary of the Treasury to promulgate regulations requiring manufacturers of cigars to pay $10 per thousand for stamps to indicate the origin of the tobacco and the place of manufacture.

At Law. Action by the United States against E. Rosenburg & Sons, a corporation. On demurrer to declaration. Sustained.

Herbert S. Phillips, U. S. Atty., of Tampa, Fla.
McKay & Withers, of Tampa, Fla., for defendant.

CALL, District Judge. The declaration in this case, after setting out the passage of Act Oct. 3, 1913, c. 16, 38 Stat. 114, and that the defendant company executed the bond required, alleges that pursuant to the provisions of the act the Secretary of the Treasury promulgated a regulation requiring all manufacturers of cigars doing business under the act to pay to the United States $10 per thousand for all stamps to be used to indicate the character of the boxes, etc., containing cigars, the origin of the tobacco, and the place of manufacture, and that pursuant to this regulation 70,000 stamps were furnished the defendant company, for which it had not paid, and claims $700 therefor.

To this declaration the defendant interposed a demurrer on 10 grounds. The third ground is as follows:

"The declaration fails to show the legal authority of the Secretary of the Treasury to promulgate the regulations therein contained."

The regulation in question is contained in T. D. 34659, and is as follows:

"Treasury Department, July 22, 1914.

"Sir: Replying to the various requisitions made by your office for stamps to be affixed to boxes containing cigars made in a bonded warehouse under the provisions of the act of October 3, 1913, I have to request that proprietors of the bonded premises using such stamps be charged therefor at the rate of ten dollars per thousand stamps," etc.

"Wm. P. Malburn, Asst. Sec."

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Section 4M of the act of October 3, 1913 (Comp. St. 1916, § 5672), among other things provides that:

"Articles manufactured under these provisions may be withdrawn, under such regulations as the Secretary of the Treasury may prescribe for transportation and delivery into any bonded warehouse at an exterior port for the sole purpose of immediate export therefrom: Provided that cigars manufactured in whole of tobacco imported from any one country, made and manufactured in such bonded manufacturing warehouses, may be withdrawn for home consumption, upon the payment of the duties on such tobacco in its condition as imported under such regulations as the Secretary of the Treasury may prescribe, and the payment of the internal revenue tax accruing on such cigars in their condition as withdrawn, and the boxes or packages containing such cigars shall be stamped to indicate their character, origin of tobacco from which made, and place of manufacture."

It is the proviso to which this Treasury Decision and the stamps showing the character, origin of tobacco, and place of manufacture applies, and the power to make it rests upon the words contained in such proviso:

"Under such regulations as the Secretary of the Treasury may prescribe."

The decision of the question of the power of the Secretary to require the manufacturer to pay to the government $10 per thousand for these stamps must be decided upon the words and the context in which they are used. The part of the proviso containing the quoted words is to the effect that cigars manufactured from imported tobacco may be withdrawn for home consumption upon the payment of the duties on such tobacco in its condition as imported, under such regulations as the Secretary may prescribe and the payment of the internal revenue tax on the cigars and stamping the boxes or packages as required by the act. The act requires these packages or boxes of cigars to be stamped, indicating their character, origin of tobacco, and place of manufacture. It also provides that all labor performed and services rendered under these provisions shall be under the supervision of a duly designated officer of the customs and at the expense of the manufacturer.

Does the power delegated by Congress to the Secretary of the Treasury to prescribe regulations for the payment of the import duty on the tobacco from which the cigars were manufactured invest the Secretary with power to prescribe the amount the manufacturer shall pay for a stamp indicating the character, tobacco, and place of manufacture, in addition to the import duty on the tobacco, the internal revenue tax, and the labor performed and services rendered under the provisions and required to be paid by the manufacturer by the act? In other words, has the Secretary of the Treasury the power to require by regulation the manufacturer to pay $10 per thousand for these stamps additional to the amounts required by the act itself? The power to levy the tax and imposts is with Congress, and if an attempt has been made to delegate such power to the Secretary it would scarcely be contended that it was legal; but in the instant case it is clear to me that Congress made no such attempt. It seems to me that the attempt of Congress was to invest the Secretary with power

to make regulations for the inspection, grading, fixing the quality, proper amount of import tax, etc., on the tobacco in its condition as imported, in order to arrive at the proper amount of import tax on such tobacco. The payment of the internal revenue tax on the cigars and the contents of the stamp to be placed on the package or boxes is prescribed by the act, and there is no attempt to vest the Secretary with power to regulate these or either of them. It seems to me that the Treasury Decision relied upon to fix the indebtedness upon the defendant in the case is a sum in addition to and beyond what the act requires to be paid by the manufacturer before the goods can be withdrawn from the bonded warehouse for home consumption, and not in the nature of a regulation authorized by the act, a sum apparently fixed arbitrarily, and is an addition to the law.

For these reasons, I am of opinion that the demurrer to the declaration is well taken, and should be sustained.

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NEW YORK LIFE INS. CO. v. KENNEDY et al.

(District Court, S. D. Florida. June 27, 1918.)

1. COURTS ⊜274—JURISDICTION OF FEDERAL COURTS—CONSTRUCTION OF STATUTE.

Under Act Cong. Feb. 22, 1917, authorizing insurance companies to file bills of interpleader, vesting District Courts of the United States with jurisdiction, and providing that bill "shall be filed in the district where the beneficiary or beneficiaries reside," suit must be brought in the district of the residence of the beneficiary, whether there has been as assignment of the policy or not.

2. COURTS ⊜92—FEDERAL COURTS—FOLLOWING PRIOR DECISION—DICTA.

A prior decision placing a construction upon a statute is only persuasive where a construction was not necessary to a decision of the matter involved.

In Equity. Bill of interpleader by the New York Life Insurance Company against Georgia L. Kennedy and others. On complainant's motion to strike out certain portions of answer of defendant Thomas R. L. Daughtery. Granted.

John L. Doggett, of Jacksonville, Fla., for plaintiff.

Marks, Marks & Holt and Hartridge & MacDonell, all of Jacksonville, Fla., for defendants.

CALL, District Judge. This cause comes on for a hearing on motion of the complainant to strike certain portions of the answer of Thomas R. L. Daughtery, one of the defendants.

[1] The portion of the answer moved to be stricken sets up the want of jurisdiction in this court to hear and determine the questions presented by the pleadings. The bill of complaint was filed under the act of Congress approved February 22, 1917 (39 Stat. 929, c. 113), authorizing insurance companies, etc., to file bills of interpleader. This act, after vesting District Courts of the United

States with the general jurisdiction to hear and determine the controversies between insurance companies and bona fide claimants, under the conditions therein set out, continues as follows:

"Provided, that in all cases where a beneficiary or beneficiaries are named in the policy of insurance, * * * or where the same has been assigned and written notice thereof shall have been given to the insurance company, * * * the bill of interpleader shall be filed in the district where the beneficiary or beneficiaries may reside."

[2] This proviso determines the situs of the suit. In the case of Penn Mut. Life Ins. Co. v. Henderson et al. (D. C.) 244 Fed. 877, Judge Sheppard reached the conclusion that Congress meant to include assignees by the words "beneficiary or beneficiaries," used in the proviso. This construction was not necessary to the decision of the motion then pending before him, and is therefore only persuasive on the question now before me. Without this proviso, the situs of the suit would have been fixed by the Judicial Code, and the suit could have been brought in the district of the residence of either of the interested parties. This proviso makes an exception to this rule in all cases where a beneficiary is named in the policy, or where there has been an assignment of the same and notice given. It is with these facts in view that we must construe this portion of the act.

In a case where there is a beneficiary named in the policy and an assignment of the same, and the residence of the beneficiary and assignee is in different districts, the question would arise which would be the proper district in which to bring said suit. Congress could have invested either District Court with the jurisdiction, by adding "assignees" to "beneficiary," but did not do so, but confined it to the residence of the beneficiary or beneficiaries. And in this case that exact condition prevails. It is true that in this case the beneficiary named in the policy has assigned her interest to the defendant Daughtery, making the objection to the jurisdiction; but, if Congress meant to invest jurisdiction in the district of the residence of the named beneficiary, this fact would not oust this court of jurisdiction, and vest it in the district of the residence of such assignee. A difficulty might arise where there is no beneficiary named and an assignment of the policy is made. In this last-mentioned case does the act authorize the institution of the suit in the district of the residence of the assignee? It does not say so, unless the assignee is construed to be the beneficiary, and such construction might be reasonably made in such a case.

It seems to me the reasonable construction of the act is that, if there is a beneficiary named in the policy, the suit must be brought in the district of the residence of such beneficiary, whether there has been an assignment of the policy or not.

The motion to strike the portion of the answer referred to in said motion will therefore be granted.

## THE MARIO MARIOFEL.

(District Court, S. D. Florida. May 31, 1918.)

SEAMEN ⟸28—SHARE IN EARNINGS—SUPPLIES.

Where cruise is made on agreement for sharing in net earnings, the owner of the boat, being a merchant, and furnishing the supplies, may charge the market price, and need not furnish goods from his store at cost, or give the crew the benefit of trade discount in purchase from other merchants.

In Admiralty. Libel by George Calamakis against the schooner Mario Mariofel. Decree for libelant.

James B. Gibson, Jr., of Tampa, Fla., for libelant.
Macfarlane & Chancey, of Tampa, Fla., for respondent.

CALL, District Judge. The facts as they appear from the evidence may be stated as follows: The libelant, with others, agreed to go on a sponging cruise, each of the crew to receive a proportion of the net results of such cruise; the proceeds to be divided into 21 shares, the boat to receive 5 shares, the libelant 1½ shares, and the others of the crew different numbers of shares, according to the labor performed by each. After the termination of the voyage and the sale of the sponges, a division clerk was appointed, who audited the accounts for supplies, etc., and made the division among the crew, which was accepted by all, except the libelant, as satisfactory. There seem three points on which the libelant was dissatisfied:

1. He claims the proceeds were to be divided into 19½ shares, instead of 21. The number of shares seems to have been understood by all the others interested in the eventure to have been 21, and therefore, from the evidence, I find that 21 was the number agreed upon.

2. He objects to an expense of $150 deducted from the gross proceeds paid to an oarsman for service on the voyage. It appears peculiar that libelant should have been the only member of the crew who was ignorant of this arrangement. If there had been others, undoubtedly their testimony would have been produced. In the division this $150 was added to the expenses of the voyage, and the remaining proceeds divided into 19¾ shares, instead of 21. Oarsmen's shares seem to have been always 1¼, and, the oarsman having been paid $150 unconditionally, instead of a share, the share he would have drawn ordinarily was, it seems to me, properly subtracted from the 21 shares into which the proceeds were to be divided under the original agreement.

3. He objects to $50 charged as paid to a negro. The testimony is such on this item that I cannot find it was a proper or necessary expense of the voyage.

He also objects to the bill for supplies furnished the vessel. The testimony in regard to these seems to me to support the charges. I gather from the testimony that the owner of the boat was a merchant at Tarpon Springs, furnishing the supplies from his stock, such as he had, and purchasing from others such as he did not have. It is well known that merchants purchasing from others receive what is called a trade discount, so as to permit them to supply their customers at a profit to themselves. Now, the testimony shows that the articles, whether purchased from the store of the owner or procured from other merchants, were furnished to the boat at the market price. This is all that the crew could reasonably require. They would have no right to demand or expect that the owner should furnish goods from his store at cost, nor give them the benefit of any trade discount received by him in the purchase of other articles from other merchants.

The account may be stated as follows:

| | | |
|---|---|---|
| Expense for supplies | | $1,065.40 |
| Wages to oarsman | | 150.00 |
| Wages to Salvadon | | 20.00 |
| Wages to division clerk | | 6.50 |
| Total of expense | | $1,241.90 |
| Total proceeds of sale | $2,734.06 | |
| Amount to be divided | | $1,492.16 |
| Libelant's share | $94.44 | |
| Supplies furnished | 66.95 | |
| Amount libelant is entitled to | $27.49 | $27.49 |

A decree will be entered for this amount in favor of the libelant, with interest at the rate of 6 per cent. from October 3, 1916, and the costs of this proceeding.

Respondent could have, under rule 41 (c) of the Admiralty Rules, relieved himself of the costs and interest subsequent to filing his answer, had he seen fit to do so. But this he did not do, and therefore the interest and costs must be decreed against it.

It will be so decreed.

## UNITED STATES v. GUARANTY TRUST & SAVINGS BANK.

(District Court, S. D. Florida. August 13, 1918.)

INTERNAL REVENUE ⟸25—EXCISE TAXES—CALCULATION — DEDUCTION OF STATE TAXES.

State, county, and municipal taxes paid by a bank under Laws Fla. 1907, c. 5596, § 8, constitute a liability of the bank, and not its stockholders, and are to be deducted from the gross income of the bank, to ascertain the net amount on which the 1 per cent. of excise tax under Act Aug. 5, 1909, § 38, cl. 2, subd. 4, is to be calculated.

At Law. Action by the United States against the Guaranty Trust & Savings Bank. Judgment for defendant on the pleadings and stipulated facts.

H. S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla.

W. M. Bostwick, Jr., of Jacksonville, Fla., for defendant.

CALL, District Judge. This suit is brought by the government to recover from the defendant a certain amount as taxes upon the net income of the bank for the years 1909, 1910, 1911, 1912, 1913, and 1914, which amounts are arrived at by disallowing certain amounts paid by the bank as taxes to the state, county, and city. The declaration contains six counts, each count claiming an amount for one of the years above mentioned.

The defendant interposed two pleas to each of the first three counts: (1) The plea of never was indebted as alleged; and (2) the plea denying that the amount stated in the counts was correct amount of net income of the bank for that year. To the fourth, fifth, and sixth counts the defendant pleaded that the tax sued for had been paid, and application is now pending before the department for a refund.

Issue was joined on these pleas, and a stipulation of facts filed, with the waiver of a jury and submission of the case to the court for trial without a jury. The stipulation of facts is as follows:

The defendant is a banking corporation, incorporated under the laws of the state of Florida, and doing business at Jacksonville, in said state, during the years 1909, 1910, 1911, 1912, 1913, and 1914, and rendered to the collector of revenue for the district its return of annual net income for each of said years; that in each of its annual returns for the years 1909, 1910, and 1911 deductions were made for state, county, and municipal taxes, paid under chapter 5596 of the Laws of Florida, 1907; and that the amounts claimed in the first three counts are 1 per cent. of these taxes so deducted, specifying each of such amounts. As to the amounts claimed in the fourth, fifth, and sixth counts, it is stipulated that these amounts have already been paid, and application is now pending before the department for a refund.

I find the facts as set forth in the stipulation, which stipulation is made a part hereof. This presents the question of law, on the first,

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second, and third counts, whether the tax paid by the bank defendant to the state, county, and city was properly deducted from the gross income. Section 8 of chapter 5596 of the Laws of Florida, is as follows:

"The owner or holder of stock in any incorporated company doing business under the corporate name shall not be taxed for such stock: Provided, that such stock is returned for taxation by such incorporated company and taxes are paid thereon by such company, or the property of said company is assessed for taxes where located and taxes are then paid on such property."

The decision of the question of the liability of the bank under the first three counts depends upon the construction of this act of Florida Legislature. If the tax is upon the bank, as distinguished from the stockholder, the defendant is not liable. If it is a tax upon the stockholder, and the payment by the bank is for the stockholder, not for itself, then it is liable. The rest of the provision of section 8 of the chapter, where provision is made for the taxing of the stockholders in national banks, would seem to evince the intention of the Legislature to make the bank return its property, stock, etc., and pay taxes thereon. In case of failure of the bank to do this, then and only then the state would look to the stockholder for taxes on the value of his stock. It seems to me the primary obligation rests upon the bank to pay this tax, without provision to recover it from the stockholder, as is the case with national banks. Such being the case, the tax so paid must be deducted from the gross income, to arrive at the net amount on which the 1 per cent. of excise tax is to be calculated, under the fourth subdivision of the second clause of section 38 of the Act of August 5, 1909 (36 Stat. 113, c. 6).

I am therefore of opinion that, upon the pleadings and stipulation of facts filed herein, judgment should go for the defendant on all the counts in the declaration.

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CENTRAL TRUST CO. OF ILLINOIS et al. v. UNION TERMINAL CO. et al.

(District Court, S. D. Florida. May 21, 1918.)

1. MORTGAGES ⊜151(5)—LIENS—SUPERIORITY.
One who furnished fire-extinguishing apparatus for a building with knowledge that the owner had executed a mortgage securing bonds issued and sold to raise funds to defray the cost of construction is not, though he had recovered a judgment for the amount due, entitled to a lien superior to that of the bondholders.

2. MORTGAGES ⊜492—PAYMENT OF LIENS.
Where a decree establishing a lien prior to a mortgage gave the mortgagees leave to pay off the same, the mortgagees, having discharged the lien and relieved the property therefrom, are in equity entitled to recover from the property the amount so paid.

In Equity. Suit by the Central Trust Company of Illinois and William T. Abbott against the Union Terminal Company and others. On exceptions to the master's report. Exceptions overruled.

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N. P. Bryan, of Jacksonville, Fla., for complainants.

J. T. G. Crawford, of Jacksonville, Fla., for defendant Union Terminal Co.

F. P. Fleming, of Jacksonville, Fla., for defendant General Fire Extinguisher Co.

R. P. Marks, of Jacksonville Fla., for defendant Turner Construction Co.

CALL, District Judge. This cause comes on for a hearing upon the exceptions to the master's report, filed by the Turner Construction Company and the General Fire Extinguisher Company. The contention of the General Fire Extinguisher Company is that its lien upon the fire-extinguishing apparatus is superior to the lien of the complainant mortgagees. Two cases, Holt v. Henley, 232 U. S. 637, 34 Sup. Ct. 459, 58 L. Ed. 767, and Detroit Steel Cooperage Co. v. Sistersville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166, are particularly relied upon to sustain this contention.

[1] The facts of this case are radically different from those of either of those cases. In the instant case a mortgage was executed to the complainants, and bonds issued and sold, for the purpose of constructing the building, including the fire-extinguishing apparatus to be installed. With knowledge of this condition of affairs, the General Fire Extinguisher Company installed and affixed to the building the apparatus on which it now seeks to affix a lien superior to the lien of the complainants, under the agreement filed in evidence before the master, which on its face purports to give a first lien to said Extinguisher Company. On default in the payments the company brought a simple action at law and recovered a judgment for the amount due for the apparatus. The lien of this judgment upon the entire property is subsequent to the lien of complainants. While the complainants do not occupy the position of subsequent creditors or purchasers, strictly speaking, yet I think they do occupy a position which gives them a superior equity to have their claim first satisfied before the General Fire Extinguisher Company can assert any special lien to the apparatus installed in and made a part of the building to be erected by the funds derived from the sale of the bonds which the mortgage was given to secure.

The exceptions filed by the Turner Construction Company raise questions, it seems to me, which will properly arise before the master when it comes to the payment of the bonds. The evidence shows that the bonds were sold and outstanding, and this in judgment proves the debt due from the debtor.

The exceptions of the General Fire Extinguisher Company and the Turner Construction Company will therefore be overruled.

[2] At the hearing the solicitor for the complainants offered in evidence the certified copy of the master's report, showing the payment by the complainants of the decree in the case of Turner Construction Company against the mortgagor defendant herein, which had heretofore been declared a lien prior to the lien of the mortgage, with the request

that the amount so paid be included in the decree of foreclosure. The General Fire Extinguisher Company and the Turner Construction Company object to this being done. This decree was a prior lien to the mortgage, and in the decree the mortgagees were given leave to pay off same. This they have done, thus relieving the property of this prior lien. It seems nothing but equity to allow the mortgagees to recover from the property the amount so paid.

The decree will provide for the payment of the sum so paid in satisfaction of the decree.

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## In re UNITED STATES CHRYSOTILE ASBESTOS CO.

(District Court, S. D. New York. April 22, 1918.)

BANKRUPTCY ⇐213—POWERS OF COURT—DETERMINING VALIDITY OF MORTGAGE.

Where a trustee has possession of mortgaged real estate in another state, the court of original jurisdiction has power to summarily determine the validity of the mortgage and to restrain a sale thereunder if it has jurisdiction over the person of the mortgagee; but the customary procedure is to permit a foreclosure suit to be brought in which the validity of the mortgage may be determined.

In Bankruptcy. In the matter of the United States Chrysotile Asbestos Company, bankrupt. On motion by trustee for injunction. Restraining order continued.

Saul S. Myers, of New York City, for trustee.

Alexander Dunnett, of St. Johnsbury, Vt., for Northern Trust Co.

AUGUSTUS N. HAND, District Judge. The trustee in bankruptcy has brought a proceeding in this court to sell certain real and personal property in Vermont, free from the lien of a mortgage which the trustee alleges was induced by fraudulent representations. After the Northern Trust Company of Philadelphia, which is the trustee of the mortgage, had appeared in the foregoing proceeding and obtained an adjournment, it instituted a suit to foreclose the mortgage in the United States District Court for the District of Vermont. The referee, before whom the proceeding to sell free from the lien of the mortgage is pending, has handed down an opinion in favor of such a sale. In order to sell free from the lien, without any interference from the foreclosure suit, the trustee has moved in this court to stay the Northern Trust Company from going on with that suit in Vermont, and served notice of motion by mail.

The Vermont property was in possession of the trustee in bankruptcy before the foreclosure suit was commenced by the Northern Trust Company. There is therefore no doubt that a summary proceeding might be had by the proper bankruptcy court to determine the validity of the mortgage. The court of original jurisdiction may be invoked for this purpose and notice by mail to a claimant outside the jurisdiction would seem to be sufficient to conclude his

rights in the property if he did not choose to come in and defend them. The customary method of procedure, however, in such a case is to allow the mortgagee to proceed by foreclosure. The validity of the mortgage can be tested in such a suit. In re Granite City Bank, 137 Fed. 818, 70 C. C. A. 316. It is, however, almost unnecessary to say that this court would have no power to restrain the Northern Trust Company from instituting the foreclosure suit in Vermont unless it could secure jurisdiction over the person of that company. Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208. Counsel for the trustee in bankruptcy urgently insist that, since the Northern Trust Company is here contesting the proceeding to sell free from the lien of the mortgage, this court can enforce its jurisdiction by prohibiting that trust company from continuing foreclosure in Vermont.

There is, however, a distinct difference between an adjudication as to property outside the jurisdiction, such as a sale free from an underlying mortgage, and an order directed against the person of the Northern Trust Company when the latter is a resident of Philadelphia, and is not within the Southern district of New York.

The trust company, while insisting that the referee was without jurisdiction to order a sale of the Vermont property free from liens, did not take the position before the referee that the court had no personal jurisdiction over it, but appeared generally and obtained an adjournment. Under such circumstances, the only question is whether, the company being here to oppose an order of sale, this court can protect the proceeding by restraining the trust company from going on with the foreclosure suit in Vermont. I am inclined to think that it has the power; but, irrespective of that, and as a matter of discretion, I will only continue the restraining order upon the following terms and to the following extent:

(1) The trustee shall make no sales of property covered by the Vermont mortgage until the Northern Trust Company shall have time to review the referee's decision by an appeal to a judge of this court.

(2) The Vermont suit may proceed, and the trustee shall answer therein, except that the Northern Trust Company shall not go to a sale in the Vermont court without the further order of this court.

Settle order on notice.

## In re C. W. BARTLESON CO.

(District Court, S. D. Florida. August 15, 1918.)

1. BANKRUPTCY ⟸84—INVOLUNTARY PETITION—AMENDMENT.
A petition in involuntary bankruptcy may be amended, although the alleged act of bankruptcy has occurred more than four months prior to the amendment.

2. BANKRUPTCY ⟸84—INVOLUNTARY PETITION—AMENDMENTS.
Where a petition for leave to amend an involuntary petition in bankruptcy was filed, and a consent order was entered that the petition "be and the same is hereby amended as prayed," and the petition for and containing the amendments was properly signed and sworn to by the petitioning creditors, the amendments were sufficiently signed and sworn to.

In Bankruptcy. Involuntary proceedings in bankruptcy against C. W. Bartleson Company. On motion to strike the petition as amended. Denied.

See, also, 243 Fed. 1001.

George M. Powell and Fleming & Fleming, all of Jacksonville, Fla., for bankrupt.

Haley & Heintz, George C. Bedell, John C. Cooper & Son, and McNeill & Strum, all of Jacksonville, Fla., for various creditors.

CALL, District Judge. April 15, 1916, an amended involuntary petition in bankruptcy was filed against the bankrupt, and such proceedings had that a reference was made to an examiner to take testimony. After the taking of testimony had proceeded, the petitioning creditors filed, on October 13, 1917, their petition for leave to amend paragraphs 6 and 7 of the amended petition in certain particulars to conform to the testimony then taken; also to add another paragraph, 7a, charging the disposal of certain real estate within four months before the filing of the amended petition, with intent to hinder and delay creditors of the bankrupt. This petition was granted, and on October 18, 1917, the bankrupt filed its motion to dismiss the amended petition as amended.

The grounds of the motion to dismiss, as contained in this last motion, except those referring specifically to paragraph 7a, and the grounds going to the sufficiency of signing and swearing to the amendment, were considered and ruled upon in the motion to dismiss the amended petition on March 20, 1917. I see no reason to change that ruling. This leaves the grounds of the motion directed to the sixth and seventh amended paragraphs, and paragraph 7a. The only grounds to these paragraphs, which call for special attention, are the twenty-fourth, twenty-fifth, thirty-fourth, and thirty-fifth.

[1] The twenty-fourth and twenty-fifth grounds raise the question whether the act of bankruptcy alleged, having occurred more than four months prior to the amendment, can be considered. This question, it seems to me, is settled in the affirmative by the case of Hark v. C. M. Allen Co., 146 Fed. 665, 77 C. C. A. 91, 17 Am. Bankr.

Rep. 3. I have read the case of Armour & Co. v. Miller, 209 Fed. 784, 126 C. C. A. 508, but I do not think the principle decided in this case changes the rule as laid down in the first case cited, which I think governs the instant case.

[2] The thirty-fourth and thirty-fifth grounds challenge the signing and swearing to the amendments. In this case a petition was filed, praying for leave to make the amendments. The order allowing said amendments was made by consent of the parties, on October 15, 1917, in which it is ordered that the "amended petition in bankruptcy, filed on April 14, 1916, be and the same is hereby amended as prayed in said petition." The specific amendments were not filed, but the proposed amendments were set out in the petition to be allowed to make such amendments. These amendments have been treated by all the parties as filed. The petition to make the same was properly signed and sworn to by the petitioning creditors. While it would probably have been better in strict pleading for the amendments to have been prepared, signed, and sworn to as required by the Bankruptcy Law, yet I do not think the court would be justified in striking the amendments because of this failure, when by a consent order the court has made those proposed amendments a part of the amended petition.

I am of opinion that the motion to strike the amended petition as amended, and the paragraphs thereof, should be denied. It will be so ordered.

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HALL et al. v. PULLMAN CO.

(District Court, S. D. Florida. August 3, 1918.)

1. CARRIERS ⟸411—CARRIAGE OF PASSENGERS—ASSAULT—LIABILITY OF PULLMAN COMPANY.
Where the porter of a Pullman car conspired and colluded with a passenger in the latter's making of an assault upon another passenger while in her berth, the Pullman Company was liable to the assaulted passenger.

2. CARRIERS ⟸411—CARRIAGE OF PASSENGERS—LIABILITY FOR ASSAULT.
Where passenger on Pullman car indicated he intended to assault woman passenger in her berth, who rang bell for porter and conductor, and they failing to respond, whereupon assault was committed, Pullman Company was not liable, unless it or the porter had reasonable ground to believe violence was imminent.

At Law. Action by Florence M. Hall and another against the Pullman Company. On demurrer to declaration. Demurrer overruled as to first count, and sustained as to second and third counts.

George M. Powell and Giles J. Patterson, both of Jacksonville, Fla., for plaintiffs.

John E. & Julian Hartridge, of Jacksonville, Fla., for defendant.

CALL, District Judge. The first count of the declaration charges that the plaintiff was assaulted while in her berth in a sleeping car by

a passenger, and that the porter conspired and colluded with said passenger in the making of the assault. The second count charges that the plaintiff and the passenger making the assault were passengers on the sleeping car, and that by his acts and demeanor he indicated that he intended making the assault, whereupon she rang the bell for the porter, but that the porter failed to respond, whereupon the assault was committed, and that, had the porter responded to the call, he could have prevented the assault. The negligence charged in this count is the porter's failure to answer the bell. The third count charges substantially the same facts, but substitutes the conductor for the porter.

[1, 2] In Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249, 26 L. Ed. 1070, Justice Miller says:

"To warrant a finding that negligence * * * is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, * * * and that it ought to have been foreseen in the light of the attending circumstances."

In Ball v. C. & O. R. Co., 93 Va. 44, 24 S. E. 467, 32 L. R. A. 795, 57 Am. St. Rep. 786, Judge Keith quotes approvingly from Britton v. A. & C. Air Line R. Co., 88 N. C. 536, 43 Am. Rep. 749, as follows:

"The liability of the defendant to the plaintiff grows not out of the fact that she was injured, but out of the failure of its servants to afford her protection, after they had reasonable grounds for believing that violence to her was imminent."

Testing this declaration by these principles, I am of opinion that the first count is not vulnerable to the attack by demurrer, but that the second and third counts are. The rule of liability in a case of loss of baggage and damage resulting from an assault by a fellow passenger is, as I understand the cases, different, and this difference is based upon the fact that larceny may and ought to be expected and guarded against by the sleeping car company or its agents and servants, while an assault by a fellow passenger is not to be expected, and the company cannot be held for negligence in not protecting the passenger, unless the company or its servants had reasonable grounds for believing that violence was imminent, either through the circumstances surrounding the injured person within the knowledge of the company's servants or by being informed of such circumstances. A criminal assault upon a female passenger, although there are only two passengers on the sleeping car, is not within the rule enforced in cases of larceny of the passenger's baggage, nor is the failure of the porter or conductor to answer the call bell the natural and probable cause of the injury complained of, which ought to have been foreseen in the light of the attending circumstances set out in the second and third counts of the declaration.

The first count is, I think, good under the decision in Pullman Palace Car Co. v. Campbell, 154 U. S. 513, 14 Sup. Ct. 1151, 32 L. Ed. 1069. If an assault by the porter makes the company liable, then the assault by a passenger conspiring with the porter would equally make the company liable.

## In re ABRAMOVITZ.

(District Court, S. D. Florida. May 25, 1918.)

1. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION.
   Specifications of objection to a bankrupt's discharge are pleadings within Bankruptcy Act, § 18c (Comp. St. 1916, § 9602), and must be verified by positive oath to the facts alleged.
2. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION—SUFFICIENCY.
   Specifications of objection to the bankrupt's discharge, which are made on information and belief, and enter into no details as to property, etc., are insufficient.
3. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION—WHO MAY FILE.
   Specifications of objection to a bankrupt's discharge are made by creditors, and should be signed by the creditor, whether an individual or a corporation.
4. BANKRUPTCY ⟸413(3)—DISCHARGE—SPECIFICATIONS OF OBJECTION—SIGNING BY CORPORATION.
   Where a corporate creditor files specifications of objection against a bankrupt's discharge, it must sign the same by having its seal affixed thereto by proper authority.

In Bankruptcy. In the matter of the bankruptcy of Adela Abramovitz. On motions to strike specifications of objection to discharge. Motions granted.

W. Hunt Harris and H. H. Taylor, both of Key West, Fla., for bankrupt.

Rand & Kurtz, of Miami, Fla., for objecting creditor.

CALL, District Judge. On April 25, 1918, certain specifications of objection to discharge were filed. These specifications, two in number, were signed Beasley Shoe Company, by Rand & Kurtz, attorneys. This is sworn to on information and belief. On April 25, 1918, a paper styled "Supplemental Specifications of Grounds of Opposition to Bankrupt's Discharge," was filed, signed "Rand & Kurtz, Attorneys for Beasley Shoe Company." These, consisting of five, and all, except the fifth, made on information and belief, are sworn to by E. B. Kurtz. This appears to be a carbon copy of the same paper filed May 17th, except it is sworn to on information and belief by J. T. Gilliam, as treasurer, and signed by "Beasley Shoe Company, by Rand & Kurtz, Its Attorneys." Motions are made by the bankrupt to strike the papers filed April 25th and May 17th, on the ground that the same are not signed by objecting creditors, nor sworn to as required.

[1] Section 18c of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 551 [Comp. St. 1916, § 9602]) requires all pleadings setting up matters of fact shall be verified under oath. In Re Brown, 112 Fed. 49, 50 C. C. A. 118, the Circuit Court of Appeals for this circuit decided that specifications of objection to bankrupt's discharge are pleadings, and the form of oath attached to these papers did not

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

authorize the court to hear and determine same. The motion to strike same will therefore be granted.

[2] There are other grounds of the motions which are not necessary to decide, but, since the attorneys for the creditor request leave to amend its specifications filed April 25th, by having the proper oath made to them, which request will be granted, it is better that I call attention to the so-called supplemental specifications. The first four are made on information and belief, and enter into no details as to property, etc. It does not seem to me that these four state, either in the form in which they are filed, or the matter stated therein, proper specifications of objection to discharge.

[3, 4] Specifications of objection to a bankrupt's discharge are made by the creditor. If it is an individual, he should sign such specifications. If it is a corporation, such specifications should be signed by the corporation, and the only way a corporation may sign an instrument or pleading requiring its signature is by having its seal affixed by proper authority. The decision by Judge Hammond (In re Glass [D. C.] 119 Fed. 509) is enlightening, and I think states the law.

An order will be made, granting the motions to strike and allowing the creditor 20 days within which to make such amendments as it may be advised.

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## In re MINNERS.

(District Court, S. D. New York. August 3, 1918.)

1. BANKRUPTCY ⟸372—REOPENING ESTATE—DEFECTIVE CONVEYANCE OF PROPERTY.
   A court of bankruptcy given power by Bankr. Act 1898, § 2, subd. 8 (Comp. St. 1916, § 9586), to reopen estates "whenever it appears they were closed before being fully administered," may properly reopen an estate on petition of a purchaser of real estate from the trustee where it appears that the sale was not legally perfected.
2. BANKRUPTCY ⟸372—REOPENING OF ESTATE—ELECTION OF TRUSTEE.
   On reopening an estate for further administration, the trustee should not be reinstated, but a new trustee elected.

In Bankruptcy. In the matter of Charles Minners, bankrupt. On petition to reopen estate. Granted.

Bernard Braun, of New York City, for purchaser.

AUGUSTUS N. HAND, District Judge. [1] A purchaser of real estate from the trustee in bankruptcy in this estate asks the court to reopen the estate, reinstate the trustee, and call a meeting of creditors to confirm the sale which appears to have been made without notice to creditors.

Section 2 (8) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545 [Comp. St. 1916, § 9586]) empowers the court, among other things, to "close estates whenever it appears that they have been fully administered, by approving the final accounts and discharging the trus-

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tees, and reopen them whenever it appears they were closed before being fully administered."

[2] If the sale was not legally perfected even though an equitable title passed to the trustee's vendee by estoppel, yet the legal title would be still outstanding. Under such circumstances, I think the estate cannot in a fair sense be regarded as fully administered. A proposed order is submitted reinstating the former trustee. This should not, under the opinion of the Circuit Court of Appeals for this circuit in Re Rochester Sanitarium & Baths Co., 222 Fed. at pages 27, 28, 137 C. C. A. 560, be done, but a new trustee should be elected for the purpose of executing a confirmatory deed, if such should be ordered, and for taking any further steps in the administration of the premises which were attempted to be conveyed by the former trustee that may be necessary. The purchaser's vendee is a party interested in the estate within the meaning of such decisions as In re Chandler, 138 Fed. 637, 71 C. C. A. 87. He is either entitled to have a deed from the trustee properly authorized, or to receive back from the creditors the consideration paid. The court may therefore reopen the estate on his motion, but he should indemnify the referee for the expenses of calling the creditors' meeting, and should also pay any expenses to which the new trustee may be put in procuring his bond if the creditors authorize a confirmatory deed by the trustee.

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In re KAUFMAN.

(District Court, S. D. New York. April 27, 1918.)

BANKRUPTCY ⟸92—DISMISSAL OF PROCEEDINGS—REINSTATEMENT.

Dismissal of an involuntary petition based on a written consent, apparently of all creditors, pursuant to an agreement for settlement, will not be set aside because the agreement was not made or carried out by bankrupt in good faith.

In Bankruptcy. In the matter of Morris Kaufman, bankrupt. On petition to set aside order of dismissal. Denied.

Henry H. Silver and Harry J. Moskowitz, both of New York City, for petitioner.

Frank & Wolfson, of New York City, for bankrupt.

H. & J. J. Lesser, of New York City, for petitioning creditors, receiver, and trustee.

AUGUSTUS N. HAND, District Judge. This is a petition to set aside an order dismissing a proceeding in bankruptcy on the grounds (1) that the order was not obtained upon the consent of, or on notice to, all of the creditors; (2) that the order was obtained by fraud. A consent was signed in the following form:

"We the undersigned, creditors of the above-named bankrupt, do hereby agree to and with each other, and with the said bankrupt, to receive in full settlement of our respective claims against the said Morris Kaufman, a

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

sum equal to 50 per cent. of our claims to be paid as follows: * * * This acceptance shall be valid as an acceptance of a like offer of composition in bankruptcy, if made by the said Morris Kaufman, and shall also be valid, if signed on separate sheets. We do hereby also consent to the dismissal of the involuntary petition herein."

It does not seem to be established that the owners of all claims against the bankrupt estate did not consent to the dismissal of the petition, but it is said that several creditors obtained more than 50 per cent. of the amounts due them. This was not a composition in bankruptcy, but a common-law settlement. If the bankrupt broke his promise, and paid certain creditors more than 50 per cent. of their claims, when he had agreed that no creditor should receive more than that amount, or made any fraudulent representations to any creditor as to the percentage others were getting, nevertheless a valid order of dismissal was granted on consent. To establish a doctrine that a bankruptcy proceeding, once dismissed, can be reopened under such circumstances, with the possible attendant result of suits to recover property and set aside preferences, would, I think, be an undesirable result.

The jurisdiction of this court is gone, and the petitioner must seek his remedy in the state court, or in a new bankruptcy proceeding, where the estate will consist of present assets.

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LEWIS FOUNDRY & MACHINE CO. v. CAYUGA TOOL STEEL CO., Limited.

(District Court, N. D. New York. October 12, 1918.)

MASTER AND SERVANT ⊂=25, 59—CONTRACT OF EMPLOYMENT—IMPOSSIBILITY OF PERFORMANCE.

It is an implied condition of a contract for employment in a special service for a term of years that in case of involuntary inability to perform by either party no damages for breach are recoverable.

In Equity. Suit by the Lewis Foundry & Machine Company against the Cayuga Tool Steel Company, Limited. In the matter of the claim of Charles M. Hammond for damages for breach of contract by defendant. Claim disallowed.

Charles M. Hammond presents a claim for damages for breach of contract of employment growing out of a state of facts which will be stated in my opinion. The special master has reported against the validity of the claim.

Hancock, Spriggs & Hancock, of Syracuse, N. Y., for claimant.

Chas. V. Byrne and D. F. Costello, both of Syracuse, N. Y., for creditors.

Gannon, Spencer & Michell, of Syracuse, N. Y., for receivers.

RAY, District Judge. Cayuga Tool Steel Company, Limited, is a corporation of the state of New York, and was engaged in manufac-

turing at the city of Auburn, N. Y., where its plant and property were situated. It entered into a valid contract with Charles M. Hammond, by the terms of which Hammond was to perform services for the said corporation in overseeing production and selling for a term of years at a fixed compensation per year, and in addition he was to have a certain commission on sales made by him. The contract as stated by claimant was:

"Mr. Hammond was employed by the Cayuga Tool Steel Company for the period of five years from January 1, 1917, to manage and direct the manufacture of the company's products, etc., on terms as follows: $5,000 for the first year, $6,000 for the second year, and $7,500 for the third year—and that a rate for the fourth and fifth years is to be fixed by the board of directors, but at not less than $7,500 per year; that in addition thereto said Charles M. Hammond is to receive additional compensation by way of a bonus in an amount equal to 10 per cent. of the company's profits, after deducting an amount equivalent to 7 per cent. of the then outstanding capital stock of the company, to be payable in the capital stock of the company."

Some months ago the corporation found itself in financial difficulties and this action was brought by the plaintiff, a large creditor, to conserve the assets, etc. The claimant, Hammond, was paid for all the services actually performed by him for the company and all commissions earned. Receivers were appointed by this court, with authority to continue the business, and the business was continued by them. The receivers neither affirmed nor disaffirmed the contract, but on their appointment employed Hammond to work for them on the same terms he had been working for the corporation, and he did work and has been or will be paid in full for such services. As the corporation was insolvent, a decree of sale of all the assets and property was made in such suit and entered, and the property has been sold and the corporation put out of business by action of the court. It cannot further or hereafter do business, and has no assets, except such as were derived from this sale, and which are to be distributed to creditors after the payment of expenses.

By reason of the insolvency of the corporation and the action of this court the corporation cannot give work to Hammond as agreed, or pay as agreed. The corporation has never denied or repudiated the contract. The action of this court, predicated on the facts stated, makes performance by the corporation impossible. It has not voluntarily or willfully done any act in violation of the contract. Its inability to give employment is wholly involuntary on its part.

This was and is a personal contract, providing for employment in a special service by the one party and the performance of such service by the other. The contract is not assignable. It seems to me it implied that in case of involuntary inability to perform by either party no action for damages would lie. "Where the contract is wholly executory, there must be some express and absolute refusal to perform, or some voluntary act on the part of the individual which renders it impossible for him to perform, in order to constitute an anticipatory breach for which an action will lie." Ga Nun v. Palmer, 202 N. Y. 483, 489, 96 N. E. 99, 101 (36 L. R. A. [N. S.] 922). In Jones v. Judd,

4 N. Y. 412, it was held that if, after a contract is made, the law interferes and makes subsequent performance impossible, the party is held to be excused. Here the law has interfered and made performance by the Cayuga Tool Steel Company impossible. In Jones v. Judd, supra, the facts are thus stated in the syllabus:

"Thus, where the defendant contracted with the state to construct a section of the Genesee Valley Canal, and made a subcontract with the plaintiffs for a portion of the work, at so much per yard for excavation and embankment, payable monthly, except 10 per cent., which was not to be paid until the final estimate, and before the completion of the plaintiffs' job the work was stopped by the state officers, and the original contract terminated by an act of the Legislature, held, that the plaintiffs were entitled to recover the price agreed on for the work actually done by them."

This case is cited and approved in Lorillard v. Clyde et al., 142 N. Y. 456, 462, 37 N. E. 489, 24 L. R. A. 113, which to a certain extent is in point here. See, also, Dexter v. Norton, 47 N. Y. 62, 7 Am. Rep. 415. In this last-cited case the court said:

"But there are a variety of cases where the courts have implied a condition in the contract itself, the effect of which was to relieve the party when the performance had, without his fault, become impossible; and the apparent confusion in the authorities has grown out of the difficulty in determining in a given case whether the implication of a condition should be applied or not, and also in some cases in placing the decision upon a wrong basis. The relief afforded to the party in the cases referred to is not based upon exceptions to the general rule, but upon the construction of the contract."

See, also, Spalding v. Carl Rosa et al., 71 N. Y. 40, 27 Am. Rep. 7.

I am of opinion, and hold, that in this case no claim exists in favor of Hammond against the Cayuga Tool Steel Company for breach of this contract, as the law came in and made performance impossible, and such company is excused. This was a contingency within the contemplation of the parties.

The report of the special master, rejecting the claim, is confirmed.

## FIREMEN'S FUND INS. CO. v. TROJAN POWDER CO.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3037.

1. INSURANCE ⟸488 — MARINE INSURANCE — LIABILITY FOR FORWARDING CHARGES.
   Where the contract of affreightment authorized the carrier in case of stranding to forward by another ship, and charge extra compensation therefor, which contingency happened, the cargo insurer, which, although exempted from particular average, contracted to pay special forwarding charges for which it would otherwise be liable, *held* liable for the extra cost of forwarding.
2. SHIPPING ⟸112—DISABILITY OF SHIP—AUTHORITY TO FORWARD CARGO.
   Under the law of England, where a ship is damaged on the voyage and cannot be repaired without a very great loss of time, the master or the shipper may procure another ship to carry her cargo to place of destination.
3. INSURANCE ⟸488—MARINE INSURANCE—"PARTICULAR CHARGE."
   By the law and custom of England, when in consequence of a peril insured against the voyage cannot be accomplished in the original ship, the cargo underwriter is liable for the excess expense of forwarding by another vessel as a "particular charge."
4. INSURANCE ⟸488—MARINE INSURANCE—CONSTRUCTION OF POLICY.
   A clause of a marine cargo policy, "Freight warranted free from any claim consequent upon loss of time, whether arising from peril of the sea or otherwise," does not apply to excess freight paid for forwarding on stranding of the ship, for which the insurer is otherwise liable.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action at law by the Trojan Powder Company against the Firemen's Fund Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This action was brought upon a policy of marine insurance issued upon 6,000 cases of explosives shipped by the plaintiff in the action, defendant in error here, by the steamer Pleiades, of the California Atlantic Steamship Company, from San Francisco to Balboa, Isthmus of Panama, under a contract of carriage which provided that the freight, whether prepaid or to be collected, was to be considered as earned, vessel or goods lost, or not lost, at any stage of the transit, and that, on the happening of any of the contingencies mentioned in the contract of shipment, the carrier was to have the right to forward the freight to the port of destination on its own ship, and should receive extra compensation therefor, whether performed by its own vessels or those of others, among which contingencies were stranding, straining, and any accidents or perils of the sea. The plaintiff prepaid the freight, amounting to $4,950, and the Pleiades left San Francisco on her voyage with the explosives on board, but was stranded off the coast of Mexico on the 16th of August, 1912, and was then and there, together with her cargo, in danger of becoming a total loss. The plaintiff then undertook to abandon the said goods, which abandonment the defendant insurer refused to accept. The ship was subsequently floated, but because of her damaged condition was unable to proceed upon her voyage, and was taken back to San Francisco for repairs, where her cargo, including the insured explosives, was discharged into lighters. The repairs on the vessel were not completed until December 27, 1912. The explosives so shipped and insured had been sold to the Panama Canal Commission for use in the building of the

canal, with the right on the part of the commission to refuse to receive the shipment if it did not arrive within a fixed time, and, there being no other market at that place, it was therefore important for the shipper to get the explosives to their destination. To do so it was compelled to, and did, on October 15, 1912, reship the said goods on another steamer of the same carrier, called Mackinaw, for which transportation it was compelled to and did pay to the steamship company additional freight in the sum of $4,050, for which latter sum the plaintiff brought the present action against the present plaintiff in error, the latter having refused payment on demand.

The insurance was in the sum of $35,000 upon the explosives laden on board the Pleiades for the voyage first mentioned, and it was expressly agreed that the insurance should commence at the time the goods should be laden on board the ship and continue until safely landed at Balboa. The policy also contained the usual "sue and labor" clause, and these further provisions: "And touching the adventures and perils which the said company is content to bear and does take upon itself in the voyage so insured as aforesaid, they are of the seas, * * * restraints and detainments of all kings, princes, and people, of what nation, condition, or quality soever, * * * and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance or any part thereof. * * * General average payable as per foreign statement or per York-Antwerp Rules of 1890, if in accordance with the contract of affreightment. * * * It is hereby agreed that the rights of assured shall not be prejudiced by the insertion in the bill of lading of the London Conference Rules of Affreightment 1893, or of the following clause: 'The act of God, perils of the sea, * * * restraint of princes, rulers, and people, collisions, stranding, and other accidents of navigation excepted, even when occasioned by the negligence, default, or error in judgment of the pilot, master mariners, or other servants of the shipowners.' Warranted free from average unless general, or the ship or craft be stranded, sunk, or burnt, each craft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for * * * any special charges for warehouse rent, reshipping, or forwarding for which they would otherwise be liable. * * * All questions of liability arising under this policy are to be governed by the laws and customs of England. * * * Freight warranted free from any claim consequent upon loss of time, whether arising from a peril of the sea or otherwise. * * *"

McCutchen, Olney & Willard, Edward J. McCutchen, and Ira A. Campbell, all of San Francisco, Cal., for plaintiff in error.

Nathan H. Frank and Irving H. Frank, both of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1] It is obvious that the contract of affreightment evidenced by the bill of lading lay at the foundation of the insurance, the liability of the insurer to be governed by the laws and customs of England. It is conceded by the defendant in error that its recovery cannot be sustained on the "sue and labor" clause of the policy, since the reshipment freight charge for which the suit was brought was not paid by it in order to prevent the explosives insured from being lost by reason of any impending peril; but its contention is that in consequence of a peril insured against, that is to say, the stranding of the ship, the voyage insured was threatened with frustration, and the expense of reshipping the explosives was incurred to prevent such frustration. That the Pleiades was stranded, and the completion of her voyage thereby rendered impossible, is not questioned; nor is the further fact

that the necessary repairs upon her were not completed until December 27, 1912—nearly four months subsequent to the interruption of the voyage insured.

[2] Neither by the law of England, as we understand it, nor by the contract of the parties, was the shipper obliged to wait for such a length of time before seeking to get its explosives to their destination. Respecting the law, the complaint in the case alleges, and the answer thereto admits, that it is the law of England that if, by reason of damage to the ship, she cannot be repaired without a very great loss of time, the master is at liberty to procure another ship to transport her cargo to the place of destination; and by the contract of shipment in the instant case the carrier was given the right to forward the explosives to their destination, either by one of its own vessels or that of another, together with the right to receive extra compensation therefor. That this contract carrier did so forward this freight by another of its own ships on October 15, 1912, and demand and receive from the plaintiff in the case additional compensation therefor in the sum of $4,050, for which the latter recovered judgment in the court below, is also a fact clearly shown by the record, and is, indeed, undisputed.

[3] As has already been said, it is conceded that the plaintiff was not entitled to recover under the "sue and labor" clause of the policy, and for the reason that has been stated. But we understand the reshipment charge in such a case as the present to be recoverable from the insurer, both by the established law as well as the established custom of England, as a "particular charge," as distinguished from a "particular average"; for in Arnould on Marine Insurance (8th Ed.) § 869, vol. 2, it is said:

"Another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder, is that which is embraced under the term 'particular charges.' The distinction between 'particular charges' and 'particular average' was first definitely established in our courts in Kidston v. Empire Insurance Co. [k], where the jury, after hearing the evidence of several average adjusters and other witnesses, found that there was in the business of marine insurance a well-known and definite meaning affixed by long usage to the term 'particular average,' as distinguished from the term 'particular charges'—viz., that 'particular average' denotes actual damage done to or loss of part of the subject-matter of insurance, but that it does not include any expenses or charges incurred in recovering or preserving the subject-matter of insurance, and that expenses incurred in warehousing and forwarding goods are not 'particular average,' but are termed 'particular charges.' Accordingly section 64, subsection 2, of the Marine Insurance Act states that 'expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average' [l]. They are recoverable from underwriters when incurred after the arising of a peril insured against, in order to prevent such peril causing a loss for which the underwriters would be liable, if it were so caused. In this event they are charges incurred 'in and about the defense and safeguard' of the subject-matter of insurance, within the suing and laboring clause. In certain cases they may also be recoverable from underwriters, apart from the suing and laboring clause, as losses occasioned by a peril insured against when they have been necessarily incurred in consequence of such a peril—as, for example, expenses of warehousing and forwarding cargo [m], when a peril insured against has occasioned the neces-

sity of such expenditure [n]"—the small letters in brackets referring to notes citing the cases referred to by the author.

Again, in section 214, vol. 1, 8th Ed., of the same author, it is said:

"When, in consequence of a peril insured against, the voyage cannot be accomplished in the original ship, it seems that the excess of the expense to which the owner of the goods is put in bringing them to their destination over the freight which he would have had to pay in the ordinary course is a loss directly due to such peril. The practice of underwriters has been to pay such excess as particular charges [e], and as one of the objects of an insurance on goods is to guarantee that the goods shall reach their destination, it is submitted that this practice is correct in principle [f]. It is certainly not inconsistent with the provisions of the Marine Insurance Act [g]."

It thus appears not only that, both by the law as well as the prevailing custom of England, the underwriter in such a case as we have here is required to pay, as a "particular charge," the excess of expense to which the owner of the goods was put in order to get them to their destination, but we have the further declaration of the distinguished author that the practice is correct in principle and in no wise inconsistent with the provisions of the English Marine Insurance Act.

Counsel for the plaintiff in error refer particularly to section 64 of the latter act and conclude therefrom that "particular charges partake of the nature of recoveries under the 'sue and labor'" clause, and are subject to the rule that governs claims under that clause. We do not so understand the law. It is true that by the express declaration of the English statute particular charges are not included in particular average. The language of the section cited is as follows:

"(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.

"(2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. Particular charges are not included in particular average."

We are unable to see from this that any inference should be drawn, as contended for the plaintiff in error, that particular charges should be likened to claims under the ordinary "sue and labor" clause, to sustain which it is necessary to show that the recovery sought was expended in order to prevent the insured property from being lost by reason of an impending peril insured against, and which "sue and labor" clause was expressly inserted in the policy in suit. On the contrary, Mr. Arnould, as has been shown, lays it down not only as the law but also the custom of England that particular charges include "another class of losses, which, though not specially enumerated in the policy, are nevertheless recoverable thereunder" when, as in the present case, the loss was occasioned by a peril insured against and when necessarily incurred in consequence of such peril.

The cases particularly relied upon by counsel for the plaintiff in error in support of their contention are Great Indian Peninsular Ry. Co. v. Saunders, 101 English C. L. R. 41, and Booth v. Gair, 15 Com. Bench Reps. (N. S.) 290, and they say that in the former the policy involved was practically identical with the policy involved in

the present case. In that statement we think counsel clearly in error. In that case certain rails were shipped by the plaintiff by the ship Bombay on a voyage to Kurrachee or Bombay, for a certain sum paid in advance, ship lost or not lost—the plaintiffs having insured themselves by a policy in the ordinary form of a Lombard Street policy on the rails, "valued at £4500, warranted free from particular average, unless the ship be stranded, sunk, or burnt." The ship was by perils of the seas disabled, and obliged to put into Plymouth, England, in such a state that she was not worth repairing; but she was neither stranded, sunk, nor burnt. The rails were saved and were sent on other vessels to their destination, and in order to forward them to their destination it was necessary to pay freight to the extent of £825. 11s. 7d. The latter, the court said, "was an extra expense incurred by the shippers of the goods in consequence of the sea risk which had frustrated the voyage of the Bombay; and the question we have to determine is whether the insured can recover this sum on a policy containing" the warranty that has been mentioned. The court held that the warranty in that case was equivalent to a stipulation against total loss and general average only, and consequently included expenses incurred in relation to the goods, and further held that the expenses there paid by the owner for the purpose of forwarding the rails to their destination at a time when they were not in any peril of total loss, either actual or constructive, were not recoverable under the "sue and labor" clause which the policy there involved also contained.

That case was followed by Booth v. Gair, in which bacon was insured upon a voyage from Liverpool to New York, "free from average unless general, or the ship were stranded, sunk, or burnt." The vessel on her way, by perils of the sea, but without being stranded, sunk, or burnt, became disabled and put into Bermuda, where she was constructively totally lost. The bacon was landed in specie and was not totally lost, constructively or otherwise. No expenses appeared to have been incurred in saving the goods from a total loss, which was negative; but certain expenses were incurred in the way of extra freight, transshipment, warehousing, surveying, and cooperage, all of which were treated as expenses of forwarding the goods. It was in that case further proved that it was the practice of underwriters on goods to pay such expenses under like circumstances under the name of particular charges. The judgment was for the underwriters upon the ground that what the master did was in discharge of his duty in ordinary course, and that there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses there in question.

What is above said regarding the cases of Great Indian Peninsular Railway Co. v. Saunders and Booth v. Gair is substantially taken from the opinion in the subsequent case of Kidston v. Empire Marine Ins. Co., L. R. I. C. P. 535 (14 Eng. Rul. Cases, 247), which latter case was an action upon a policy on charter freight, which included the usual suing and laboring clause, and the following warranty:

"Warranted free from particular average, also from jettison, unless the ship be stranded, sunk, or burnt."

The cargo was guano, at a freight payable on arrival at the port of discharge, shipped from the Chincha Islands to the United Kingdom, by a vessel which, on going around Cape Horn, suffered damage so serious that she had to put into Rio, and was accordingly sold. The plaintiffs in the action gave no notice of abandonment, but, the guano having been landed and warehoused at Rio, the master procured another vessel to carry it to Bristol for an agreed price, which the plaintiff paid, receiving from the owners of the cargo the full charter freight. The master also incurred certain expenses for landing, warehousing, and reloading the guano at Rio. The action was brought to recover the expenses of transshipment and forwarding. In holding that the plaintiffs were entitled to recover, under the suing and laboring clause of the policy, the expenses so incurred and the freight, notwithstanding there had been no abandonment, and that the application of the suing and laboring clause was not excluded by the warranty against particular average, the court said, among other things:

"The word 'average,' so far from being a term of art (except in so far as according to the evidence usage may have limited its meaning to loss or damage to the goods themselves), or a word with a rigid or unchanging signification necessarily including expenses in the defense or safeguard of the subject-matter insured, is a word used in a great variety of phrases as applicable to different subjects-matter, and not with any fixed or settled application. It would be tedious to go through the various uses to which it is applied; and we need not do more than refer to the instances cited in argument, and more especially to the very learned note of Mr. Maclachlan in Arnould on Insurance (3d Ed., vol. 2, p. 739). Amongst the various uses to which the word has been applied, no doubt, that of 'small expenses' is one, as in the usual clause in a charter party. So, in the case of insurance itself, expenses must often be taken into account in determining whether there has been a loss or not, but only because a thing is lost in insurance law which cannot be got back, except at an expense equal to its value when recovered. The question here, however, is not as to the extension of which the term 'average' is capable, but of the sense in which it ought to be understood in the particular context with which it is to be reconciled, and if possible read so that effect may be given to every provision in the instrument. Nor is it to be forgotten that the suing and laboring clause, which for the reasons already given specially provides for this case, has been allowed to remain a part of the policy, and that a special provision as to a particular subject-matter is to be preferred to general language, which might have governed in the absence of such special provision. Generalia specialibus non derogant. Specialia generalibus derogant. In our opinion, quite apart from usage, the true construction of the policy, as reconciling and giving effect to all its provisions, is that the warranty against particular average does no more than limit the insurance to total loss of the freight by the perils insured against, without reference to extraordinary labor or expense which may be incurred by the assured in preserving the freight from loss, or rather from never becoming due, by reason of the operation of perils insured against, and that the latter expenses are specially provided for by the suing and laboring clause, and may be recovered thereunder."

In distinguishing and holding inapplicable to the case then before the court the cases of Great Indian Peninsular Ry. Co. v. Saunders and Booth v. Gair, the court in Kidston v. Empire Marine Ins. Co. further said that before those decisions—

"the liability of the underwriters appears to have been universally admitted and acted upon, even in the cases where the expenses were incurred to forward goods existing in specie at the port of distress, and warranted free from particular average, so that no liability could accrue to the underwriters by their not being forwarded."

We think that neither of the three English cases above referred to is applicable to the case we have here, for the reason that, the Pleiades having been stranded, this case is brought within the exception to the warranty clause of the policy in suit, and for the further reason that that clause is followed by the express provision that the underwriters, notwithstanding the warranty, would pay "any special charges for warehouse rent, reshipping, or forwarding for which they would otherwise be liable." Nor are we able to sustain the contention of the plaintiff in error that the stranding of the Pleiades was not the proximate cause of the extra expense to which the insured was necessarily put. It was, as we view it, the sole cause.

[4] We have had some doubt as to whether the insured is not precluded from recovery by that clause of the present policy which reads:

"Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise."

The cases relied upon in support of the point are Taylor v. Dunbar, 4 Com. Pleas L. R. 206, and Russian Bank for Foreign Trade v. Excess Insurance Company, Limited, The Times Law Reports, 383, and subdivision (b), § 55, of the English Marine Insurance Act of 1906, which reads:

"Unless the policy otherwise provides the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

In the two decisions cited the loss sued for was occasioned by damage—in the one case to meat, and in the other to barley—resulting from delay in transit, to which loss the warranty relied upon directly applied. In the prseent case, however, the action is not based upon any loss growing out of any damage to any of the property insured, for there was none; its sole basis is the excess freight the insured was compelled to pay to the carrier to get the rails transported to their destination, which forwarding charges this policy as has been shown, expressly provides the insurer should pay. We therefore think the cases, as well as the the statutory provision cited, inapplicable to the present case.

The judgment is affirmed.

THE BEAVER. THE NECANICUM. SAN FRANCISCO & P. S. S. CO. v. LEGGETT S. S. CO. (two cases).

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

Nos. 2969, 2970.

1. ADMIRALTY ⊂=118—REVIEW ON APPEAL—FINDINGS OF FACT.
In an admiralty cause, findings of fact made by the trial court on conflicting evidence, for the most part taken in open court, will not be disturbed by the appellate court, except for manifest error.

2. COLLISION ⊂=82(1)—"MODERATE SPEED" IN FOG—CONSTRUCTION OF RULE.
The speed of a vessel need not necessarily be reduced from her full speed to be "moderate," within article 16 of the International Rules (Comp. St. 1916, § 7854), providing that "every vessel shall in a fog, mist, falling snow or heavy rainstorms go at a moderate speed, having careful regard to the existing circumstances and conditions."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Moderate Speed.]

Appeal from the District Court of the United States for the First Division of the Northern District of California; Maurice T. Dooling, Judge.

Suit in admiralty for collision by the San Francisco & Portland Steamship Company, owner of the steamship Beaver, against the steam schooner Necanicum, the Leggett Steamship Company, claimant, with cross-libel. Decree for respondent on cross-libel, and libelant appeals. Affirmed.

McCutchen, Olney & Willard, Ira A. Campbell, and Edward J. McCutchen, all of San Francisco, Cal., for appellant.

W. S. Burnett, Denman & Arnold, and Thomas A. Thatcher, all of San Francisco, Cal., for appellee.

Before GILBERT and HUNT, Circuit Judges, and VAN FLEET, District Judge.

VAN FLEET, District Judge. The controversy arises from a collision occurring between the steamer Beaver and the steam schooner Necanicum on the coast of California. The Beaver, a passenger steamer of 2,997 net tonnage, 380 feet in length, and 57 feet beam, was proceeding south from Astoria to San Francisco, loaded with passengers and freight, while the Necanicum, a much smaller vessel, 175 feet in length, and 35 to 40 feet beam, was going north light, from San Pedro to Astoria, for cargo. The vessels came into collision shortly south of Point Arena, under circumstances very much in controversy. That a fog of greater or less density was prevailing at the time is established by the evidence on both sides; but as to all other material circumstances bearing on the disaster, excepting as to the respective rates of speed of the two vessels at the time, the evidence of the parties is as wide apart as the poles. It does appear without controversy that when the vessels last caught sight of each other in the fog, from 1½ to 2 minutes before the collision, the Beaver was proceeding at a speed of $14^{7}/_{10}$ knots and the Necanicum at 8¼ knots per hour.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Both vessels suffered injury, and this injury resulted in cross-actions; appellant, as owner of the Beaver, libeled the Necanicum, and the owners of the latter brought an action in personam against appellant. These actions were consolidated for trial, and the cause was tried in open court—some 28 witnesses being examined, and a large volume of evidence taken. The court below filed an opinion in which, after discussing the circumstances, it says:

"There is in this case, as in all similar cases coming under my observation, much contradictory testimony as to the events occurring at the time of the collision. But this one fact seems to me to stand out clearly: That the Beaver was gravely negligent in proceeding at the rate of 14.7 knots per hour in the fog, and that but for such speed, and the resulting momentum due to her size and weight, the collision would not have occurred. Contradictory as the testimony is, there is nothing therein which tends in any manner to excuse the running of a large, heavy, and loaded passenger steamer at such a rate of speed in the fog then prevailing. This speed prevented the rectification, before it was too late, of whatever error arose from confused or contradictory signals."

And in its decree the court recited as the basis of its conclusion these additional facts:

"That the evidence fails to establish that the said steamship Necanicum, prior to and at the time of the collision alleged in the libel, did not have a proper and efficient lookout and proper and competent officers, or that she failed to alter her course or conduct herself in accordance with the passing rules or exchange of signals between her and the steamship Beaver, or that she failed to stop and reverse at a proper time before said collision; and further finds that the said collision was not in any way caused or contributed to by any neglect, error, default or misconduct of the steamship Necanicum, or her claimant, the Leggett Steamship Company; and further finds that the said collision was caused by the neglect and misconduct of the steamship Beaver in proceeding in the fog, prior to the collision, at an immoderate rate of speed, while the steamship Necanicum was proceeding at a moderate rate of speed for the conditions then prevailing."

In accordance with these findings, the trial court dismissed the libel of appellant, and in the cross-action held it to be responsible to the appellee in damages for the injury suffered by the Necanicum. Decrees were entered accordingly. The appeal is from both decrees.

[1] The case does not call for extended consideration. Much of appellant's argument is devoted to a discussion of the evidence in particulars as to which, it is urged, that it warrants a finding of the facts as to the circumstances attending the collision at variance with those found by the trial court, establishing the liability of the Necanicum and the exculpation of the Beaver; and it is urged that, as this is a trial de novo, it is the duty of this court to examine the evidence with that view, and substitute its own findings and conclusions on the evidence for those of the court below. We need not follow this argument in detail. It is sufficient to say that, recognizing our power in the premises, we do not regard the case as justifying that course. The entire mass of evidence upon which the trial court passed, with the exception of that of two or three witnesses for appellee taken on deposition, was heard in open court, with full opportunity for observation of the character and demeanor of the witnesses, and that evidence on all controverted facts was sharply conflicting. Such a case, notwith-

standing a small portion of the evidence rests upon deposition, is to be regarded as well within the reason of the rule that the findings of the trial court should not be disturbed, except for manifest error. The Dolbadarn Castle, 222 Fed. 838, 138 C. C. A. 264; Sorenson v. Alaska S. S. Co. (Jan 7, 1918) 247 Fed. 294, —— C. C. A. ——; Central California Canneries Co. v. Dunkley Co., 247 Fed. 790, —— C. C. A. ——; Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356; The Hardy, 229 Fed. 985, 986, 987, 144 C. C. A. 267. And we have examined the record sufficiently to satisfy us that there was evidence substantially tending to sustain the several findings and conclusions of the court below.

[2] This leaves but one other point to be noticed. It is contended by appellant that, as the court found that a fog prevailed at the time of the collision and it appeared without controversy that the Necanicum was proceeding at the time at her full speed, or substantially such, it results as matter of law that she was equally at fault with the Beaver, and that the court should have so held, and at least apportioned the damages. This contention is based upon the effect claimed by appellant of article 16, International Rules of the Sea (Act Aug. 19, 1890, c. 802, 26 Stat. 320, 326 [Comp. St. 1916, § 7854]), which, so far as here pertinent, reads:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions."

Appellant's contention is, in substance, that under this rule, no matter what the other circumstances may be, nor how low soever the maximum rate of speed of a vessel may be, she must, in face of any one of the atmospheric conditions specified in the rule, reduce her speed below its maximum point or be necessarily held in fault in case of collision; that, in other words, "moderate speed," as there required, necessarily means less than full speed, and that a vessel going at full speed in such conditions of weather is violating the rule, no matter how slow that speed may be, and is guilty of negligence as matter of law. We are not disposed to accept this interpretation of the rule as it now exists. In support of its contention appellant cites some early cases from Judge Brown in the District Court. In the City of New York (D. C.) 15 Fed. 624, 628, that learned judge, discussing the effect of this maritime rule, as then existing, in a case of collision in a fog, says:

"The authorities are quite uniform in requiring a diminution of speed under such circumstances. Whatever 'moderate speed' may be, under given circumstances, having reference, as it doubtless does, to the steamer's ordinary speed and her ability to stop quickly, the density of the fog, and the means which vessels have of observing each other, so as to avoid danger, it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, until the bark was in sight, was a clear violation of the statutory obligation to go at a moderate speed."

And again, in The State of Alabama (D. C.) 17 Fed. 847, 852, the same judge says:

"To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed."

And see, to similar effect, The Pennland (D. C.) 23 Fed. 551; The Britannic (D. C.) 39 Fed. 395; The Normandie (D. C.) 43 Fed. 151, 157.

But not only do the later decisions fail to sustain this rather hard and fast interpretation, but the rule itself has since undergone modifications tending to give it, not only more comprehensive scope in its application, but greater elasticity and adaptability to conditions as they may arise. The pertinent language of the rule in its original form, as considered in the cases referred to by appellant, was that "every steam vessel shall, when in a fog, go at a moderate speed." It was in that form rule 21 of the International Code, adopted in 1863 by a British Order in Council, and in 1864 by the Congress of the United States (Rev. St. § 4233 [Comp. St. 1916, § 7963]). In 1879 a new or revised code was adopted in Great Britain, and thereafter, in 1885, by Congress (Act March 3, 1885, c. 354, 23 Stat. 438, 441). In this revision, the old rule 21 became article 13, and provided that "every ship, whether a sailing ship or a steamship, shall, in a fog, mist, or falling snow, go at a moderate speed." After the promulgation of article 13 by the British government, and before its adoption by Congress, it came under consideration in the Court of Appeals in England in The Elysia, 4 Asp. N. S. 540, 46 L. T. 840, where the court, in a collision case, in answer to the same contention that is made here, rejected it as untenable; Lord Coleridge saying:

"There are constructions of this thirteenth rule which have been suggested for our consideration, but I think the rule means what it says. It says that a ship, whether a sailing vessel or a steamship, must go at a speed which is perfectly moderate. It says nothing whatever about the capacity of a vessel for speed. If a ship be a slow ship, it does not follow that, because she is going at her greatest speed, which is a slow speed, she is to reduce her speed in proportion to a faster vessel. It is not, if her best speed is moderate, that she must reduce it; but, if her speed is more than moderate, she must bring it down to what is moderate. It would, indeed, be very dangerous to lay down any rule as to what is moderate and what is immoderate speed. A moderate speed in the Atlantic Ocean may be immoderate elsewhere."

And Lord Cotton said:

"Now, as to the consideration of the thirteenth rule, I have little to add to what has already been said by my learned Brothers. In my opinion the rule does not require that the speed is to be slackened by a naturally slow vessel. If the vessel was going at a moderate speed, it is not bound to go at a less speed."

And the latter judge adds, in substance, that what is a moderate speed must depend upon the situation and circumstances. Not only is this construction of the rule to be deemed to have been in the mind of Congress when it later adopted its language (I. C. C. v. B. & O. R. R., 145 U. S. 263, 284, 12 Sup. Ct. 844, 36 L. Ed. 699), but it is in harmony with the views subsequently expressed by the courts of this country (Quinette v. Bisso, 136 Fed. 825, 69 C. C. A. 503, 5 L. R. A. [N. S.] 303; The Colorado, 91 U. S. 692, 23 L. Ed. 379;

The Chattahoochee, 173 U. S. 540, 548, 19 Sup. Ct. 491, 43 L. Ed. 801; The Umbria, 166 U. S. 404, 417, 17 Sup. Ct. 610, 41 L. Ed. 1053).

The rule in its present form was adopted in 1890 as a result of a convention of maritime nations held at Washington, and became effective by proclamation of the President March 1, 1895 (28 Stat. 1250, 1257), and it is significant that in this revision there was added to the text as it previously read, and presumptively to bring it more clearly in line with the construction theretofore given it by the courts, the words "having careful regard to the existing circumstances and conditions." And as to the effect of the rule in its present form, see Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726.

It is apparent, therefore, we think, that the court below did not misapprehend the rights and obligations of the parties under this rule within the circumstances as found by it. Its decrees must therefore be affirmed; and it is so ordered.

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## EMMETT IRR. DIST. et al. v. THOMPSON et al.*

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3062.

1. WATERS AND WATER COURSES ⟸230(2)—IRRIGATION DISTRICTS—VALIDITY OF BONDS.

Under Rev. Codes Idaho, §§ 2396, 2397, providing that bonds of an irrigation district shall be authorized by a vote of the electors, shall be designated as a series, and may be issued and sold from time to time, but shall be dated January 1, or July 1, next following their authorization, they are properly signed by the officers of the district in office at the time of their issuance.

2. ESTOPPEL ⟸62(1)—IRRIGATION DISTRICTS—VALIDITY OF BONDS.

An irrigation district, which issued bonds under a contract made without fraud, and with full knowledge of the facts, requiring the other party in part payment to take up certain claimed liens on the property, is estopped to afterward question the validity of the bonds on the ground that some of the lien claims paid were invalid.

Appeal from the District Court of the United States for the Second Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit in equity by J. Paul Thompson and others against the Emmett Irrigation District and others. Decree for complainants, and defendants appeal. Affirmed.

J. M. Thompson, of Caldwell, Idaho, and Fremont Wood and Dean Driscoll, both of Boise, Idaho, for appellants.

Richards & Haga and McKeen F. Morrow, all of Boise, Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The bonds here in suit are a part of an authorized issue of $1,100,000, par value, made by the appellant irriga-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied February 10, 1919.

tion district, and, except as to numbers, amounts, and dates of maturity, are identical. Each is a coupon bond, negotiable in form, and made payable to bearer, and recites upon its face, among other things, that it is one of a series of bonds aggregating $1,100,000 in amount and issued by the district by authority of an act of the Legislature of the state of Idaho entitled "An act relating to irrigation districts and to provide for the organization thereof, and to provide for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes, and for other and similar purposes," approved March 9, 1903 (Laws 1903, p. 150), together with acts amendatory thereof and supplemental thereto, and further recites as follows:

"And it is hereby certified that all things required by law to be done in and about the organization of said district and the issuance of the said bonds have been done, have happened, and have been performed, and that the issuance of this bond is duly and legally authorized by vote of the electors of said district at a special election duly called and held in accordance with the provisions of the said act and by resolution of its board of directors, and that all other acts, conditions, and things required by the laws and Constitution of the state of Idaho precedent to and in the issue and delivery of this bond have been done, have happened, and have been performed, and that said bonds are the valid, binding, and legal obligation of the said district; that all the real property included within said distrct is subject to the levy of an annual tax for the payment thereof."

The record shows that the irrigation works were constructed by a company styled Canyon Canal Company, Limited, under contract with the state of Idaho, pursuant to certain provisions of the statutes of that state and under the provisions of an act of Congress approved August 18, 1894 (28 Stats. Lg. 372, c. 301), and amendments thereto, known as the Carey Act (Comp. St. 1916, § 4685). Those statutory provisions are specifically referred to in the opinions of this court on the former appeal of the present case (227 Fed. 569, 142 C. C. A. 192), and in the recent case of Twin Falls Salmon River Land & W. Co. v. Caldwell, 242 Fed. 177, 155 C. C. A. 17, and need not, therefore, be again set out. The canal company sold to various settlers and prospective settlers rights to water under the system for the irrigation of their respective tracts of land, liens for the purchase price of which were given both by the act of Congress and the statute of Idaho.

For the purpose of acquiring the irrigation works and water rights of the canal company, and of extending and improving the same, the appellant irrigation district, shortly after its organization, authorized the issue of bonds in the amount of $1,100,000, par value, and under and by virtue of the statutes of Idaho (Revised Codes of Idaho, §§ 2401, 2403) instituted in the proper court of the state proceedings to have it judicially determined that the district had been legally organized, that the bonds had been properly authorized, and would be in the hands of purchasers legal and valid obligations of the district, the obvious purpose of which proceedings was to further the sale of the bonds by giving such legislative and judicial security to their purchasers. The confirmation proceedings resulted in a decree of the trial court adjudging the organization of the district and the issuance of the bonds to be regular and valid—the decree setting out, according to

the express declaration of the Supreme Court affirming it, the "various steps taken for the organization of the district and of the issuance of said bonds." Emmett Irr. Dist. v. Shane, 19 Idaho, 332, 335, 336, 113 Pac. 444, 445.

The record shows that thereafter the district, through its board of directors, offered the whole amount of the bonds for sale, and that in response to due notice there was no bid. The canal company had sold water rights in the system to various settlers upon the lands under contracts on which there was payable to the company more than $600,000 in deferred payments, which contracts were liens both upon the lands of the settlers and their interests in the irrigation system. The canal company, in the course of building up the system, had issued bonds, notes, and other obligations, and given as security therefor a mortgage or trust deed to the American Trust & Savings Bank of Chicago on the irrigation system, including its water rights, and, as additional security, had deposited with the trustee the various water contracts it had entered into with the settlers. Some of the obligations of the canal company were due, and on others there was default in the payment of interest. There were also various existing liens upon the property for work and labor performed for, and materials furnished to, the canal company, and there was also some claim by a company called Trowbridge & Niver Company. Litigation and expense, therefore, confronted both the canal company and the district. In that condition of affairs the latter, on the 12th of September, 1911, entered into a contract with J. J. Corkill & Co., of Chicago, next referred to, prior to which, however, the district had acquired (through a holding company to which the canal company had conveyed it) the entire irrigation system.

The contract between the district and Corkill & Co., and a supplemental one between the same parties, as well as the facts in connection therewith, are, we think, after a careful examination of the record, fairly set forth in the following excerpt from the opinion of the learned judge of the court below:

"After reciting that the district was desirous of purchasing the irrigating system (to which, as we have seen, it already had title), and that Corkill was able to sell and deliver it, and further reciting that there were outstanding bonds and notes of the Canyon Canal Company aggregating $570,000, besides interest, secured by mortgages and water contracts, and that it was the desire of the district to pay all these obligations, and to lift all incumbrances upon and claims against the irrigation system, and to procure funds for the extension and improvement thereof, and reciting further that Corkill & Co. were able to give valuable assistance in making an exchange of the district bonds for such outstanding obligations, and were willing to purchase the bonds not required for that purpose, it was agreed that Corkill & Co. would use their best efforts to consummate the desired exchange, and would cause to be transferred to the district the entire irrigation system, and would further cause to be assigned to it an unsecured claim of the Trowbridge & Niver Company against the Canyon Canal Company, the precise nature of which is not explained. The Ft. Dearborn Trust & Savings Bank of Chicago was agreed upon as a depository, and with it the district was to deposit the entire issue of its bonds, for delivery from time to time as they were exchanged or sold by Corkill & Co. When the obligations of the canal company were finally discharged by exchange or payment, the water contracts which the canal company had deposited as collateral with the trustee of its bonds and notes were

to be turned over to the district. These aggregated $525,469.62 principal, and $76,868.16 interest, and there was also in the hands of the trustee cash to the amount of $28,197.94, making a total of principal, interest, and cash of $630,535.72, all of which was to go to the district as soon as the canal company's obligations were discharged in the manner hereinafter recited.

"The $1,100,000 bonds were to bear date January 1, 1911, and the coupons maturing July 1, 1911, were to be detached before delivery to the depository. The depository was to hold the bonds and deliver them in the following manner, namely: Four hundred and seventy thousand dollars to Corkill & Co., or upon their order, in even exchange for $470,000 of the bonds and notes of the Canyon Canal Company, and Corkill & Co. were to pay to the holders of such outstanding bonds and notes any excess of accrued interest thereon, for which they were to be reimbursed out of the $28,197.94 cash in the trustee's hands, and $130,000 on account of the other $100,000 of bonds and notes and the accrued interest thereon, aggregating, principal and interest, $130,000. Two hundred and eighty thousand dollars of bonds were to be delivered upon payment to the credit of the district of cash equal to the par value thereof and accrued interest. The consideration for the other $220,000 bonds is not so clear. It was provided that they were to become the property of Corkill & Co. when the latter caused to be delivered to the depository proper instruments transferring to the district the irrigation system and the unsecured claims of Trowbridge & Niver Company, but they were to be held by the depository as security for the performance by Corkill & Co., of their obligations under the contract, among which was the obligation to purchase the $280,000 bonds in cash at par. These $280,000 bonds they were to take in installments, $50,000 in 30 days, $50,000 in 60 days, $50,000 in 90 days, and $130,000 on or before August 1, 1912. Provision was made for the delivery by the depository to Corkill & Co. of the $220,000 bonds, the details of which need not be stated, for in general the depository was at all times to retain of such bonds an amount equal to 25 per cent. of the then outstanding unexchanged obligations of the canal company, plus the amount of $280,000 bonds which Corkill & Co. had not taken and paid for in cash.

"The district further agreed to get from all landowners a written waiver of all errors and irregularities of procedure, together with consent that their lands be taxed to pay the interest and principal of the bonds. Corkill & Co. failed to purchase the whole of the $280,000 bonds within the time agreed upon, and on September 12, 1912, a supplemental agreement was executed, which, after reciting such default, provided for an extension of time to complete such purchase. It was also agreed that $5,000 of the $220,000 bonds, and $20,000 of the $280,000 bonds, should, by the depository, be returned to the district.

"There was still another contract between the parties, with a view to effecting the disposition of the bonds for cash; but it is unimportant at the present juncture, for generally it may be said that such bonds as are outstanding were disposed of under the contractual arrangement and for the considerations already explained. Of the bonds now out approximately $599,000 were exchanged in retiring the obligations of the Canyon Canal Company, as was contemplated by the agreement. Of the balance, $125,000 were sold for cash, $175,000 were delivered to Corkill & Co. on account of the $220,000, and $25,000 were, by agreement of the parties, returned to the district. The depository still has in its possession approximately $177,000. The contract was complied with in every respect, except that Corkill & Co. did not purchase for cash more than half of the stipulated amount of bonds; but admittedly this default does not affect the validity of the bonds which are actually outstanding, all of which were issued in compliance with the contract. It is further to be borne in mind that the issuance by the district of the bonds to the amount of $1,100,000 was duly authorized, and the district was not induced by any fraudulent practices on the part of Corkill & Co. to enter into the contract. The defenses are therefore limited to claims that the bonds are irregular in their form and in the manner of their execution, and that many of them, as appears from the contract and the explanatory testimony, were disposed of for an illegal consideration."

[1] We agree with the court below that the objections made to the form of the bonds and the manner of their issuance are without merit. The provisions of the statute under which they were issued are quite different from those of the California statute considered by this court in the case of Wright v. East Riverside Irr. Dist., 138 Fed. 313, 70 C. C. A. 603, and therefore the decision in that case is not in point. The Idaho statute (Rev. Codes, §§ 2396, 2397) declares that the bonds authorized by the vote of the electors of the district "shall be designated as a series and the series shall be numbered consecutively as authorized," and that "all bonds and coupons shall be dated on January 1st or July 1st next following the date of their authorization." Providing, as the Idaho statute does, for the issuance of authorized bonds in series and for their sale from time to time, all, however, to be dated on January 1st or July 1st next following the date of their authorization, and there being no express statutory provision as to who should sign them, the obvious and necessary implication is that they were authorized to be signed by the officers of the district in office at the time of their issuance and delivery.

[2] The court below found and held that all of the parties to the contract between the irrigation district and Corkill & Co. knew all of the facts, and that there was no fraud practiced, notwithstanding the untrue recital therein that the district desired to purchase the canal system, the title to which had already been conveyed to it. "Undoubtedly," said the court, "there were outstanding bonds, notes, and contracts which were claimed to be charges upon the property. The district officers could at their option have questioned them at the time the contract was entered into, and declined to include any particular bonds or claims; but manifestly they either recognized their validity, or deemed their invalidity so doubtful that they were unwilling to assume the burden of a contest. The district has now had all of these liens and charges cleaned up, and has gotten the consideration for which the bonds were issued, and it cannot be heard to say that some of the claims might have been defeated if a contest had been instituted. In good conscience it would have to restore the consideration and put the parties in statu quo, and that it does not offer to do, and probably could not do. The transaction in this respect being within the scope of the directors' authority, their action is at this late date conclusive, in the absence of fraud, and no fraud is charged."

All this being true, and the record showing that a large part of the bonds in suit were used in the payment of the works of the irrigation system, as under section 2404 of the Revised Codes of Idaho it seems could be legally done, and the remainder of such bonds having subsequent to their delivery to the depository passed into the hands of purchasers for value, even if it be assumed that the consideration for some of the latter bonds was illegal, it appears from the record that the one could not be identified from the other. It hardly seems necessary to cite the numerous cases upon the subject of estoppel. How strictly that rule is enforced by the Supreme Court

of Idaho in favor of holders of bonds of irrigation districts is clearly shown by the case of Page v. Oneida Irrigation District, 26 Idaho, 108, 141 Pac. 238. Indeed, we think that the application of the doctrine of estoppel and the decision of this court on the former appeal (227 Fed. 560, 142 C. C. A. 192) are enough to make necessary the affirmance of the judgment appealed from.

Judgment affirmed.

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## CITY OF SEATTLE v. LLOYDS' PLATE GLASS INS. CO.*

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3112.

1. EXPLOSIVES ⟸4—SUBJECT OF COMMERCE.
   Dynamite, as a legitimate subject of commerce, while in transit to a foreign country, may be lawfully brought into any harbor.
2. COMMERCE ⟸10—CARRIAGE OF EXPLOSIVES—PORT REGULATIONS—NONEXERCISE OF POWER OF CONGRESS.
   There is nothing in Rev. St. §§ 4278–4280 (Comp. St. 1916, §§ 8016–8018), relating to transportation of nitroglycerin in interstate and foreign commerce, which deprives a city of power to designate places in its harbor where explosives in course of transportation in interstate or foreign commerce shall be handled or kept.
3. MUNICIPAL CORPORATIONS ⟸736—TORTS—CREATION OF PUBLIC NUISANCE.
   While a municipal corporation is not liable for a mistake in judgment, or even negligence, of its officers in designating a place for the storing of explosives, it has no right to create a public nuisance, and, if it does so, it is liable for the resulting damages.
4. MUNICIPAL CORPORATIONS ⟸849—LIABILITY FOR ACTS OF OFFICERS—CREATION OF PUBLIC NUISANCE.
   A city ordinance, establishing harbor regulations, creating a fairway, and designating a powder dock for use exclusively for handling explosives, construed, and the city *held* liable for damages caused by an explosion of dynamite on a scow which the port warden without authority permitted to anchor in the fairway, where it had remained for 16 days.
5. MUNICIPAL CORPORATIONS ⟸741(1)—ACTIONS AGAINST—PRIOR PRESENTATION OF CLAIM.
   Under a statute and ordinance requiring claims against a city to be presented and filed before bringing action thereon, an insurance company which, under the terms of its policies, has replaced glass broken by an explosion charged to have been due to the fault of the city, may properly file claims therefor in its own name.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action at law by the Lloyds' Plate Glass Insurance Company against the City of Seattle. Judgment for plaintiff, and defendant brings error. Affirmed.

A powder company of San Francisco, Cal., shipped to the Baldwin Shipping Company, at Vladivostok, 15 tons of gelatine dynamite, by a coastwise steamer called Loop, to be transferred at Seattle to one of the Japanese marus for transportation to its destination; the latter ship being expected to sail from Seattle about the time the Loop should arrive. On the arrival of the Loop at Seattle, however, it was found that that Japanese ship could not take

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes



*Rehearing denied February 10, 1919.

the shipment, and it was then arranged to ship the dynamite on the steamship Robert Dollar, which was expected to sail about a week later. For the reasons stated it became necessary to unload the explosive from the Loop, and it was placed on a scow of the Lillico Launch & Tugboat Company, which company was the agent of and acting for the powder company. This scow, with the explosive on board, was, on the 14th day of May, 1915, moored by the launch and tugboat company, without the knowledge of the port warden of the city of Seattle, to buoy No. 1 that the city had erected in the harbor, to await the arrival of the Robert Dollar, which was the next vessel carrying explosives bound for Vladivostok.

The city had, on March 1, 1915, pursuant to authority granted by its charter, enacted an ordinance, sections 7 and 8 of which are as follows:

"Sec. 7. All waters herein specified, subject to reservations for anchorage, shall be known as 'fairway,' and shall not be obstructed in any manner whereby navigation may be endangered or impeded, and shall include, subject to such reservations, the following described waters:

"All of Elliott Bay, lying easterly of a straight line drawn from Alki Point to West Point.

"All of the east and west waterways.

"All of the Duwamish river.

"All of the Duwamish waterway project.

"All of Salmon Bay.

"All of Lake Washington Canal, outside that portion which shall be under the supervision and control of the United States government.

"All of Lake Washington, Lake Union, and Green Lake, lying or being within the corporate limits of the city of Seattle, or within the jurisdiction and control of the city.

"All that portion of Shilshole Bay, lying easterly and southerly of a line from West Point to the intersection of the northerly boundary of the city of Seattle with the outer harbor line.

"All navigable waters in the projection of public streets, lying on the landward side of the outer harbor line, shall be fairway. It shall be unlawful for the master, or other person in charge of any vessel, to anchor, tie, or make fast such vessel in any such fairway for a longer period of time than reasonably sufficient to load or unload the same, except that the port warden may, in his discretion, grant any permit for the use of any such fairway for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for.

"Sec. 8. In aid of commerce and navigation anchorage for vessels is authorized in the following described waters:

"Elliott Bay Anchorage—Beginning at the northeast corner of Harbor Island; thence northerly and in a straight line to a point intersecting a line drawn along the north side of King street; thence west on said line to a point intersecting the east line of the west waterway; thence along said east line to the northwest corner of Harbor Island; also, beginning at a point of intersection of the outer harbor line with a straight line drawn along the west line of the west waterway; thence north to a point intersecting a straight line drawn along the north side of Washington street; thence in a westerly direction to the junction of the outer harbor line and the east side of the West Seattle Ferry dock."

Within that portion of Elliott Bay lying easterly of a straight line drawn from Alki Point to West Point, and within a half-mile from the path of shipping that comes into Seattle Harbor, a like distance from the wharves and docks of the city, and 1,300 feet from a fill in Elliott Bay known as Harbor Island, which at the time here in question was vacant land, the city erected buoy No. 1. The morning after the scow of the Lillico Launch & Tugboat Company, with the dynamite on board, was moored to buoy No. 1, the port warden of the city was notified of the fact, and in consideration of the payment of a fee prescribed by the city ordinance of $1 per day he issued a permit to the launch and tugboat company to so moor the scow, at the time knowing that it had on board the 15 tons of dynamite. The scow so remained moored to that buoy until the dynamite exploded, about 2 o'clock in

the morning of May 30th, resulting in great damage, including the breaking of a large amount of plate glass owned by various persons in the city of Seattle, a part of which glass was insured by policies of insurance issued to such owners by the Lloyds' Plate Glass Insurance Company and the Globe Indemnity Company. Pursuant to the obligations imposed by those policies, the insurance companies mentioned caused the glass to be replaced, and filed claims against the city for the amounts paid by them for the replacing of such glass under their respective policies. Subsequently the Globe Indemnity Company assigned its claim against the city to the Lloyds' Insurance Company, which brought the present action against the city for damages, resulting in findings and judgment for the plaintiff, to review which the city brought the present writ of error.

Hugh M. Caldwell and Frank S. Griffith, both of Seattle, Wash., for plaintiff in error.

Bogle, Graves, Merritt & Bogle, Flick & Paul, and Hughes, McMicken, Ramsey & Rupp, all of Seattle, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). [1, 2] It cannot be doubted that the dynamite, being foreign commerce in transit to its place of destination, was rightfully brought into the harbor of Seattle. Such substance has long been a legitimate subject of commerce. Actiesselskabet Ingrid v. Central R. Co. of New Jersey, 216 Fed. 72, 132 C. C. A. 316, L. R. A. 1916B, 716; The Ingrid (D. C.) 195 Fed. 596, and cases there cited. The contention of the appellant that the city was without power to designate the place or places within the harbor where such an explosive should be handled, kept, or stored we are unable to sustain. Neither section 4278 nor 4279 of the Revised Statutes (Comp. St. 1916, §§ 8016, 8017), embodying provisions of the act of Congress of July 3, 1866 (14 Stat. 81, 82, c. 162), nor the decisions of the Supreme Court reported, respectively, in Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, Northern Pac. Ry. Co. v. Washington ex rel. Atkinson, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. 237, and Southern Ry. Co. v. Reid, 222 U. S. 424, 32 Sup. Ct. 140, 56 L. Ed. 257, in our opinion, sustain it.

It is beyond question that, where Congress has legislated in respect to either foreign or interstate commerce, no state or other subordinate legislation upon the same subject is of any validity. But we find no legislation of Congress with respect to the place or places within any harbor of the United States where any kind of explosives shall be handled, kept, or stored. Section 4278 above cited makes it unlawful to transport, carry, or convey, ship, deliver on board, or cause to be delivered on board, certain specified kinds of explosives, including nitroglycerin, upon or in any vessel or vehicle used or employed in transporting passengers by land or water, between a place in any foreign country and a place within the limits of any state, territory, or district of the United States, or between a place in one state, territory, or district of the United States and a place in any other state, territory or district thereof; and section 4279 of the same Statutes makes it unlawful to ship, send, or for-

ward any quantity of such explosives by a vessel or vehicle of any description, by land or water, between a place in a foreign country and a place within the United States, or between a place in one state, territory, or district of the United States, and a place in any other state, territory, or district thereof, unless the same shall be securely inclosed, deposited, or packed in a certain prescribed way; and the next section—4280 (section 8018)—declares that the two preceding sections shall not be so construed as to prevent any state, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of those substances between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits for sale, use, or consumption therein.

In all this we see nothing in any way relating to the place or places in any harbor of the United States where any kind of an explosive in course of foreign or intrastate commerce shall be placed, kept, or stored; and while, as has been said, it is beyond question that where Congress has legislated in respect to either foreign or interstate commerce no state or other subordinate legislation upon the same subject is of any validity, yet we understand the law to be that, where Congress is silent, the state may legislate in aid of, but without burdening, both foreign and interstate commerce. Such we understand to be the effect of the last of the decisions above cited of the Supreme Court, where, at page 436 of 222 U. S., at page 142 of 32 Sup. Ct. (56 L. Ed. 257), the court cited, with apparent approval, its previous decisions in the cases of Atlantic Coast Line R. R. Co. v. Mazursky, 216 U. S. 122, 30 Sup. Ct. 378, 54 L. Ed. 411, and Western Union Tel. Co. v. James, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105, saying, among other things, that—

"In those cases, and in the later case of Western Union Tel. Co. v. Milling Co., 218 U. S. 406 [31 Sup. Ct. 59, 54 L. Ed. 1088, 36 L. R. A. (N. S.) 220, 21 Ann. Cas. 815], the principle is expressed that 'there are many occasions where the police power of the state can be properly exercised to insure a faithful and prompt performance of duty within the limits of the state upon the part of those engaged in interstate commerce.' Such exercise of power, it was further said, was in aid of interstate commerce, and, although incidentally affecting it, did not burden it."

[3] We readily concede that municipal corporations, which are created by the state and invested with certain governmental powers for local purposes and for the public good, are not liable in damages for their failure to so legislate, or for any mistake in judgment in the matter of any such legislation. Decisions to this effect are very numerous. But we think it is clear that such a corporation has no right to create a public nuisance, and that, if it does so, it is liable for the resultant damage. See Bruhnke v. La Crosse, 155 Wis. 485, 144 N. W. 1100, 50 L. R. A. (N. S.) 1147; Fitzgerald v. Town of Sharon, 143 Iowa, 730, 121 N. W. 523; Mayor, etc., v. Furze, 3 Hill (N. Y.) 612; Hughes v. City of Fond du Lac, 73 Wis. 380, 41 N. W. 407; Hart v. Board of Chosen Freeholders of Union County, 57 N. J. Law, 90, 29 Atl. 490.

The cases cited and relied upon by the plaintiff in error, in which it was sought to hold the city of Baltimore liable for damages resulting from an explosion in waters over which it had jurisdiction—Zywicki v. Jos. R. Foard Co. et al. (D. C.) 206 Fed. 975; Jos. R. Foard Co. v. State of Maryland, 219 Fed. 827, 135 C. C. A. 497; Gutowski v. Mayor, etc., of City of Baltimore, 127 Md. 502, 96 Atl. 630—were based upon the alleged negligence of that city in designating the place for the transshipment or keeping of the explosive, or negligence in not properly supervising the handling of it; the Circuit Court of Appeals of the Fourth Circuit saying in the second of the cases last referred to (219 Fed. 834, 135 C. C. A. 504):

"Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transshipment of dynamite, in that it was a place frequented by other vessels and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit."

And in the case of Gutowski v. Mayor, etc., of Baltimore, 127 Md. 502, 96 Atl. 630, the same obvious distinction was pointed out by the Supreme Court of Maryland, between such cases of negligence or failure on the part of the municipality and such a case as is here complained of, where the complaint in the case, as well as the decision of the court below, are based upon the ground that the defendant city, in authorizing and directing, through its port warden, this dynamite to be placed and kept at its buoy No. 1, created a public nuisance, in violation of its own ordinance designating another and different place for such purpose.

[4] About two months before the occurrences in question, to wit, on the 1st of March, 1915, the city enacted the ordinance referred to in the statement, by which the city, in the exercise of its police power, assumed control and jurisdiction over all navigable waters within its limits, and by which there was, among other things, created the fairway in the waters of the bay that has been described, subject to anchorage, and in which fairway the city subsequently constructed and maintained, among others, anchorage buoy No. 1. The ordinance made it unlawful for any master or person having charge of any vessel to anchor or make the same fast in the waters of the fairway or anchorage without first obtaining a permit therefor from the port warden of the city, and paying certain prescribed anchorage fees therefor; the port warden being thereby given power, and it being made his duty, to remove any vessel from any buoy, wharf, or anchorage for nonpayment of any such prescribed fees. It prohibited every master or other person in charge of any vessel from attaching the same to any city buoy until he should have obtained permission so to do from the port warden, provided that during the night or in bad weather such vessel might be attached to any vacant buoy, with the requirement that the person in charge thereof should notify the port warden not later than 8 o'clock of the next legal day

of such act, stating the name and character of the vessel and the probable length of time it desired to remain at the buoy. It made the port warden the sole judge as to what vessel or vessels should occupy the city buoys, and conferred upon him power to revoke any such permit for a violation of any of its terms. It made various provisions respecting the handling, keeping, and storage of explosives within the harbor, and, among others, these parts of section 38:

"No person shall, on any pier or other structure, except on the powder dock or on powder boats within Seattle Harbor, store or have on hand for sale, or sell, or keep any powder, ignition caps, dynamite, or other like explosives, either by day or night.

"No vessel with a cargo or part cargo of powder, ignition caps, dynamite, or other like explosive arriving at Seattle Harbor, shall lie alongside of or make fast to any pier until the port warden shall have issued a permit so to do. * * * Any person, desiring a permanent berth at the powder dock for the transfer of powder, shall pay to the port warden a minimum charge of twenty-five (25) dollars per month when such vessel does not exceed fifty (50) net tons, which shall allow such vessel to lie thereat and discharge or handle in any one month not over twenty-five (25) tons of explosives over the same. Whenever any vessel shall handle more than twenty-five (25) tons of explosives over such dock in any one month, the regular one (1) dollar per ton rate shall be collected in lieu of such twenty-five (25) dollar rate.

"Every powder boat engaged in the transfer or handling of explosives and lying at the powder dock for such purpose, or for the transfer of explosives direct to vessels on the day of departure, as permitted herein, shall have on board a written permit from the port warden, known as a 'Monthly Powder Permit.' The port warden shall collect two (2) dollars for each monthly powder permit, and the terms of the permit shall comply with the provisions of this ordinance, which permit may be revoked by the port warden for cause without notice. * * *

"Every vessel carrying a cargo of explosives in any form, while lying at anchor, or at a city buoy, or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew, which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency requires, or when required by the port warden. * * *

"Every vessel, whether lying at anchor, or at a city buoy, or in any other position within Seattle Harbor, engaged in the transfer of explosives, shall have on board at the time of such transfer a written permit therefor from the port warden, which permit shall state the time and place of such transfer, and the amount of explosives to be handled. * * *"

Section 39 is as follows:

"The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite, and other like explosives, and as a place for vessels carrying as cargo or part cargo such explosives. Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden."

The ordinance in question is not as clear as it might have been made, and, indeed, is in some respects somewhat perplexing; but we are of the opinion that there is not only nothing in it authorizing the port warden to permit any vessel engaged in transferring dynamite from one vessel to another in the harbor to tie up with it on board to buoy No. 1 in Elliott Bay fairway, but, on the contrary, that there are affirmative and express provisions in the ordinance prohibiting such action, namely, the provisions of section 39, by which the Harrison Street pier was expressly designated "for use

temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite, and other like explosives, and as a place for vessels carrying as cargo, or part cargo, such explosives," and that provision of section 38 expressly declaring that "no person shall on any pier, or other structure, except on the powder dock or on powder boats, within Seattle Harbor, store or have on hand for sale, or sell, or keep any powder, ignition caps, dynamite, or other like explosive, either by day or night."

It is true that the ordinance contains several provisions contemplating the anchoring within the harbor of the city of vessels having on board a cargo or part cargo of dynamite or other explosives, and contemplating the transfer by vessels of all or any of such explosives from one vessel to another within the harbor. Those provisions are the clauses which read:

"Every vessel lying at any powder dock or at anchor within Seattle Harbor, which has a cargo or part cargo of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives in any form, shall between sunset and sunrise display" certain signals, and "shall at all times, both by day and night, have on board a competent and sufficient crew which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency requires, or when required by the port warden."

But neither of those provisions, we think, can be properly held to apply to the scow of the Lillico Launch & Tugboat Company, which took on board the 15 tons of dynamite from the ship Loop, and was permitted by the port warden to keep it for 16 days anchored to buoy No. 1 in the Elliott Bay fairway.

[5] The point is made on behalf of the plaintiff in error that the court below erred in admitting in evidence over its objection the claims filed by the insurance companies against the city pursuant to the provision of the city charter and a similar provision of a statute of the state of Washington, providing, as a condition to the bringing of an action against the city for damages, that a claim therefor be presented to the city council and filed with the city clerk. The contention on the part of the city is that such claims should have been filed by the parties whose glass was broken. But we think the conclusive answer is that the glass was at once replaced by the insurance companies pursuant to the provisions of the respective policies, which companies thereupon became subrogated, both by the terms of the policies as well as by the law, to all of the rights of their respective assured, and thenceforth the sole parties in interest.

The case of Haynes v. Seattle, 83 Wash. 51, 145 Pac. 73, said by the plaintiff in error to be "on all fours with the case at bar," we think not at all like the present one, for there a third party filed a claim against the city for the injured person. While the Supreme Court of the state of Washington has in many cases, and always, given effect to the provision of the charter of the city and of the statute, it has uniformly held that its requirements must be reasonable, and that a reasonable compliance with the provision is all that can be demanded. Falldin et al. v. City of Seattle, 50 Wash. 561,

97 Pac. 658; Walters v. Seattle, 97 Wash. 657, 663, 167 Pac. 124. We think there is no merit in the point.

The judgment is affirmed.

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MARYLAND CASUALTY CO. v. REPASS (two cases).

(Circuit Court of Appeals, Fourth Circuit. April 19, 1918.)

Nos. 1610, 1611.

1. SUBROGATION ⊂⊃7(1)—RIGHTS OF SURETY—PAYMENT OF DEBT.
   It is a general rule that a surety on payment of the debt is entitled to all the collaterals, securities, and other protection held by the principal creditor, to whom the debt is paid, emanating from the principal debtor, for whom the debt is paid.

2. SUBROGATION ⊂⊃31(3)—PAYMENT OF DEBT BY SURETY—RIGHT TO ASSIGNMENT OF SECURITIES.
   Unless in exceptional circumstances, the surety on a supersedeas bond given pending proceedings in error to reverse a judgment, on payment of the judgment after affirmance is entitled to an assignment of the same, where necessary to its efficient and prompt enforcement against the judgment defendant.

3. APPEAL AND ERROR ⊂⊃1244—SUIT BY SURETY ON SUPERSEDEAS BOND—PARTIES.
   A judgment defendant is not a necessary party to a suit by the surety on his supersedeas bond brought after affirmance of the judgment to enjoin prosecution of an action on the bond by the judgment plaintiff.

Appeal from and in Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Suit by the Maryland Casualty Company against Sallie C. Repass, administratrix of the estate of Charles Repass, deceased. Decree for defendant, and complainant appeals. Reversed.

Action by Sallie C. Repass, administratrix, against the Maryland Casualty Company and the Big Vein Pocahontas Company. Judgment for plaintiff, and the Casualty Company brings error. Reversed.

D. Lawrence Groner, of Norfolk, Va., for appellant and plaintiff in error.

William H. Werth, of Tazewell, Va., for appellee and defendant in error.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. These two causes, although brought up, one by a writ of error, and the other by an appeal, yet as involving the same facts, and between the same parties, and dependent upon the same rule of law, were heard together. The facts are, that at the March term, 1916, the appellee, Sallie C. Repass, administratrix of the estate of Charles M. Repass, obtained a judgment in the District Court of the United States for the Western District of Virginia,

for $7,000, with interest and costs. This judgment was obtained in an action against the Big Vein Pocahontas Company, as the sole defendant, to recover damages for the death of Charles M. Repass, an employé of that company. The Big Vein Pocahontas Company took out a writ of error from this court to that judgment, and in order to supersede execution thereof, filed its bond in an amount approved by the presiding judge of the District Court, with the Maryland Casualty Company, the appellant herein, as the surety on that supersedeas bond. The writ of error came on to be heard in this court, which affirmed the judgment of the lower court, and the mandate of this court affirming that judgment was duly certified and sent to the court below. The Big Vein Pocahontas Company, however, refused to pay the judgment, and the said Sallie C. Repass, as administratrix, thereupon, in lieu of issuing and enforcing execution on the judgment, demanded that the Maryland Casualty Company, the surety on the supersedeas bond, pay the judgment. Thereupon the Maryland Casualty Company, as surety on the supersedeas bond, tendered to Mrs. Sallie C. Repass the amount of the judgment, interest, and costs, and demanded that upon the payment thereof the said Sallie C. Repass as administratrix should assign the judgment to the Maryland Casualty Company, such assignment to be without recourse upon said Sallie C. Repass; but she refused to receive the money tendered on that condition, although the amount tendered was in full of everything she could claim under the judgment, and refused to execute an assignment; and on the 22d of March, 1917, the said Sallie C. Repass filed her declaration in a new action at law in the District Court of the United States for the Western District of Virginia against both the Big Vein Pocahontas Company and the Maryland Casualty Company, asking for judgment against them upon the supersedeas bond.

To this declaration the Maryland Casualty Company filed two special pleas. In the one plea it set up that it had requested the plaintiff Sallie C. Repass, administratrix, to issue her execution and levy the same on the property of the defendant the Big Vein Pocahontas Company, but that Sallie C. Repass had refused and continuously refuses to do so. The second plea was to the effect that the Maryland Casualty Company as surety on the supersedeas bond had theretofore tendered to Sallie C. Repass, administratrix, the amount of the judgment, interest, and costs, on condition that the judgment aforesaid and the lien thereof and all right of action thereunder by suit, execution, or otherwise be assigned to the Maryland Casualty Company without recourse against the said Sallie C. Repass, but that the said Sallie C. Repass had refused to make the assignment. On the 20th day of November, 1917, the cause having come on to be heard upon the declaration and these two pleas, the court below struck the pleas from the file, and adjudged that the plaintiff recover of the defendants jointly and severally the amount due under the supersedeas bond. In the meantime, viz. on the 28th of June, 1917, the appellant, the Maryland Casualty Company, filed its proceeding in equity against the said Sallie C. Repass, administratrix, to enjoin

and stay the proceedings in the action instituted by her upon the supersedeas bond, on the ground that the Maryland Casualty Company was entitled as surety under the supersedeas bond if it paid the judgment in full to have the benefit by way of assignment of the original judgment against the Big Vein Pocahontas Company, which had been recovered by Sallie C. Repass, as administratrix, and to secure the payment of which the supersedeas bond was given, on which bond the Maryland Casualty Company was only a surety; that it was entitled to have this assignment, and that the court should decree that Mrs. Repass should receive the amount she was entitled to under the judgment, and execute and deliver to the Maryland Casualty Company an assignment of the judgment, and that any further proceeding in the action at law under the supersedeas bond should be enjoined.

When this bill was filed, an order was made in the court below on the same day restraining the law action until the further order of the court. On the 19th of September, 1917, after a hearing, the District Court ordered that the bill of complaint be amended by making the Big Vein Pocahontas Company a party defendant, and the said bill was so amended, and the answer of Sallie C. Repass filed to the amended bill. Sallie C. Repass in her answer practically admits the facts stated in the bill, but alleges that she was informed that there was a contract of indemnity or insurance which existed and was in force between the Maryland Casualty Company and the Big Vein Pocahontas Company, by which the Maryland Casualty Company undertook to protect and insure the Big Vein Pocahontas Company against liability in actions against it seeking to recover damages for the injury or death of its employés, which was the cause of action sued on, and upon which the original judgment against the Big Vein Pocahontas Company was recovered; that there was a controversy existing between the Big Vein Pocahontas Company and the Maryland Casualty Company, in which the Big Vein Pocahontas Company contended that the Maryland Casualty Company was liable by virtue of the contract of indemnity between them for the payment of the whole of the judgment, and that those parties intended to litigate that matter between them, and that the plaintiff was advised that it was not proper for her to intervene in that controversy by giving an assignment of the judgment to one of the parties whereby it might obtain a supposed advantage over the other. The Big Vein Pocahontas Company was duly served, and thereupon made a motion to dismiss the bill of complaint upon the ground that it appeared upon the face of it that the District Court for the Western District of Virginia was without jurisdiction to hear and determine the matters therein set forth, because the proceeding was not brought in the district of the residence of either the plaintiff or defendant, and next that it appeared upon the face of the bill that the Maryland Casualty Company was primarily bound or obligated to pay a portion of the judgment.

At the same time the defendant Sallie C. Repass, administratrix, also made a motion to dismiss the bill of complaint, and upon hearing both motions the District Court on the 20th of November, 1917,

made a decree dismissing the complainant's bill as amended as against Sallie C. Repass, administratrix. The decree provided, second, that said bill having been dismissed as to Sallie C. Repass, it should also be dismissed as to the Big Vein Pocahontas Company, solely on the ground that, Sallie C. Repass having been dismissed, that left the proceeding in equity existing only as between the Maryland Casualty Company, a citizen of Maryland, and the Big Vein Pocahontas Company, a citizen of West Virginia, and the district in which the bill was filed being the residence neither of the complainant nor of the defendant, as the proceeding then existed, the bill should be dismissed for want of jurisdiction. From this decree of the District Court this appeal has been taken.

[1] The general rule of law is that the surety upon payment of the debt is entitled to all the collaterals, securities, and other protection held by the principal creditor to whom the debt is paid, emanating from the principal debtor for whom the debt is paid. In this case the debt is really the original judgment recovered in the action at law by Sallie C. Repass, administratrix, against the Big Vein Pocahontas Company in March, 1916. These two were the only parties to that action at law. The Maryland Casualty Company was not a party to it. Nor was it bound as a party by the judgment recovered in that action. After this judgment had been recovered the Big Vein Pocahontas Company took out a writ of error from this court, and for the purposes of that writ of error it filed a supersedeas bond upon which the Maryland Casualty Company was the surety. There can be no doubt that the Maryland Casualty Company on that bond was merely the surety; it was not a party to the action at law; no judgment had been recovered against it; the rule and practice of law requires that a supersedeas bond should be given with sufficient surety, and the bond in this case for a supersedeas was given by the Big Vein Pocahontas Company as the principal, with the Maryland Casualty Company, as surety. When this judgment was finally affirmed, and the mandate from this court was sent to the District Court, it became absolute. It is alleged in the amended bill of complaint herein that the Big Vein Pocahontas Company is solvent, and had, within the jurisdiction of the District Court for the Western District of Virginia, ample property both real and personal for the payment of the judgment, which property was susceptible of levy and execution. This allegation is in no way controverted upon the face of the pleadings as heard by the District Judge below, and as they appear in this court, and must be taken to be admitted. It would seem, therefore, that the natural and ordinary and quickest method of proceeding would have been for the appellee Sallie C. Repass, to have issued execution upon the final judgment against the Big Vein Pocahontas Company she held as made absolute by the decree and mandate of this court, and collected the money to which she was entitled thereunder, by the enforcement of this execution on the property of the Big Vein Pocahontas Company. It is rather difficult to understand why this was not done.

It is contended by the counsel for the appellee, Mrs. Repass, that she had her option to issue execution against the principal judgment

debtor, or enforce her supersedeas bond, and that being informed that the principal judgment debtor would object to the enforcement of the execution and resist it, and from fear of any litigation that would result therefrom, he preferred for his client to begin an entirely new action at law upon the supersedeas bond to recover judgment against both the Big Vein Pocahontas Company, and the Maryland Casualty Company. He already had judgment against the Big Vein Pocahontas Company, and therefore no action on the supersedeas bond would as against that company by any judgment he could recover, improve the position of Mrs. Repass. The only object of that proceeding could have been to obtain judgment against the Maryland Casualty Company in addition to the judgment he already possessed against the Big Vein Pocahontas Company. Inasmuch as it is admitted that the Big Vein Pocahontas Company was quite able to respond to the execution if levied at once, this new action at law would seem to be a very circuitous method taken for the purpose of collecting the amount due on the original judgment. However that may be, the Maryland Casualty Company thereupon tendered the entire amount due under the original judgment, and simply asked that an assignment of that judgment be made to it. Under the general rule of law upon the payment of the original judgment the Maryland Casualty Company as surety would have been entitled to be subrogated in equity to the position of Mrs. Repass as the judgment creditor under the original judgment. Mrs. Repass alleges that the asking of the assignment was an unnecessary and useless condition because if the Maryland Casualty Company was really a surety (which she intimates was not the case), then by payment alone without any written assignment that company would become in equity entitled by way of subrogation to the benefit of the judgment. So far as Mrs. Repass was concerned the Maryland Casualty Company held no relation to her, except that of surety on the supersedeas bond. Her very action at law against it is predicated on its liability under that bond, and any supposed equities between the Maryland Casualty Company and the Big Vein Pocahontas Company upon a wholly different instrument with which she had nothing to do were no concern of hers.

The Maryland Casualty Company, however, sets up as special reasons why it needed a legal assignment that the judgment could only have the force of a lien if it was properly transcripted and entered in the county in which the property of the Big Vein Pocahontas Company was situate, and furthermore that, unless execution was issued under the law of Virginia within a limited time, no such lien could be procured; that in order that the Maryland Casualty Company should retain to itself the benefit of the lien to which this judgment was entitled, and the power of issuing execution thereunder, it was necessary to have some legal right to transcript and record the judgment, and issue execution and obtain a lien, which could not be obtained within the time that would be required upon a bill filed in equity to compel assignment or obtain consequent subrogation. The assignment asked of Mrs. Repass was an assignment which would leave the assignee without any right to recourse upon Mrs. Repass, and which in effect could only pass to the assignee

the Maryland Casualty Company, such rights as Mrs. Repass held under the judgment, and only such rights as the Maryland Casualty Company would have the power to enforce as against its principal, the Big Vein Pocahontas Company. If the assignment were made and the Maryland Casualty Company undertook to enforce the execution, it would be quite competent for the Big Vein Pocahontas Company to file a proceeding in equity setting up any equitable grounds as it might possess, which should operate to prevent an enforcement of this judgment against it as in favor of the Maryland Casualty Company, and upon such equitable grounds being drawn to the attention of the court of equity it could stay the enforcement of the judgment in the hands of the Maryland Casualty Company until the equitable controversy existing between the Maryland Casualty Company and the Big Vein Pocahontas Company was settled, retaining, however, to the Maryland Casualty Company, until it was settled, all the rights and liens to which it would be entitled as the holder of the judgment paid by it, if the decree in the equity cause, if brought by the Big Vein Pocahontas Company, should be that the Maryland Casualty Company was entitled to retain and enforce the judgment.

With this equitable controversy between these two Mrs. Repass had nothing to do; she avers that she is not willing to volunteer or take any part or be connected with the controversies between these parties, and yet her very action and the allegations contained both in her declaration in the law case and her answer in the equity case are in result equivalent to an active participation in the matter on behalf of the Big Vein Pocahontas Company. Admittedly the original liability was that of the Big Vein Pocahontas Company, so far as Mrs. Repass was concerned. She sued for damages for the death of the deceased, Charles M. Repass, caused by the negligence of the Big Vein Pocahontas Company, and to that company, and to that company alone, until the giving of the supersedeas bond, she looked for payment. It is difficult to see how she could have failed to avail herself of her immediate, prompt, and ready remedy, by enforcing her execution to collect the amount due on her judgment, unless it was that she desired to force payment out of the Maryland Casualty Company, to the ignoring of the principal judgment debtor, the Big Vein Pocahontas Company.

[2] The right of the surety on a supersedeas bond, when he has paid that bond, to be remitted by subrogation to the benefit of the judgment for the payment of which the bond was given, cannot ordinarily be questioned. There appears no circumstance in this cause at this time why any different rule should be applied in this case. The request of the Maryland Casualty Company for an assignment of the character requested was under the circumstances of this case entirely reasonable, and should have been granted. What rights thereby accrued, or would accrue, to the Maryland Casualty Company, and what rights of enforcement it thereby acquired, so far as it was concerned, against the Big Vein Pocahontas Company, is a question or controversy solely between those parties to be adjudi-

cated upon proper proceedings when the Maryland Casualty Company threatens or attempts to enforce that judgment.

[3] In the opinion of this court, the court below was in error in dismissing the bill of complaint, and was in error in requiring the complainant to amend its bill to make the Big Vein Pocahontas Company a party defendant. It should upon the bill of complaint, as between Mrs. Sallie C. Repass and the Maryland Casualty Company, have decreed that upon the payment by the Maryland Casualty Company, within a time to be limited in the decree of the District Court, into the court of the full amount of principal, interest, and costs accrued to date, that the defendant Sallie C. Repass, administratrix, should execute and file with the court an assignment in due form (but without recourse upon her) of all her right, title, and interest whatsoever in and to the original judgment recovered by her against the Big Vein Pocahontas Company, with the lien thereof, and all rights of enforcement thereof which she possessed, and that upon the filing of the same the amount paid by the Casualty Company should be thereupon paid over to her, and the assignment should be delivered to the Maryland Casualty Company, and that the order requiring the Big Vein Pocahontas Company to be made a party to those proceedings should be vacated, and that upon the payment in full of the said judgment an injunction should be issued perpetually enjoining the further prosecution of the action at law against the Big Vein Pocahontas Company and the Maryland Casualty Company, and enjoining the enforcement of any judgment entered therein.

The decree below is accordingly reversed in cause No. 1610, and the cause remanded to the District Court, to proceed in accordance with the principles of this opinion.

In cause No. 1611 the judgment entered up against the Maryland Casualty Company and the Big Vein Pocahontas Company is also reversed, as having been ordered when the action should have been stayed to await the decree in the equity cause under the principles herein announced, with direction that the action be stayed until the final action of the court in the equity cause.

Reversed.

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## HEALEY v. MORAN TOWING & TRANSPORTATION CO.

Appeal of CRANFORD CO.

(Circuit Court of Appeals, Second Circuit. May 24, 1918.)

No. 228.

1. SHIPPING ⊂=52—INJURY TO SCOWS—LIABILITY OF CHARTERER.

A subcharterer of two dumper scows, to be used in moving excavated material, under a contract requiring it to furnish sufficient depth of water at all times at the loading place, and to be responsible for injuries caused by negligence of its employés, *held* primarily liable for injury to the boats by grounding and by heavy boulders dropped into them without the customary precautions.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. WORDS AND PHRASES—"DUMPING BOARD."

A "dumping board" consists of an elevated structure of timber, which in part overhangs the water, to enable a scow to go under it for the purpose of taking on a load.

3. WORDS AND PHRASES—"TIPPLE."

That portion of a dumping board, which is hinged so that it may be tipped up after material is deposited on it from an inclined plane or slide over, and from which the material is deposited by gravity in the scow, constitutes a "tipple."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Tipple.]

Appeal from the District Court of the United States for the Eastern District of New York.

Suit in admiralty by Harriett A. Healey against the Moran Towing & Transportation Company and the Cranford Company, impleaded. Decree for libelant, and the Cranford Company appeals. Affirmed.

For opinion below, see The Olympia, 243 Fed. 236.

This cause comes here upon appeal from a final decree entered in the United States District Court for the Eastern District of New York on June 1, 1917. The libelant is the owner of the scow and dumper Olympia, a vessel without motive power, built and used for the carriage of cargoes through the waters of the harbor of New York and waters tributary thereto. The Moran Towing & Transportation Company is a corporation created and existing under the laws of the state of New York.

The libel states two causes of action. For a first cause of action the libel alleges that the Olympia was delivered under a charter to the respondent on September 3, 1914, at New York City, in a sound and seaworthy condition. That while the said scow was in the exclusive possession of the respondent under the charter, and was being used by it, she was injured on September 4, 1914, by an accident while taking on a cargo of material for respondent at the dock of the Cranford Company, in the borough of Brooklyn, New York City, and was returned to libelant in such injured condition to the damage of the libelant in the sum of $94. It is then alleged that after being repaired by libelant she went again into the possession of respondent under the charter, and while in respondent's exclusive possession and while being used by respondent, was again injured and damaged by an accident while taking on another cargo of material for respondent at the Cranford Company's dock aforesaid, in the borough of Brooklyn, and was again returned to respondent in such injured condition to the damage of libelant in the amount of $433.50. It is then alleged that after the Olympia was again repaired she went once more into the possession of the respondent under the charter, and while in the exclusive possession of the respondent on September 22, 1914, she was again damaged by an accident while taking on another cargo of material for respondent at the Cranford dock in the borough of Brooklyn, and was again returned to the libelant in an injured condition to the libelant's damage in the sum of $104. It is alleged that the aforesaid damages were not due to the fault or negligence of the libelant, but were solely caused by respondent. And damages are asked in the sum of $631.50.

For a second cause of action the libel alleges that the libelant was the owner of the scow or dumper Atlanta, a vessel without motive power, and used for the carriage of cargoes through the waters of the harbor of New York and its tributaries and that on July 29, 1914, the scow was delivered by libelant to respondent under a charter and in a sound and seaworthy condition, and that the scow while in respondent's exclusive possession and being used by it, was injured while taking on a cargo of material at the Cranford dock in the borough of Brooklyn. It is then alleged that while in this injured condition the vessel was returned to libelant and was repaired, the amount of the damages amounting to the sum of $111.11. It is then alleged

that the damages aforesaid were not due to the fault or negligence of libelant, but were solely caused by the respondent. A decree under these two causes of action was asked in the sum of $742.61.

The respondent filed its answer in which is stated that it had chartered the scow Olympia and the scow Atlanta to the Cranford Company, and that if either scow sustained any damage it was while they were in the service of the Cranford Company, and not through any fault of the respondent, its agents or employés, but through the omission and carelessness of the master in charge of the respective scows, the employé of the libelant, or through the carelessness of the Cranford Company and its employés. The Cranford Company was brought in by petition of respondent under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi). The District Judge found the Cranford Company primarily liable. The damages were fixed by consent at $693.50, which, with the interest and costs, made a total of $868.50, and a decree was entered for that amount against the Cranford Company, and in case libelant should be unable to collect that sum from it then that libelant should have execution against the respondent. On this appeal the amount of the damages is not disputed, but the Cranford Company disputes liability.

Grout & McKinney, of New York City (Edward M. Grout and James F. McKinney, both of New York City, of counsel), for appellant.

Alexander & Ash, of New York City (Mark Ash and Edward Ash, both of New York City, of counsel), for appellee Healey.

Macklin, Brown & Purdy, of New York City (William F. Purdy, of New York City, of counsel), for appellee Moran Towing & Transportation Co.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). It appears that the Cranford Company had a contract for the construction of a certain portion of a Rapid Transit subway in the borough of Brooklyn. It also appears that the Cranford Company then entered into a contract with the Moran Towing & Transportation Company, which contract is in writing and under seal, for the delivery of its excavated material at its Gowanus Canal dumping board to scows or dumpers of the latter. The agreement recites the subway contract and stipulates that in the subway work "it will be necessary to dispose of excavated material which will be composed of earth, sand, gravel and boulders." It declares that "the expression 'material' used in the contract shall be construed to include earth, sand, gravel, and such boulders as will not exceed what is commonly known as two-man stone size, and other unobjectionable material which may be taken in by the Cranford Company." It states that the Cranford Company has arranged "to transport its excavated material to its dock on the Gowanus Canal * * * so that the earth may be dumped from the dumping board there installed into scows." It also states that the Moran Company proposes to supply dumpers and scows "to receive such material at said dock" and "dispose of said earth, sand, gravel, and boulders." And it further states that the Cranford Company agrees to provide a floating depth of water at all stages of the tide, to keep the entrance to the dumping board free from obstructions, "use due care in boarding all boats, and be responsible for all damages

caused by the carelessness or negligence of its employés." It agrees that the Cranford Company will provide berth at its docks for the loading of above-mentioned boats, where there will be sufficient water to float scows and dumpers at all stages of the tide. And the Cranford Company agreed "to have the entrance to dumping board free from obstruction, either floating or otherwise, so that ingress and egress may be readily had at all times."

The above are the pertinent provisions of the agreement between the Moran Company and the Cranford Company. And for the performance of this contract the Moran Company chartered from libelant the two dumpers, the Olympia and the Atlanta, and they were sent to the dumping boards to be loaded. While so engaged in September, 1914, the Olympia was damaged on two occasions by reason of heavy stones being dropped into the pockets by the Cranford Company while loading the dumper, and on one occasion by reason of her grounding at the dock of the Cranford Company while she was being loaded. The Atlanta was also damaged by the negligent dropping by the Cranford Company of a heavy stone in one of her pockets. The damages complained of consisted in the breaking of planks in the bottoms of the pockets by the dropping of the heavy stones, together with certain damage to the bottom of the Olympia by her grounding.

The libelant contends that the heavy stones which caused the injuries in the bottom of the pockets were much larger than two-man stones, and that the dropping of them into the dumpers without the usual precautions being taken of first dumping a quantity of dirt in the dumpers to break the force of the dropping, as is alleged to be the custom when heavy stones are dropped into a dumper, was negligence. And the injury to the Olympia by her grounding is claimed to be a violation of the express provision of the contract already quoted which made it the duty of the Cranford Company to provide a berth where there would be sufficient depth of water "at all stages of the tide."

[1-3] A dumping board, to which reference has been made, consists of an elevated structure of timber, which in part overhangs the water to enable a scow to go under it. A portion of the board (called a tipple) is hinged so that it may be tipped up after material is deposited on it from an inclined plane or slide over, and from which the material is deposited by gravity in the scow. Such a board has to be constructed a sufficient distance above the water that at high tide any style of scow may come under and take on a load. The customary height of the board at high tide is 12 to 14 feet, and at lower water the fall from the board to the bottom of the gates of a dumper is approximately 19 feet. The chief engineer of the Cranford Company testified at the trial that a 100-pound stone (one within the two-man limit of size) falling a distance of 16 feet would strike with an impact velocity of 3,200 foot pounds, which means that the force is sufficient to raise 3,200 pounds one foot. He testified that a stone so falling might break a plank, but whether it would or not would depend upon the thickness of the plank, the kind of wood in the plank, the shape

of the stone, and various other matters. This testimony was quite indefinite, and of no value by itself in helping to a solution of the case.

The contract provided for boulders which were not to exceed "two-man stone size." If boulders were dumped which exceeded that size, and damage resulted, the Cranford Company was clearly responsible; and, if stones which did not exceed the "two-man stone size" were dropped, it was the duty of the Cranford Company to use reasonable care that injury might not result therefrom. There is testimony in the record, apparently from a disinterested witness, a foreman carpenter in a shipyard who signed the survey on the Olympia, that he saw in the Olympia at the time of her first injury a stone of about three feet in diameter which two men could not lift, but which five or six men might "if they could get a good grip on it"; and the captain of the Olympia testified that the stone weighed 600 or 700 pounds. He testified respecting the second injury the Olympia received that the stone weighed about 400 or 500 pounds; and the captain of the Atlanta testified that the stone which was dropped into her pockets was very large and weighed about a ton. We know of no reason for discrediting the testimony of these witnesses.

But if we assume that they were mistaken it would not relieve the Cranford Company from liability. The president of the Moran Company testified that the custom in New York was when stones were to be dumped to "take the cars that we are sure the boulder dirt is in, and make a cushion for any stones that we have to dump." They dumped a load of soft dirt into the pocket to form a blanket which would absorb the shock of the falling stones. The evidence on this point is very clear so far as the injury to the Atlanta is concerned. The captain of that scow was asked whether, when the stone came down there was anything in the pocket of the scow, any dirt; and he replied that there was nothing in it. Stones large enough to break the planks in the dumpers should not have been dropped without taking the usual precaution of first dumping a covering of soft dirt into the pocket. It is true that it does not affirmatively appear whether the precaution was taken in the case of the Olympia; but, as the injuries resulted from dropping large stones into her pockets, it may not be unfair to presume that the parties in charge carried on their work on both boats in the same way.

The fact that, after the Olympia was injured the first time by the negligent loading of the Cranford Company and repaired, the dumpers were returned to the latter, is said to constitute an insurmountable estoppel as against the Moran Company, and it is claimed that "it assumed the risk and cannot shift it." If that be true, then, if a person traveling on a railway train is injured by the negligence of its employés, and after he recovers therefrom again travels on the same railway, he assumes the risk of any injury arising from the like negligence. Surely such an argument would not be seriously advanced by any one, and certainly not by the distinguished counsel who made it.

In the argument in this court counsel for the Cranford Company contended that that company in any event is not liable for an item of $433.50 for the expense of the survey of September 14, 1914, made

after the second injury to the Olympia covering the damage and the demurrage incident thereto. It is enough to say that under the assignment of error no mention is made of the matter now objected to. And no objection was raised at the trial in the court below. In the opinion of the District Judge he says:

"No fault was alleged in the method of making the repair, and it is necessary to assume, therefore, that the removal of these planks and their restoration was a proper item in repairing the damage caused by leakage."

It seems that when the dry dock people got possession of the boat they removed three planks from her bottom to get the water out of her. These planks the Cranford Company claims were perfectly good, and they say that the vessel was then found to be so out of repair from causes not the fault of the Cranford Company that 12 planks were put in her and other general repairs were made, for which the Cranford Company cannot properly be charged. But for the reason stated we are not at liberty to consider the point. This court is compelled to hold that the evidence shows that the injury to the Atlanta and the injuries to the Olympia were caused by the negligence of the employés of the Cranford Company in dumping the boulders into these scows without due care, as well as in permitting boulders larger than the contract permitted to be dumped at all. For the damages so caused the Cranford Company must respond in damages.

As to the injury occasioned to the bottom of the Olympia by grounding the case is equally clear. The contract expressly made it the duty of the Cranford Company to berth the boat at a dock having a sufficient depth of water to float her at all stages of the tide. The captain of the Olympia testifies that while she was being loaded he noticed she was lying with the bottom touching the bed of the water and that two or three times he told those engaged in loading the boat to stop because she was touching bottom and they continued loading, and then they sent for a tug to pull the scow out and that the scow could not "budge at all." There is no doubt that, when these boats were chartered to the Moran Company, they were in a seaworthy condition, and that that company was bound under its contract to return them in as good condition as it received them, reasonable wear and tear excepted. It did not do so, and is therefore liable. But as the damage to the boats was occasioned by the fault of the Cranford Company, which has been brought into the case under the fifty-ninth rule, the latter is primarily liable, with a right in the libelant to recover from the Moran Company, should she be unable to collect the amount of the decree from the Cranford Company.

Decree affirmed.

MORSE et al. v. TILLOTSON & WOLCOTT CO.

(Circuit Court of Appeals, Second Circuit. June 10, 1918.)

No. 175.

1. CONTRACTS ⊂=23—MEETING OF MINDS—ADDITIONAL AGREEMENT.
Where defendants accepted plaintiff's proposal to buy notes of a corporation to be organized by defendants, the notes to be secured by a mortgage on ships, plaintiff's demand for an abstract of title, and that the deal be not consummated until title was approved by its attorneys, did not warrant defendants in repudiating the agreement on the ground that there was no meeting of the minds, for the offer was impliedly conditioned that title was good.

2. CONTRACTS ⊂=28(3)—ACTION—EVIDENCE.
In an action for profits which plaintiff claimed to have lost because of defendants' breach of an agreement whereby plaintiff was to purchase notes of a corporation to be organized by defendants, the notes to be secured by a mortgage on a fleet of ships, evidence *held* to warrant a finding that a binding contract had been entered into.

3. CORPORATIONS ⊂=30(5)—ACTIONS—EVIDENCE.
In an action for breach of an agreement whereby plaintiff was to purchase notes of a corporation to be organized by defendants, the notes to be secured by mortgage on ships, *held*, that defendants could not escape liability on the ground the contract was one of promoters, which defendants were making as agents for a corporation then in existence, whose name was not disclosed.

4. CORPORATIONS ⊂=218—CONTRACTS BY STOCKHOLDERS—PERSONS BOUND.
Where persons agree that a corporation shall do a certain thing, which they can compel it to do because of their ownership of a majority of the stock, the corporation is not bound by the agreement; but such persons bind themselves individually, unless the agreement specifies to the contrary.

5. APPEAL AND ERROR ⊂=273(5)—REVIEW—SUFFICIENCY OF OBJECTIONS BELOW.
A general exception to a portion of the court's charge, which did not specifically point out the error relied on, is insufficient to warrant an appellate court in reviewing the same on error.

6. CONTRACTS ⊂=346(3)—ACTIONS—DEFENSES—PLEADING.
Where defendants repudiated a contract that plaintiff should purchase notes of a corporation they were to organize, the notes to be secured by a mortgage on ships, and impossibility of the condition as to insuring the ships was not pleaded as a defense, it cannot be relied upon.

In Error to the District Court of the United States for the Southern District of New York.

Action by the Tillotson & Wolcott Company against Charles W. Morse and another. Judgment for plaintiff, and defendants bring error. Affirmed.

The plaintiffs in error, defendants below, will be hereinafter referred to as defendants, and the defendant in error, defendant below, will be referred to as plaintiff. The plaintiff is a corporation organized under the laws of the state of Ohio, with its place of business in the city of Cleveland. The defendants are citizens of the state of New York and residents of the Southern district thereof.

The action is for breach of contract. The complainant alleges that the plaintiff agreed to purchase notes of a corporation to be organized by defendants, which notes were to amount to $555,084, for the price of $518,000, and it al-

leges that the defendants undertook that the transaction should be carried out by the corporation, and afterwards repudiated the agreement.

The answer is a general denial, except it states that "there were negotiations between the plaintiff and the defendants, for the purpose of agreeing, if possible, upon a contract under which the plaintiff was to make a loan upon the credit of some or all of the ships named in the complaint; but the plaintiff and the defendants failed to agree upon the terms of such loan, and no contract was entered into between the plaintiff and the defendants with respect thereto."

The case was tried before Judge Grubb and a jury, and a verdict was returned for the plaintiff in the sum of $31,416, with interest at 6 per cent. from March 16, 1916. The assignment of errors covers 27 printed pages. The complaint states three causes of action.

The first cause of action as stated in the complaint is that in the months of January and February, 1916, the defendants negotiated with the plaintiff for a loan to be made by it to the United States Steamship Company, or another corporation which was then being or had already been organized by the defendants and certain associates of the defendants, for the purpose of owning the steamships Huron, William Castle Rhodes, St. Paul, and Minneapolis, said loan to be evidenced by notes secured by mortgage upon said vessels; it was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation amounting to $280,000, in consideration of a loan by the plaintiff to such corporation of $266,000, bearing interest at 6 per cent. per annum, and secured by blanket mortgage upon said four vessels; that it was further agreed that the notes should mature in the amount and at the dates specified; that it was further agreed that the said notes should be executed by said United States Steamship Company, or other corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed securing same by such corporation covering all of said vessels, and that there should be proper insurance covering the period of transit to the coast, rebuilding and refitting of the said ships upon arrival at the coast, and for all subsequent operations; that defendants repudiated their agreement on March 16, 1916, and plaintiff has been prevented by the defendants from making such loan to the said United States Steamship Company, or any other company owning and operating said steamships; that the plaintiff has been damaged in the sum of $14,000, being the profit or commission that would have been earned by it upon said loan.

The second cause of action as stated in the complaint, repeating the previous allegations, alleges that during the pendency of the negotiations the defendant applied for a further loan to be made on the security of three other vessels, to wit, McCullough, Owego, and Chemung, said loan to be evidenced by notes secured by mortgage upon said vessels; that it was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation, or other corporation which was then being or had already been organized by the defendants for the purpose of owning the said steamships, amounting to $450,000, in consideration of a loan by the plaintiff to such corporation of $412,500, bearing interest at the rate of 6 per cent. per annum and secured by blanket mortgage upon said three vessels; that it was further agreed that the said notes should mature in the amount and at the dates specified; that it was further agreed that the said notes should be executed by said United States Steamship Company or another corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed securing same by such corporation covering all of said vessels, and that there should be proper insurance covering all the operations of said steamships; that in the course of the negotiations the steamship Chemung was sold, and, with the consent of the plaintiff, the stipulated notes were reduced by $175,000, making the net amount of the notes $275,000, and the net amount of the loan $252,084, yielding a profit or commission to the plaintiff of $22,916; that on March 16, 1916, the defendants repudiated their agreement and refused to complete the transaction, and the plaintiff has been damaged in the sum $22,916, together with the legal services and expenses incurred in the drafting of the mortgage of $443, making a total of $23,359.

The third cause of action as stated in the complaint, repeating the previous allegations, is that in the months of January and February, 1916, the defendants negotiated with the plaintiff for a loan to be made by it to the United States Steamship Company, or another corporation which was then being or had already been organized by the defendants and certain associates of the defendants, for the purpose of owning the steamships Huron, William Castle Rhodes, St. Paul, Minneapolis, McCullough, Owego, and Chemung, said loan to be evidenced by notes secured by mortgage upon said vessels. It was thereupon agreed between the plaintiff and defendants that the plaintiff should purchase notes of such corporation, of which the defendants should procure the execution, amounting to $730,000, in consideration of the loan by the plaintiff to such corporation of $678,500, bearing interest at 6 per cent. per annum, and secured by blanket mortgage upon said vessels; that it was further agreed that the said notes should mature in the amount and at the dates specified. It was further agreed that the said notes should be secured by the said United States Steamship Company, or another corporation organized by the defendants for such purpose, and that a blanket mortgage should be executed covering all of said vessels and that there should be proper insurance covering the period of transit to the coast, rebuilding and refitting upon arrival at the coast of such ships as were upon the Great Lakes, and proper insurance for all of said vessels for their subsequent operations; that in the course of the negotiations the steamship Chemung was sold, and with the consent of the plaintiff the amount of the stipulated notes was reduced by $175,000, making the net amount of said notes $555,000, and the net amount of said loan $518,084; that the plaintiff has been damaged in the sum of $37,359, being the amount of the profit and commission which it would have earned upon said loan as reduced, as aforesaid, together with legal services and expenses incurred in the drafting of the mortgage of $443.

The plaintiff has obtained a verdict in the sum of $31,416, with interest at 6 per cent. from March 16, 1916, and judgment has been entered in the sum of $33,810.51.

Beck, Crawford & Harris, of New York City (James M. Beck and Joseph W. Goodwin, both of New York City, of counsel), for plaintiffs in error.

Everett, Clarke & Benedict, of New York City (A. Leo Everett, of New York City, of counsel), for defendant in error.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge (after stating the facts as above). The action is upon a contract which, if made, was made by letters, by telephone communication, and by conversations. The existence of the contract was denied by defendants, who, admitting the negotiations, claimed that they never reached the stage where both parties agreed to the substantial terms, and the question whether the contract existed was therefore submitted to the jury under appropriate instructions. The parties began their negotiations on January 28, 1916, in Cleveland, Ohio, and on that day a letter was drawn up and signed by Mr. Tillotson, as president of the Tillotson & Wolcott Company, the plaintiff herein. The last paragraph of the letter read:

"An acknowledgment of this letter will be considered an acceptance, and we will then proceed to have the appraisal and classification made."

At the end of the letter there is indorsed thereon on the following day the words: "Accepted January 29th, 1916. B. G. Higley"—

the latter being one of the defendants herein. The important portions of the letter are as follows:

"Referring to our conversation of this afternoon, we understand that you and your associates have recently purchased four steamers, formerly owned by the Mutual Transportation Company, for the sum of $560,000, the steamers being the Huron, the William Castle Rhodes, the St. Paul, and the Minneapolis, and that you propose to make such changes as are necessary to fit them for the ocean trade. * * * We further understand that these boats are to be placed under a new corporation and that you desire to borrow 50 per cent. of their sound value as determined by appraisers of our selection and meeting with your approval, and for this purpose we will want Mr. Horatio N. Herriman of this city, or some representative of the American Ship Building Company.

"We are willing to make you a one year loan, to be dated February 1, 1916, payable with interest at the rate of 6 per cent. per annum payable semi-annually, at the Guardian Savings & Trust Company, Cleveland, trustee, and to pay you ninety-five and accrued therefor—subject to the following conditions: (1) The mortgage is to be the usual marine form, and is to provide that full fire and marine and P. & I. insurance be carried. (2) The vessels are to receive Lloyd's classification before the loan is made. (3) All excess earnings, pending the payment of the loan, are to be deposited with the trustee. In order to save you interest, we are willing to have the mortgage provide that all or any part of the bonds may be called at 101 at any time after three months by giving thirty days' notice. (4) All proceedings incident to the issuance of the mortgage are to be under the supervision of Messrs. Goulder, White & Gray of Cleveland, who will give us their opinion.

"We understand that your corporation will be affiliated with or a part of United States Steamship Company, recently organized under the laws of the state of Maine, and United States Steamship Company, organized under the laws of the state of New York. It is mutually agreed that we shall have the right to name a Cleveland director."

A few days after this letter was signed Tillotson learned that Charles W. Morse, the defendant, was associated with Higley in the enterprise, although Morse's name was not in the list of his associates as given in the above letter of January 28th. Thereafter most of the correspondence and telephone communications that Tillotson had concerning the matter were with Morse or his office, and there were a good many letters, a good many telephone messages, and some telegrams. On February 3d Higley gave a letter to a Mr. Sherman and a Mr. White, the president and treasurer of the several corporations which he stated had entered into contract for the purchase of the steamships named, and he added:

"They have the authority to execute necessary papers for obtaining mortgages on each of the several ships. We would thank you, if you could arrange to give them a check for 50 per cent. of the valuation of each boat, you to be protected by bill of sale pending completion of mortgage. If you wish this all in one company, we have organized the United States Steamship Company of New York, and the matter can be arranged in a like manner through that corporation. I believe we have conformed to all you require in this matter and hope you will expedite the same."

On the same day Higley wrote a second letter which was as follows:

"Confirming your letter of the 28th of January, the separate paragraphs contained therein regarding the four Lake boats: The first condition is all right. The second condition, we will need the loan before the Lloyds classification is made, but will not put the vessel to sea until it is classified. We believe

that all other conditions are correct. Regarding the three other boats, the McCullough, Chemung, and Owego, the above conditions do not apply."

On February 4th Morse telegraphed Tillotson that he wanted to arrange loan Monday morning and "can give you bill of sale of each ship pending legal matters and insurance." And thereupon Tillotson wrote Higley:

"It would be impossible for us to effect a loan on Monday for several reasons: (1) The trust deed and bonds could not be prepared so soon. (2) We have not yet received the details of the insurance policies. As I stated to you while you were here, this insurance matter is almost the most important thing pertaining to the loan. We must have a policy that is absolute in its terms and one which will meet the approval of our counsel. * * * It will be necessary, in our judgment, to have one mortgage on the three boats, and so, in order to save time, it may be best to use the United States Steamship Company of New York organization."

On February 18th Tillotson wrote Morse as follows:

"Our position has been the same from the very first time that we talked to Mr. Higley, which was over two weeks ago. In order to hasten events, at your and Mr. Higley's request, Mr. House and I visited New York a week ago Wednesday; and in each instance we have maintained the same position, that we must have fleet mortgages, one on the Chemung, Owego, and McCullough, the other on the four other boats. Had the insurance been obtained, the papers could have been prepared before this and our money would have been forthcoming. In order to save time, now, we strongly recommend that you cause the company to be organized, with the men whose names you gave us while we were in New York as officers and directors; let this company take over the McCullough and the Owego, and the Chemung later when she is ready. Upon the approval of our counsel of the companies and the policies of the proceedings incident to the organization of your company, we will advance the proportion of funds required and later the proposition of the Chemung. This can all be done by Monday or Tuesday, and it is the only feasible way to do it. We had hoped that you would send some one here to-day authorized to act for you, in order to facilitate matters for you."

On the same day Morse wrote the complainant, stating that they had organized the United States Steamship Company which would operate the vessels, and giving the names of the persons who had consented to serve on the board of directors and who were to be elected the next day. The letter continues:

"We are sending to you to-night Mr. Hexamer, of Parsons & Co., who will hand you this letter and give you all the information regarding insurance. We can't see where we could need anything more, but pending these affairs we would like to have $87,500 deposited to-morrow, and we will give you bill of sale from the Erie Railroad Company direct to you or anybody you may name for the ship, which guarantees title. If it is not direct from them, they must guarantee the title, as that is the agreement with us. We can fix the Owego at your convenience. The four Lake boats, Huron, Minneapolis, St. Paul, and William Castle Rhodes, we would like to take over next week and have you advance on the same. The Salvage Association will send a man to-morrow to Buffalo to get a valuation on the four ships that are there. For these four ships we paid $560,000, and we presume you will lend $280,000 on the four, which with the $450,000 on the other boats makes $730,000 altogether."

On February 21st Tillotson wrote Morse:

"Your letter of February 17th was just received this morning. There are two things that I do not seem to be able to impress upon you. Our requirements are: First. That the issue is to be a fleet issue; that is, one mortgage of

$450,000 on the three boats. We must know promptly what the name of the company will be which is to make the mortgage. Second. That the vessels must be insured to their full insurable value, Mr. Hexamer reports that he can probably place very close to the appraised value on each boat. Three weeks have elapsed since we first discussed this matter with Mr. Higley, and the bonds should have been out long before this. Mr. Hexamer has Mr. Goulder's requirements—one of them being that you will have to get the abstracts at once and send them on for approval. With the title established, the mortgage can probably be drawn within two or three days, and we will take one temporary typewritten bond pending the printing of the definite bonds. Full insurance must accompany; the insurance policies must be ready when the mortgage is ready for record."

On February 26th Morse wrote Tillotson:

"We would like to borrow on these ships, on each ship or on the four ships together, as you prefer, one-half of whatever they are valued at, not to exceed $70,000 on each ship, as we paid for them $140,000 apiece. We have already settled for the Owego and the McCullough, and made a payment on the Chemung, so we feel no hurry about these ships. The price we paid for the Owego is $325,000, for the McCullough $175,000, and for the Chemung $325,000. The Chemung will not be finished until the 1st of April. If you want to lend 50 per cent. on these three ships for one year at 6 per cent. and 5 per cent. commission, we would take the money on all seven. We would agree to deposit with you monthly from the earnings of the vessel one-twelfth of the amount of the loan with the right to take the bonds up. The four Lake boats we would like determined on Tuesday and we would like you to pay the money over right away. The three Erie boats that are here you can arrange at your convenience. We would prefer not to issue bonds, except possibly to the Trust Company on loan. But you can do as you like. The insurance as you know is already provided for. The organization of the company is fixed as we have before written you, and if you do not sell bonds you can take the name of the steamships in anybody's name which you may designate, or you can take it in the name of the steamship company we have organized and take a mortgage back with a note of the company."

In reply Tillotson wrote Morse on February 28th:

"We have explained to your counsel that it would be impossible for us to advance money on any boats until our counsel has seen the abstracts on them and the mortgage has been prepared. We have been ready for two weeks to make the loan, which has been the result of so much telephone conversation and correspondence. Mr. Eaton knows exactly what is required. We will pay you, as heretofore indicated, $412,500 for $450,000 of bonds on the Chemung, Owego, and McCullough, payable on or before one year after date. The mortgage is to be in the usual marine form and is to provide for full insurance, as detailed to Mr. Eaton, and a sinking fund of one-sixth of the next maturing interest and one-twelfth of the principal to be deposited with the trustee each month: the payments into the sinking fund for principal to be used, if you desire, for retiring all or any part of the bonds upon thirty days' notice at 101. We assume that the four Lake boats can be sent through the canal, and that they can be fully insured pending their arrival at some point for reconstruction. With this assumption, and the assurance that the necessary changes are to be made and paid for, in order that the boats can be classified, so as to receive full marine insurance for coastwise trade, and Mr. Goulder or his firm advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest, assuming, of course, that your estimates of value are sustained. While the Guardian Savings & Trust Company will, I think, if necessary, advance the money pending the preparation of the mortgage, it is only a question of a few days when this can be done. Mr. House assures me that he very much prefers to have it done in the usual order. It is, of course, understood that all other details of the proposal submitted to Mr.

Higley, including the payment of costs incident to the issue, etc., are to be carried out."

On March 7th Tillotson wrote Morse:

"You can imagine our surprise when we learned from Mr. Eaton that the Chemung had been sold and that you were reducing the amount of bonds by $175,000. This action is entirely agreeable to us provided we do not lose thereby, and we, of course, shall expect that the $15,000, or thereabouts, which was the discount on $175,000 bonds against the Chemung, be paid to us."

On March 16th, Eaton, one of the attorneys for defendants, wrote the plaintiff company as follows:

"On my return to New York after my conversation with you yesterday, I find that it is impossible for us to meet the conditions imposed by the Guardian in connection with the proposed loan about which we have been negotiating, and we are therefore reluctantly obliged to accede to your suggestion that the proposition be canceled. This is a matter of regret to Mr. Morse, as I realize it is to you, but under the circumstances there is nothing further that can be done."

In reply to the above, Mr. Milligan, the vice president of the plaintiff company, wrote:

"We have your letter of March 15th, signed by Mr. Eaton, to the effect that you are obliged to cancel your sale of bonds to us. In view of the fact that Mr. Tillotson had this matter in charge, your letter will be referred to him upon his return from the South this week."

And on March 21st Morse wrote Milligan:

"Your favor of the 20th at hand. We know of no sale of bonds to you which you mention in your letter, and we know of no cancellation on our part. We surely tried hard enough to do business with you and regret very much that we could not."

If a contract existed, it evidently was intended that it should be canceled by the letter of March 16th. Milligan, to whom the letter was addressed, had his attention called to the statement that defendants were "reluctantly obliged to accede to your suggestion that the proposition be canceled," and he was asked when on the stand whether he had made any such suggestion. And his reply was: "Absolutely not." The writer of the letter of cancellation testified that in an interview in Cleveland, on March 2d, with the president of the plaintiff company, the latter said to him that the whole matter was in quite unsatisfactory shape, and "that they did not seem to be making any progress at all toward bringing the transaction to a close, and he added that that was the more unsatisfactory to him because he did not suppose that he had any definite contract with Mr. Morse in regard to it." But the president of the company was then recalled to the stand and asked whether he had ever made any such statement, and denied absolutely that he ever did. He was then asked, "How certain are you that you did not make such a statement?" The answer was, "I am very positive, sir." There was here a disputed question of fact, and evidence which justified the jury, if they believed it, in concluding that the contract, if one existed, was canceled by the defendants.

[1] The defendants assert that the minds of the parties never met, that one of the conditions of the agreement was that the attorneys for

the plaintiff were to be furnished with abstracts of title to the ships and that they were to examine them, and that the deal was not to be consummated until the title was approved. In the letter dated February 28, 1916, written by the president of the plaintiff corporation the writer stated that, when the attorneys "advise us that the title is good, we will advance up to $280,000 on bonds at 92 and interest." And there is no evidence in the case that, when defendants on March 16th canceled the agreement, the plaintiff's counsel was satisfied that the titles were good or that he had rendered any opinion on that subject. It will no doubt be conceded that an offer to sell implies that the title is marketable. And if an offer to sell is made by A. and accepted by B., subject to the title being found good upon examination, it hardly seems that the words "subject to the title being found good" import any new term into the acceptance, so as to prevent a meeting of the minds upon the offer as made.

In Hussey v. Horne-Payne, L. R. 8 Ch. Div. 670 (1878), an offer was made to sell land for a specified sum of money, and the offer was accepted "subject to the title being approved by our solicitors." The defendants afterwards declined to complete the sale, the title not yet having been approved, and the plaintiff claimed specific performance. The Vice Chancellor had held that the offer had been unconditionally accepted, and the demurrer was overruled. The case was carried to the Court of Appeal, where it was reversed, and the demurrer was sustained. In his opinion Jessel, M. R., said:

"The expression 'subject to the title being approved by our solicitors' appears to me to be plainly an additional term. The law does not give a right to the purchaser to say that the title shall be approved by any one, either by his solicitor, or his conveyancing counsel, or any one else. All that he is entitled to require is what is called a marketable title, or, as it is sometimes called, a good title. Therefore, when he puts in 'subject to the title being approved by our solicitors,' he must be taken to mean what he says; that is, to make it a condition that solicitors of his own selection shall approve of the title."

The case was carried to the House of Lords (L. R. 4 A. C. 311), where it was affirmed, but upon different ground. The House of Lords did not agree with the Court of Appeal upon the point upon which that court decided the case. Upon that point the Lord Chancellor (Earl Cairns) declared that he was disposed to look upon the words "subject to the title being approved by our solicitors" as meaning—

"nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the solicitor of the purchaser. Of course, that would be subject to any objection which the solicitor made being submitted to decision by a proper court, if the objection was not agreed to."

The thing sold in that case happened to be land; but the decision would have been the same, had it been bonds or ships.

Counsel for defendants, however, in this connection rely upon Village of Ft. Edward v. Fish, 86 Hun, 548, 33 N. Y. Supp. 784 (1895), which was afterwards affirmed by the Court of Appeals (156 N. Y. 363, 50 N. E. 973). In that case the plaintiff, the water commissioners of the village, had entered into an agreement with defendant to sell to

him certain water bonds, which they were to issue, for less than par. The agreement contained a provision stating that it was not to be binding on the party of the second part unless certain attorneys, which it named, "approve of the regularity and validity of said bonds in writing." The attorneys in question telegraphed the commissioners:

"Think that the present board of trustees must reorganize as water board and give new bonds before bonds can be issued."

The water commissioners, regarding this as an adverse opinion from the attorneys as to the regularity and validity of the bonds, telegraphed to defendant that they withdrew from the agreement. They then sold the bonds to the state comptroller. This was on July 28, 1893, and on August 4, 1893, the defendant notified the water commissioners that the clause in the contract requiring the approval of the attorneys was for his benefit, and that he waived such approval and demanded delivery of the bonds or payment of damages. The court held that the contract to sell the bonds for less than par was illegal and void. The court, however, added that, when the plaintiff on July 28th was informed by the attorneys of their refusal to approve the bonds, the "plaintiff then (if not before) was freed from any obligation to defendant under the contract." "On that date defendant was not bound to take the bonds. It follows that plaintiff was not bound to deliver them." The court admitted that the provision requiring the approval of the bonds was for the benefit of defendant and probably might have been waived by him. "But he did not make such waiver," said the court, "until after plaintiff, as it lawfully might, had acted on the assumption that the contract was at an end. The waiver was too late."

We do not challenge the correctness of the conclusion reached, and the case may easily be distinguished from the case at bar in important particulars, only one of which it is necessary to mention. It is evident that no contract at any time existed in the New York case between these parties, for the writing expressly declared that:

"This agreement is not to be binding on the party of the second part unless [the attorneys] approve of the regularity and validity of said bonds in writing."

As the attorneys named never approved the bonds, of course the party of the second part never was bound; and, if the party of the second part was not bound, the party of the first part was not bound. There is a clear difference between an agreement to sell "subject to the approval" of title by counsel and an agreement which declares that the entire writing is not to be binding unless a certain thing happens which never happens. Hussey v. Horne-Payne was not referred to in the opinion in Village of Ft. Edward v. Fish. But, if we are wrong in thinking that any real distinction exists between Hussey v. Horne-Payne and Village of Ft. Edward v. Fish, we prefer to follow the former in its application to the facts of this case. An acceptance which in terms is conditioned on what the law implies is a good acceptance, as it introduces nothing new into the contract. See Anglo-American, etc., Co. v. Prentiss, 157 Ill. 506, 42 N. E. 157; Ottumwa, etc., Co. v. Ainley, 109 Iowa, 386, 80 N. W. 510; Hubbell v. Palmer, 76 Mich. 441, 43 N. W. 442; Page on Contracts, vol. 1, p. 78.

[2] The plaintiff does not claim that the writing of January 28th was a completed draft of the contract. It is not pleaded as such. The transaction was difficult and complicated, and a number of items remained to be gone over and agreed upon, and they were not all definitely settled until the mortgage agreement was drawn. The plaintiff contends that when that was drawn every doubtful or disputed point had been resolved and finally determined, and nothing remained to be added to it or subtracted from it. The writing of January 28th between Tillotson and Higley was that the plaintiff should purchase bonds to be secured by a mortgage on the four boats known as the Lake boats, and that this mortgage was to be drawn under the direction and approval of certain specified attorneys of Cleveland. In the interview on March 2d between the plaintiff's attorney, Mr. White, and defendants' attorney, Mr. Eaton, of Boston, Mr. Tillotson said:

"Now, we have agreed upon all the details of this loan, and we want you [White] to get right busy and draw the mortgage, and Mr. Eaton [representing defendants] is out here for the purpose of getting these details cleaned up and out of the way just as fast as possible."

He also at that time declared that the agreement was to put all the boats under one mortgage. All this was said without Mr. Eaton's contradiction. And White and Eaton worked together for several days, and drew up the mortgage, and it contained all the terms, securing notes to the amount of $730,000, which was reduced afterwards to $555,000, because of the sale of the Chemung. Mr. White had been employed for 17 years in the business of drawing such mortgages, and had drawn 200 or 300 of them. He testified that there were no unusual terms in the mortgage as finally agreed upon. He was asked on the stand whether Mr. Eaton objected to any provisions as unusual. He answered:

"No; there was, of course, in framing the language, some discussion as to just the wording, or verbiage, or things of that kind; but the drawing of the mortgage from the start to the finish was simply a friendly collaboration, without any differences."

Mr. White was asked whether Mr. Eaton called up his principals during the course of these four or five days of negotiations. His answer was:

"Mr. Eaton used the long distance phone a number of times. He would, of course, retire to another room, and I had no means of knowing with whom he conversed, except as he would come back and say that he had received word of something or other, and then we would go on working with the mortgage."

Then he was asked:

"Did he make decisions after going to the telephone which he was not able to make before going to the telephone?"

To which he replied:

"I don't know whether he was able to before or not; but when we were discussing the different phrases of the mortgage, I know he would go to the telephone, and then come back, and we would go on, and those points would be arranged, but whether he received authority from any one I don't know."

And Mr. Eaton, when on the stand, admitted that he was talking over the telephone with Mr. Morse in New York. After these two attorneys had completed the mortgage, Mr. Eaton said that Mr. White told him that he (White) wanted—

"to go over it with Mr. Tyler, who had had a great deal of experience with these mortgages for Mr. Tillotson, and I told him of course I would want to take it back to Mr. Morse and to Mr. Blodgett [Eaton's partner] at my end of the line."

Mr. Morse was asked on his direct examination whether he ever authorized Mr. Eaton to make any contract in his behalf, and he answered:

"I told him to go to Cleveland and to stay there until he got the money."

The jury could draw their own conclusions from such a reply. The mortgage, however, was taken to New York and submitted to Morse, and some days later there was a meeting in New York, at which two of the plaintiff's attorneys and Morse and other of Morse's associates were present. One of these attorneys was asked at the trial what, if any, objection was raised by Morse or any of his associates as to the terms of the mortgage agreement. He replied, "Absolutely none." He afterwards corrected himself, by saying that Morse wanted to have individual mortgages given, instead of a fleet mortgage; but that was not consented to, as being contrary to what had been originally agreed upon. And the jury was instructed with unusual particularity as to the circumstances under which they would be authorized, if reasonably satisfied from the evidence, to find that the minds of the parties had met upon the terms of the mortgage.

This court is of the opinion that the defendants were not prejudiced by the instructions, and that there was sufficient evidence to warrant the verdict which was reached. It is evident that the jury did not accept all that Mr. Eaton and Mr. Morse testified to; but that was their privilege. Mr. Eaton's testimony in certain particulars was flatly contradicted by others; and Mr. Morse admitted on the stand that he had been convicted of a crime. The mortgage as drawn by the respective attorneys was not in the nature of an offer submitted by one party to another, and which was not responded to by the offeree. The offer had been made and accepted prior thereto, with certain details left open, which had been determined when the mortgage was drawn.

The action was brought upon the theory that a contract had been made between the plaintiff and the defendants for a loan upon the credit of the ships named in the complaint, and that the use of the corporate form for executing the mortgage on the ships was for the convenience of defendants, so that they should not have to assume any personal liability. That seems to have been the theory of defendants themselves, when the answer to the complaint was filed; for after stating that there were negotiations between themselves and the plaintiff, for the purpose of agreeing, if possible, upon a contract, it declares that they failed to agree, and no contract was entered into.

[3, 4] But at the argument in this court the defendants advanced the proposition that the contract was a contract of promoters, which the

defendants were making as agents for a corporation then in existence, whose name was disclosed to the plaintiff, and that therefore the plaintiff could not recover. They still adhered, however, to their contention that the negotiations did not result in any meeting of the minds. We find it quite impossible to concur with counsel in the view that defendants were acting as agents for a principal, disclosed or undisclosed. They acted for themselves, as clearly appears from the letter of January 28th. Unless defendants were bound by that letter, there was no obligor on the promise to the plaintiff, for at that time the corporation which was to take over the boats had not been agreed upon. But before March 16th, when the contract was canceled, it had been determined what corporation should take over the boats, and the cancellation was made by Eaton, who does not pretend that he had been authorized formally or informally by the corporation to cancel. The inference is that Eaton was acting for Morse, and neither Eaton nor Morse could have been acting at that time as a promoter for the corporation, for it was already formed, and neither could have been acting for the corporation, for it never gave either authority to represent it in the matter. Moreover, where two or more persons agree that a corporation shall do a certain thing, which they can compel it to do, because they hold a majority of the stock, or otherwise, the corporation is not bound by their agreement, but they bind themselves individually, unless it is expressly agreed that the other party is looking to the corporation, and not to the promoters. See Harrill v. Davis, 168 Fed. 187, 94 C. C. A. 47, 22 L. R. A. (N. S.) 1153; Fentress v. Steele & Sons, 110 Va. 578, 66 S. E. 870.

[5] In the brief submitted by defendant's counsel upon the argument in this court, and upon the oral argument, stress is laid upon the fact that the judge instructed the jury to say whether there was a meeting of the minds "as to each material stipulation in the contract," and again as to the "substantial terms of the contract." If this were error, the question cannot be raised in this court, for it was not properly excepted to at the time. The exception taken was to a statement which included the matter now objected to, along with other matter, without directing the court's attention specifically to the point now made. The objection was, "I take an exception to your honor's remarks." Under the circumstances it was not sufficient. We may call attention, however, to the fact that the court in the charge directed attention specifically throughout the charge to the essentials of an agreement to sell something in the future, and as to what the minds of the parties must have met in agreement upon. What more the court should have said upon that point to a jury whose province it was to determine whether a contract existed is not apparent to us; but, if it was to counsel, it was his duty at the time to call the attention of the judge specifically to it, which he did not do.

[6] One of the assignments of error relates to that portion of the charge to the jury in which it was said:

"As I understand it, the impossibility of performance with reference to the insurance feature is not made a matter of defense to the action, except as it reflects on the matter of evidence as to whether the parties did agree on the contract as it is claimed by the plaintiff, and therefore the question in the

main would be whether or not there was a meeting of the minds between the two parties as to each material stipulation in the contract."

We are unable to see error in the above statement. It is said that the agreement was impossible of performance, inasmuch as it was impossible to insure during the war, in the manner specified, vessels intended to be used in the trans-Atlantic service. There was some evidence that the insurance required could not be obtained, and there was also evidence that it could be; a marine insurance agent testifying as follows:

"There has been no time since the war broke out when such an insurance could not be secured in accordance with the claims specified in that article 3."

Impossibility of performance may or may not discharge from the obligation of a contract, according to circumstances; and where performance is possible when the contract is made, and becomes impossible subsequent to the making, it is very generally held that the promisor is not discharged. But impossibility of performance does not appear to have been pleaded, and so could not have been relied upon as a defense to the action, except in the particular referred to in the charge. As respects that phase of the subject, there was a question of fact for the jury.

There are other assignments of error, which we have considered, but do not find it necessary to prolong this opinion by considering in detail.

Judgment affirmed.

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In re STRINGER.

(Circuit Court of Appeals, Second Circuit. April 10, 1918.)

No. 224.

1. BANKRUPTCY ⟸143(4)—ASSETS—SEAT ON STOCK EXCHANGE.
Seat or membership in Stock Exchange, Merchants' Exchange, or Board of Trade, while in the nature of a personal privilege, is property which creditors may reach, and which on bankruptcy of the member or holder will pass to his trustee.

2. BANKRUPTCY ⟸149—FIRM PROPERTY—EVIDENCE.
Seat in Stock Exchange, though in the name of a partner, *held* a firm, instead of an individual, asset.

3. BANKRUPTCY ⟸178(1)—FRAUDULENT TRANSFER—WHAT CONSTITUTES.
For one not shown to be insolvent to organize a partnership, and convey to such firm individual property, such as seat on Stock Exchange, is not a transfer in fraud of creditors.

4. BANKRUPTCY ⟸219—PROCEEDINGS.
Under Bankruptcy Act, § 5h (Comp. St. 1916, § 9589), relating to bankruptcy of one member of a firm, partnership property may, by consent of the partner or partners not adjudged bankrupts, be administered in partnership proceedings of one of the partners.

5. BANKRUPTCY ⟸219—PARTNERSHIP.
Under Bankruptcy Act, § 5h (Comp. St. 1916, § 9589), declaring that in the event of the bankruptcy of one or more, but not all, of the members of a firm, the partnership property is not to be administered, unless by

consent of the partner or partners not adjudicated bankrupts, the firm property may be administered on bankruptcy of the sole surviving partner, both individually and as sole surviving partner.

Petition to Revise and Appeal from the District Court of the United States for the Eastern District of New York.

In the matter of the bankruptcy of G. Franklin Stringer, individually and as sole surviving partner of Stringer & Co. The referee held that certain property was firm property, and his action was sustained by the District Court. From such order Mary E. Lewis and others appeal, and also petition to revise. Petition to revise dismissed, and order appealed from affirmed.

This cause comes here upon petition to revise an order entered in the District Court on January 11, 1918. The facts appear in the opinion.

Henry M. Stevenson, of New York City, for petitioners.

A. Gordon Murray, of New York City, for trustee.

Before ROGERS and HOUGH, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. A voluntary petition in bankruptcy was filed by the bankrupt on January 12, 1915. Matters connected with this bankruptcy have been heretofore adjudicated in several reported cases in the District Court. 230 Fed. 177; 233 Fed. 799; 234 Fed. 454; 244 Fed. 629. When the matter came before this court a year ago, we decided that the claims of Mary E. Lewis, H. Leroy Lewis, and the H. J. Lewis Oyster Company were not entitled to share in the distribution of the firm assets of Stringer & Co. The case is reported in 240 Fed. 892, 153 C. C. A. 578.

It appears now that the referee has declared an additional dividend of 10 per cent. to the firm creditors of Stringer & Co., but that he has been stayed from paying it until it can be determined whether the sale price of a New York Stock Exchange membership is an asset of the firm of Stringer & Co. or the individual property of G. Franklin Stringer. The referee has held that it is an asset of Stringer & Co., and his action has been sustained by the District Judge; and the question which is now presented to this court is whether the District Judge fell into error in holding that the seat on the Stock Exchange is to be held as an asset of Stringer & Co. or the individual property of G. Franklin Stringer, as a liquidating partner of Jewell & Stringer. The decision of this court in the former case said nothing whatever as to the disposition of this asset; that question not having been presented to us at that time. The petitioners in the present case are the same parties whose claims were presented in the first case and held not to be claims against the assets of Stringer & Co. The petitioners, having been excluded as to certain of their claims from the firm assets, are now here as exceptants, objecting to the decision of the lower court that the seat on the Stock Exchange is a firm asset, and they seek to have it decided that the asset is an asset of Stringer individually.

[1] Before considering that question, it may be pointed out that a difference of opinion has existed in the courts as to whether a seat or membership in a stock exchange, or merchants' exchange, or board of trade, is property which, if fraudulently conveyed or assigned, may be reached in equity by creditors. That the creditors cannot reach it seems to have been held in Barclay v. Smith, 107 Ill. 349, 47 Am. Rep. 437, Weaver v. Fisher, 110 Ill. 146, Pancoast v. Gowen, 93 Pa. 66, and In re Sutherland, Fed. Cas. No. 13,637. But, whatever may have been thought at one time on this subject, the Supreme Court of the United States has settled the matter that membership in a stock exchange is property which passes to a trustee in bankruptcy as assets of the bankrupt's estate. Page v. Edmunds, 187 U. S. 596, 23 Sup. Ct. 200, 47 L. Ed. 318; Hyde v. Woods, 94 U. S. 523, 24 L. Ed. 264. And see In re Page, 107 Fed. 89, 46 C. C. A. 160, 59 L. R. A. 94 affirming (D. C.) 102 Fed. 746. While such property is peculiar, and in its nature a personal privilege, yet such value as it may possess, notwithstanding the restrictions to which it is subject, is held to be susceptible of being realized by creditors. This court in Re Hurlbutt, Hatch Co., 135 Fed. 504, 68 C. C. A. 216, held that a seat in the New York Stock Exchange passed to a trustee in bankruptcy.

[2] It appears that the records of the Stock Exchange disclose that Edward H. Jewell became a member of the Stock Exchange in December, 1902; that on May 23, 1912, his membership was transferred to G. Franklin Stringer; that the latter was a member of the firm of Stringer & Co., which traded on the Exchange; and that Stringer's membership was transferred on August 26, 1915, for $55,000, which amount the Exchange paid over to Stringer's trustee in bankruptcy on September 13, 1915, after deducting therefrom $1,704.90, being claims against the firm of Stringer & Co. It is not disputed that the seat was originally an asset of the firm of Jewell & Stringer. Then, when that firm was dissolved, the seat was transferred to Stringer in his individual name on the books of the Exchange. The record shows that a rule of the Stock Exchange requires a membership in that organization to be an individual membership, and not a firm membership. The firm has no right to appear on the floor of the Exchange, but the membership as an asset of the firm is liable for any debt contracted by any member, and the Exchange regarded and treated Stringer's membership as an asset of the firm of Stringer & Co., and it is stipulated that at the time Jewell transferred his membership in the Exchange to Stringer the latter "became the board member of Stringer & Co., and was published as such in Stock Exchange publications." For the two years and nine months that Stringer & Co. continued to exist this seat was utilized by it in its business. It appears that the understanding between Stringer and his son, who constituted the only other member of the firm, was that Stringer should furnish the whole of the capital and the son was to put no money into the business. He was to contribute only his services, and was to share to the extent of 25 per cent. in the profits or losses; and an affidavit in the record states that:

"The membership in the Stock Exchange that had become the property of G. Franklin Stringer was thus contributed to Stringer & Co. as a part of its capital which the bankrupt had promised to furnish."

As Stringer & Co. was a stock brokerage firm doing business on the Stock Exchange by virtue of Stringer's membership therein, and as the obligations incurred by that firm on the Exchange were liabilities against the seat held by Stringer, the conclusion that the seat was an asset of the firm seems justified upon the facts disclosed.

[3] It is said, however, that when the membership in the Exchange became the individual property of Stringer, by virtue of Jewell's transfer of his seat to Stringer, the latter had no right to convert it into an asset of Stringer & Co., and that the attempt to do so was fraudulent and void as to creditors. I am unable to concur in any such conclusion. This court decided in the former case that Stringer took the assets of Jewell & Stringer as his separate property, free from the liens of the firm creditors. There is no attempt made in this case to have this court reverse its former decision upon that point. So that I begin this case at that point, and say that it is established that Stringer took the assets of Jewell & Stringer, including this seat on the Exchange, as his individual property, free from the liens of the creditors of the old firm. It was also decided in the former case, and it is not controverted in this, that at the time the old firm was dissolved, and the new firm was organized, it does not appear that Stringer was insolvent. As the assets then were Stringer's individual property, and he is not shown to have been insolvent at the time, how can it be said that he did not have the right to organize the new firm of Stringer & Co., of which he was a member, and put these assets into it? This court, in the Matter of Braus, 248 Fed. 55, —— C. C. A. ——, held that where one who does not know whether he is solvent or insolvent organizes a corporation, and transfers his property to it in return for its capital stock taken at full valuation, the transaction is not in itself to be regarded as a hindering and delaying of creditors within the meaning of the statute of Elizabeth; and I am not prepared, therefore, to hold that it is in itself within the meaning of that statute a hindering and delaying of creditors for one, not shown to be insolvent at the time, to organize a partnership and to embark his property in the partnership enterprise. I am unable to distinguish the two cases in principle.

This court cannot hold that one who puts into a partnership his individual assets is to have the transaction treated as though it were a voluntary transfer of his assets to some third person, which can be declared fraudulent as to creditors unless he retains in his individual possession sufficient remaining assets to pay the whole of his debts. I know of no case which asserts that doctrine, and if there be any we are concluded by our decision in the Matter of Braus from following it, if we were so disposed. If A. transfers his property to B., he puts his property beyond his creditors, for the creditors of A. cannot levy upon the property of B. If, however, A. and B. form a corporation or a partnership, into which A. puts his property, he does

not thereby put the property beyond the reach of creditors. They may levy in the one case on A.'s shares of stock, and in the other on the firm property to the extent of A.'s interest. That is the law of this court as established in the Matter of Braus.

[4, 5] There has been no adjudication of bankruptcy of the firm of Stringer & Co., and prior to the filing of the petition now under consideration the firm of Stringer & Co. had been dissolved by the death of the bankrupt's son. The death of the son, who, with Stringer Sr., constituted the only two members of the firm, occurred on January 9, 1915. The voluntary petition in bankruptcy was filed by the bankrupt herein on January 12, 1915, and on the same day he was duly adjudicated a bankrupt, individually and as sole surviving partner of Stringer & Co. We are told by the petitioners that the proceeds of the Stock Exchange seat cannot be distributed among the creditors of Stringer & Co. for the reason that that firm is not in bankruptcy. There is no doubt that as a rule partnership affairs are not to be administered by the trustee of the individual bankrupt without the consent of the remaining members.

The Bankruptcy Act (Act July 1, 1898, c. 541, § 5h, 30 Stat. 547 [Comp. St. 1916, § 9589]) expressly declares that in the event of one or more, but not all, of the members of a partnership being adjudged bankrupt, the partnership property is not to be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt. It follows, of course, that by the consent of the partner or partners not adjudged bankrupt the partnership property may be administered in the bankruptcy proceedings of one of the partners. In re Filmar, 177 Fed. 170, 100 C. C. A. 632; In re Harris (D. C.) 108 Fed. 517.

We know of no reason why, under the circumstances of this case, the court having jurisdiction over Stringer as an individual and as sole surviving partner of the firm of Stringer & Co. has not complete jurisdiction over the partnership estate; there being no surviving and solvent partner who is entitled to administer upon the partnership estate, and no administrator, so far as it appears, of such a partner. See In re Pierce (D. C.) 102 Fed. 977. Under the circumstances as disclosed by the record in this case it is quite immaterial that the firm of Stringer & Co. has not been adjudicated a bankrupt. We know of no reason why the court below should not distribute the funds in the trustee's hands and which belong to the firm creditors of Stringer & Co.

My Associates concur in the result, on the ground that the case presented by the petition cannot be distinguished from In the Matter of Braus.

The petition for review is dismissed, and the order appealed from is affirmed.

In re BROWN et al.

BROWN et al. v. W. H. KENWORTHY & SON et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3173.

1. BANKRUPTCY ⟸68—INVOLUNTARY PROCEEDINGS—OCCUPATION OF DEBTOR.
In determining whether an alleged bankrupt is chiefly engaged in farming, all his activities are to be taken into consideration, the relative amount of time devoted to each, and the comparative amount of revenue received and indebtedness incurred in each.

2. BANKRUPTCY ⟸68—INVOLUNTARY PROCEEDINGS—OCCUPATION OF DEBTOR—"CHIEFLY ENGAGED IN FARMING."
An alleged bankrupt, who, although conducting a large farm, also built and operated a packing house, creamery, and poultry yards, buying live stock and poultry, and who contracted the larger part of his indebtedness in connection with business other than farming, *held* not chiefly engaged in farming.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Engage.]

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

In the matter of A. L. Brown and the community consisting of A. L. Brown and Emma Brown, his wife, alleged bankrupts; W. H. Kenworthy & Son and others, petitioners. The alleged bankrupts and the Dexter Horton National Bank of Seattle appeal from an order of adjudication. Affirmed.

For opinion below, see 251 Fed. 365.

Herr, Bayley & Croson, of Seattle, Wash., for appellants Brown et al.

Peters & Powell, of Seattle, Wash., for appellant Dexter Horton Nat. Bank of Seattle.

Kerr & McCord, of Seattle, Wash., and Stephen V. Carey, of Spo-Kane, Wash.,for appellee National Bank of Commerce of Seattle.

Walter M. Harvey, of Tacoma, Wash., for petitioning creditors.

R. P. Oldham, of Seattle, Wash., for appellee Seattle Nat. Bank.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge. The question which this appeal presents is whether the court below erred in confirming the master's report and adjudging that the appellant A. L. Brown was not chiefly engaged in farming or the tillage of the soil on December 28, 1917, the date of the alleged act of bankruptcy, for which his creditors by their petition sought to have him adjudged bankrupt. Brown was a citizen of Seattle, a lawyer, and the president of the Amos Brown Estate, a corporation, in which he and his mother and sisters owned all the shares; the estate consisting of city property of the value of $2,350,000. As such president he received a salary of $3,000 per an-

num. He acquired 2,100 acres of land, situate about 60 miles from Seattle, and he and his wife had their home thereon, while at the same time they maintained apartments in Seattle, where much of their time was spent. The farm was stocked with a large number of cows, bulls, stallions, horses, swine, and poultry. Brown expended large sums of money in improving the farm. He erected thereon numerous buildings, including a stallion barn, an extensive packing house, with cold storage rooms, a creamery, and poultry houses. The packing house cost from $50,000 to $60,000, and the creamery and poultry houses about $30,000. Both the packing house and the creamery were of capacity vastly in excess of the needs of the farm. In 1915 he engaged in the business of selling his products directly to consumers by means of the parcels post. He secured the services of a government inspector for his packing plant. He slaughtered cattle and hogs, and, aside from beef, the manufactured product of the packing house included ham, bacon, sausage, and pickled pigs' feet. He bought cattle, hogs, and chickens from others to the extent of from 38 to 40 per cent. of the products which passed through the packing house. The evidence was that during the year 1917 the gross income from his several industries was about $222,000, of which about $95,000 was the gross income from the farm; that the feed purchased amounted to $37,648, while the feed raised on the farm was $17,600; that the gross expense of his operations was about $250,000, of which about $22,000 was the cost of operating the farm; that the total cost of labor was $46,391, of which the farm labor cost was $16,000. When obtaining a loan from a bank in July, 1917, Brown stated to the president of the bank that he was advertising a sale of his cattle, that he realized that in order to make money he must make it from his packing plant, and that he was making no money out of the stock, and for that reason he was going to dispose of it. On February 26, 1918, Brown wrote to his creditors as follows:

"In closing this letter I want to impress you with the fact that for the past several years I have been educating the farmers for many miles around in the raising and furnishing me with more and better products; I agreeing to take it all. They are now demanding that I still furnish them a market for their products. As a manufacturing plant I have been buying for a long time about 95 per cent. of the farm products we sold. We have daily calls for hundreds of dollars worth of Brown Farm Products, which we cannot furnish (no capital to purchase the raw products with)."

It is true that Brown testified that he did not mean by his letter that he had been buying 95 per cent. of the farm products which he sold, but that he meant he had only "enough stuff to fill 5 per cent. of the orders we were then getting." But the explanation does not seem to explain the language of the letter. At the close of the year 1917, Brown's debts exceeded $1,000,000, and his accounts payable were about $49,000. He had borrowed from the Amos Brown Estate about $500,000, and he owed to various banks and other creditors for loans $424,000. He testified that the money obtained on the most of these loans went to the Amos Brown Estate.

[1] In determining whether one is chiefly engaged in farming,

all his activities are to be taken into consideration. American Agricultural Co. v. Brinkley, 194 Fed. 411, 114 C. C. A. 373, Ann. Cas. 1915C, 100; Harris v. Tapp (D. C.) 235 Fed. 918. It is proper to consider the relative amount of time he devoted to the several lines of endeavor in which he was interested, and it has been held that the comparative amount of revenue received from each may be taken into account, as well as the relative amount of indebtedness which he has incurred in his different lines of business. Hart-Parr Co. v. Barkley, 231 Fed. 913, 146 C. C. A. 109; In re Disney (D. C.) 219 Fed. 294. One who is engaged chiefly in farming is within the exception, although as incidental thereto he raises live stock for sale and engages extensively in the creamery and poultry business. In re Thompson (D. C.) 102 Fed. 287; Gregg v. Mitchell, 166 Fed. 725, 92 C. C. A. 415, 20 L. R. A. (N. S.) 148, 16 Ann. Cas. 510. But it is otherwise if the incidental business assumes such proportions as to become the principal business. Bank of Dearborn v. Matney (D. C.) 132 Fed. 75. And one who is engaged chiefly in farming is within the exception, although he may be engaged in other lines of business of less importance wholly disconnected with farming. Couts v. Townsend (D. C.) 126 Fed. 249; Wulbern v. Drake, 120 Fed. 493, 56 C. C. A. 643.

[2] With these principles in view, we are not convinced that the evidence is such as to justify us in disturbing the conclusion of the court below. The main portion of Brown's debts were incurred on behalf of the Amos Brown Estate, and a very considerable portion of his time, especially during the year 1917, was devoted to the business of that estate. In addition to that, the evidence indicates that Brown's principal interest at the farm was in developing the business of his packing house, creamery, and poultry yards, and in purchasing live stock and poultry from others, and selling directly to consumers the products of his plants. In re Brown (D. C.) 132 Fed. 706; In re Mackey (D. C.) 110 Fed. 355; In re Disney (D. C.) 219 Fed. 294.

The judgment is affirmed.

## COOPER v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3119.

PUBLIC LANDS ⟸29—RESERVED LANDS—RIGHTS OF HOMESTEAD APPLICANT.

Where the statute opening an Indian reservation to settlement authorized the Secretary of the Interior to reserve land for town sites and the proclamation issued pursuant thereto in terms applied only to unreserved land, no rights on a tract reserved for a town site can be acquired by a homestead application.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action by the United States against C. A. Cooper. Judgment for the United States, and defendant brings error. Affirmed.

C. A. Cooper, of Plummer, Idaho, and W. H. Batting, of Cœur d'Alene, Idaho, for plaintiff in error.

J. L. McClear, U. S. Atty., of Boise, Idaho, and John R. Smead, Asst. U. S. Atty., of Idaho City, Idaho.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The government brought this action in the court below to oust the defendant thereto (plaintiff in error here) from the S. E. ¼ of section 18, township 46 north, range 4 west of Boise meridian; the defendant being in possession of the land and claiming the right to such possession under the homestead laws. A jury was waived and the case submitted to the court upon the agreed facts. Those showed that the piece of land in question is within that portion of the Cœur d'Alene Indian reservation in Kootenai county, Idaho, which the act of Congress of June 21, 1906 (34 Stat. 335, 337, c. 3504), provided should be opened to settlement and entry by proclamation of the President, and which proclamation should prescribe the time when and the manner in which the lands might be settled upon, occupied, and entered by persons entitled to make entry thereof. That act of Congress also provided at the page last cited:

"That the Secretary of the Interior shall reserve from said lands, whether surveyed or unsurveyed, such tracts for town-site purposes as in his opinion may be required for the future public interests, and he may cause any such reservations, or parts thereof, to be surveyed into blocks and lots of suitable size, and to be appraised and disposed of under such regulations as he may prescribe, and the net proceeds derived from the sale of such lands shall be paid to said Indians as provided in section 7 of this act."

Pursuant to the authority thus vested in the Secretary of the Interior, the latter, on July 15, 1907, withdrew the whole of section 18, township 46 north, range 4 west, of the Cœur d'Alene Indian reservation, for the Plummer town site. Pursuant to the authority vested in the President by the act of June 21, 1906, and other acts of Congress relating to other Indian reservations, the President, on May 22, 1909 (36 Stat. 2494), issued his proclamation by which he did

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thereby "prescribe, proclaim, and make known," among other things, that—

"All the nonmineral, unreserved lands classified as agricultural lands, grazing lands and timbered lands in the Cœur d'Alene Indian reservation in the state of Idaho, under the act of Congress approved June 21, 1906 (34 Stat. 335), shall be disposed of under the provisions of the homestead laws of the United States and said acts of Congress and be opened to settlement and entry in the following manner and not otherwise"—specifying the conditions and requirements.

By act of August 4, 1916 (39 Stat. 435, c. 268), entitled "An act authorizing the Secretary of the Interior to subdivide a part of the town site of Plummer, Idaho, and for other purposes," that officer was authorized and directed to cause to be subdivided that part of the town site of Plummer, Cœur d'Alene reservation, Idaho "(which town site was created under the act of June twenty-one, nineteen hundred and six, Thirty-fourth Statutes at large, pages three hundred and twenty-five and three hundred and thirty-seven), described as the southeast quarter of section eighteen, township forty-six north, range four west, into streets or roads and into tracts of not exceeding five acres each, and to cause the tracts to be appraised, except such as are hereinafter reserved for the town of Plummer, and sold at not less than their appraised value." The act last referred to also made various provisions for the benefit of the town of Plummer, in the way of waterworks, schoolhouses, and a park.

It is agreed that the southeast quarter of the section so reserved for the Plummer town site has never been subdivided into lots and blocks, and that on May 12, 1910, the plaintiff in error, Cooper, tendered to the United States land office at Cœur d'Alene, Idaho, a homestead application therefor, the serial number of which was 04640, which application was rejected by the local land office, an appeal from which rejection was taken May 13, 1910. On the 18th of the next month—June 18, 1910—the Commissioner of the General Land Office affirmed the action of the local land officers, on the ground that the quarter section applied for was embraced within the town site of Plummer. The stipulation contained a recital of these further facts:

"January 7, 1911, the General Land Office called upon the local land office for a report in connection with Cooper's case, and on February 16, 1911, the local office reported that no appeal had been taken on the General Land Office decision dated June 4, 1910. March 11, 1911, the General Land Office finally rejected the tendered application No. 04640, so filed May 12, 1910, and closed the case."

More than four years thereafter, to wit, August 20th, 1915, the plaintiff in error, Cooper, "filed a new homestead application, Serial No. 09792," for the land in question, which application was rejected by the officers of the local land office, from which ruling the applicant filed on the same day an appeal to the Commissioner of the General Land Office, by which officer the applicant was allowed to file written arguments in support of his appeal. Thereafter, and on September 15, 1916, the Commissioner rendered his decision, holding that the land, being included within the town site of Plummer,

was not subject to homestead entry, thereby sustaining the ruling of the local land office. The applicant being allowed an appeal to the Secretary of the Interior from that decision of the Commissioner, such appeal was taken November 29, 1916, where it remains pending.

If the land in suit could be properly regarded as public land, subject to disposal under the general laws of the United States, we should be obliged to reverse the judgment appealed from, and to direct a dismissal of the action, on the authority of the cases of United States v. Devil's Den Cons. Oil Co. and Lost Hills Mining Co. v. United States, 251 Fed. 548, 163 C. C. A. 542, recently decided by us, and cases there cited. But, as will have been seen from the abovementioned legislation, and from the proclamation of the President, it was only "nonmineral unreserved lands classified as agricultural lands, grazing lands, and timber lands in the Cœur d'Alene Indian reservation" that were authorized to be disposed of under the provisions of the homestead laws of the United States, and according to the agreed fact the whole of the section embracing the quarter section here in suit was, by express statutory authority, duly reserved for town-site purposes by the Secretary of the Interior July 15, 1907. The land in controversy was not, therefore, subject to sale or other disposal under general laws at the time of either of the homestead applications of the plaintiff in error, and that only lands of the latter character ever were subject to homestead entry is too well settled to admit of question.

The judgment is affirmed.

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## FEDERAL MINING & SMELTING CO. v. ANDERSON.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3129.

1. MASTER AND SERVANT ⟸278(10)—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.
   The finding of a jury that an injury to plaintiff, whose arm was broken by a piece of steel while he was operating a cage in defendant's mine, was due to the negligence of defendant in permitting the steel to be piled so near the shaft that it was struck by the cage, *held* sustained by the evidence.

2. NEGLIGENCE ⟸134(2), 136(9)—CIRCUMSTANTIAL EVIDENCE—INFERENCES—JURY QUESTION.
   The cause of an accident may be inferred from circumstances, and such inferences are for the jury to draw.

In Error to the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Action at law by Andy Anderson against the Federal Mining & Smelting Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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Featherstone & Fox, of Wallace, Idaho, for plaintiff in error.

Plummer & Lavin, of Spokane, Wash., and Therrett Towles, of Wallace, Idaho, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. [1] The defendant in error recovered in the court below a verdict and judgment for personal injuries alleged to have been sustained by him by reason of the negligence of the defendant to the action, plaintiff in error here. The plaintiff was employed in the operation of a cage of one of the defendant's mines, and while the latter was being lowered in the shaft, with the plaintiff on it, in passing the 1,000-foot level of the mine on its way to the 1,800-foot level, a piece of steel protruding from the level was struck by the cage and knocked against the arm of the plaintiff, inflicting the injury for which he sued and recovered. Lack of negligence on the part of the defendant, contributory negligence by the plaintiff, and assumption of risk by the latter were set up in defense—the latter in these words:

"That if the said plaintiff was injured on the 28th day of May, 1917, as alleged in plaintiff's complaint, he was injured by and through one of the risks of the employment and one of the risks he assumed, especially the risk of being injured in the course of his employment by some object falling down said shaft."

It was stipulated by the parties that the defendant company "at one time promulgated" this rule:

"Drills, timber, or other material must not be placed within five feet of any shaft, opening or winze."

And there was much testimony given tending to show a general disregard of the rule by the miners, including the plaintiff, and there was a good deal of testimony regarding the condition of the shaft and gates.

The trial court instructed the jury, among other things (to which instructions no exception was taken), that the plaintiff was not entitled to recover by reason of the condition of the shaft or gates, but that they might consider the condition of the shaft and of the gates, and the practicability of operating the hoisting device—

"in determining whether or not the plaintiff was guilty of contributory negligence; that is, of a want of proper care in having those gates open at the time the injury occurred, if you find that he did have them open."

The court also in its instructions said that there was but one primary ground of alleged negligence upon which it could find in the plaintiff's favor, if at all, that negligence being—

"according to the plaintiff's claim, that the defendant company permitted steel to be piled or left near the edge of the shaft, and that one of these pieces, by reason of the carelessness of the company in that respect, came so near the edge, indeed, projected over the edge there a little way, so that when the cage descended it struck the end of it and threw it upon him and broke his arm."

There were certainly some circumstances testified to tending to show that the accident occurred that way, while some of it tended to

show the contrary; and the court by its instructions left it to the jury to say whether the accident did result from the piece of steel as alleged by the plaintiff, and further whether—

"that steel came to the edge of the shaft by reason of the habitual placing of it there and leaving it there."

[2] That the cause of an accident may be inferred from circumstances does not admit of doubt. Perkins v. Northern Pac. Ry. Co., 199 Fed. 712, 719, 118 C. C. A. 150. Such inferences are for the jury to draw. "Twelve men," said the Supreme Court in Railroad Co. v. Stout, 17 Wall. 657, 664 (21 L. Ed. 745), "of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer—these sit together, consult, apply their separate experience of the affairs of life to the facts proven, and draw a unanimous conclusion. This average judgment, thus given, it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge. In no class of cases can this practical experience be more wisely applied than in that we are considering. We find, accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us, that although the facts are undisputed it is for the jury, and not for the judge, to determine whether proper care was given, or whether they establish negligence."

The judgment is affirmed.

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## TAIGMAN v. DESURE et al.

(Circuit Court of Appeals, Second Circuit. March 13, 1918. On Application for Reargument, April 12, 1918.)

No. 75.

1. PATENTS ⇐327—VALIDITY—CONCLUSIVENESS OF DECREE—PERSONS CONCLUDED.
One not a party to an infringement suit, and not technically a privy thereto, although allied in interest with defendant, is not bound by a decree affirming the validity of the patent alleged to have been infringed.

2. PATENTS ⇐328—INVENTION—ANTICIPATION.
Patent No. 984,327, claims 15 and 16, for a motor-control apparatus, which serves to exactly control the operation of electric motors, to start and stop the same, or to vary the speed, and patent No. 1,044,944, claim 3, for a pulley brake for motor-controlled apparatus, particularly adapted for a brake mechanism on a motor-actuated sewing machine, *held* to show invention, and not to have been anticipated.

3. PATENTS ⇐81—INFRINGEMENT SUIT—PRIOR USE.
Defendant, who admitted infringement of a patent, otherwise valid, and defended on the ground of prior public use, has the burden of establishing such use beyond a reasonable doubt.

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4. PATENTS ⟸81—INFRINGEMENT—PRIOR USE—EVIDENCE.
In a suit for the infringement of patent No. 984,327, claims 15 and 16, and patent No. 1,044,944, claim 3, evidence *held* insufficient to sustain the defense of prior public use.

Appeal from the District Court of the United States for the Southern District of New York.

Bill by Max Taigman against Samuel Desure, trading as D. & D. Electric Company, and another. From a decree for complainant, holding the first patent valid and infringed, and dismissing the bill for infringement as to the second patent, the parties cross-appeal. Decree sustaining the first patent, and holding it infringed, affirmed, and decree dismissing bill for infringement of the second patent reversed, and cause remanded, with directions.

The plaintiff alleges that he is the owner of an undivided two-thirds interest in letters patent No. 984,327, issued to David Wald, Otto C. Britsch, and the plaintiff on February 14, 1911; the plaintiff's two-thirds interest in the latter patent being his own individual one-third interest arising from the grant of the patent, together with the interest of Britsch, which plaintiff acquired by assignment. He also alleges that he is the sole owner of United States letters patent No. 1,044,944, granted to him on November 19, 1912. The defendant Wald, as the owner of a one-third interest in letters patent 984,327, was requested by plaintiff to join in the suit, and, having failed to do so, was made a defendant.

The suit was brought for infringement of both patents. An injunction and accounting was asked. A decree was entered in favor of the plaintiff, holding the first patent valid and infringed as to the claims in issue, and dismissing the bill for infringement of claim 3 of the second patent, without costs. There are cross-appeals.

C. P. Goepel, of New York City, for appellants.
Hillary C. Messimer, of New York City, for appellee.
Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The first patent in suit, No. 984,327, is for a motor-control apparatus, and has reference more particularly to apparatus of this class which serves to exactly control the operation of electric motors, to start and stop the same, or to vary the speed. The second patent in suit, No. 1,044,944, is for a pulley brake for motor-controlled apparatus, and is particularly adapted for a brake mechanism on a motor-actuated sewing machine. These two patents were before this court in Taigman v. Forsberg, 223 Fed. 787, 139 C. C. A. 607. We then held that the patents disclosed invention and were not shown to have been anticipated.

[1, 2] In this suit defendant Desure relies on additional proof as to prior public use. He also sets up in his answer a number of patents which are prior in time to those in suit, although at the trial, among all of those pleaded, he relied upon only two—the Miller & Marx patent, No. 703,942, dated July 1, 1902; and the Beswick patent, No. 828,083, dated August 7, 1906. The District Judge has entered a decree in favor of the plaintiff, in which the first patent is held valid and infringed as to the claims in issue, with costs, and the bill for the infringement of claim 3 of the second patent is dismissed, without costs.

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In the course of his opinion the District Judge, in referring to the opinion of this court when the case was here before, declares that "subsequent events have proved that the Circuit Court of Appeals was right in its conclusion as to the facts." In the former action we reversed the decree of the District Court, because we were convinced that the testimony was not sufficient to establish the fact that the inventions of the patents were in public use more than two years before the patents were granted. It was this alleged public use that the defendant in the first case had relied on to defeat the plaintiff's suit. A number of patents had been set up in the answer in the former suit, but no reference was made to any one of them by the defendant at the trial.

In the present suit the defendant did not elect to stand entirely on the alleged prior use. While relying on the prior use, he does not now deem it safe to pass unnoticed the patents of the prior art. Both of the patents now relied upon were cited in the answer in the first suit, although counsel did not then deem it important to offer them in evidence. Both were before the Patent Office at the time the patents in suit were granted. Furthermore, the Miller & Marx patent is on the Diehl box, now obsolete, and the Beswick patent is on the Beswick box, which is also now obsolete.

The plaintiff relies on claims 15 and 16 of the first patent, No. 984,327, and on claim 3 of the second patent, No. 1,044,944. Claim 15 of the first patent reads as follows:

"In apparatus of the class described, a casing having an end wall provided with an opening therein, resistances within said casing, contacts within said casing and electrically connected with said resistances, said end wall adjacent to said opening having an enlargement, presenting a bore, a spindle in said bore, and a contact arm having a hub mounted upon said spindle, and extending through said opening into said casing, and adapted to engage said contacts."

And claim 16 of the first patent reads as follows:

"In apparatus of the class described, a casing having an end wall provided with an opening therein, resistances within said casing, contacts within said casing and electrically connected with said resistances, said end wall adjacent to said opening having an enlargement, presenting a bore, a contact arm having a hub mounted upon said spindle and extending through said opening into said casing and adapted to engage said contacts, said arm, at the outside of said casing having an extension, a lever pivotally mounted upon said casing and operatively engaged by said extension of said arm, and a brake shoe carried by said lever and adapted to brake a motor controlled by the apparatus."

Claim 3 of the second patent reads as follows:

"The combination in a motor-controlled apparatus, of a revolving element, a switch arm, a brake lever having a brake shoe at one end adapted to engage said element and having its other end loosely positioned in and actuated by said arm, and means independent of said switch arm for varying the movement of said shoe relative to said element."

It is noted that paragraph 8 in the answer in this suit, which names certain patents issued prior to the patents in suit and asserts that the apparatus of the patents in suit and the apparatus of the prior patents so named are substantially identical in character, is a mere repetition of paragraph 8 in the answer in the former suit. Desure was not a party

in form at least to that suit, and it has not been proved that he was technically a privy to it, although he was allied in interest with the defendant therein. The decision in that case is not conclusive as against him. It is proper, however, to say, and good practice requires us to hold, that this belated reliance upon references which were pleaded in the former suit is not to be viewed with favor; for upon pleadings that presented the issues we have definitely held that both these patents reveal invention.

An examination of the physical exhibits discloses the fact that defendant's box is a Chinese copy of that of the plaintiff. The defendant's device is identical with that of the plaintiff, and has all the properties which are ascribed to the latter in his two patents in suit. Infringement is clear, and is not contested. The question presented is whether the plaintiff's patents are valid. Is there anything in the prior art or in the prior use which invalidates them?

The patents in suit describe a device for the control of individual sewing machines operated by an electric motor. It consists of an ordinary rheostat inclosed in a box, operated by a lever which, when released, allows a spring to relax, which brings a brake into action. The rheostat has been said to be as old as applied electricity. It is necessary in order that the current may be gradually applied, by forcing the current to traverse several electrical resistances before the direct contact or circuit is made. The brake is also old, and used to stop the machine quickly, rather than to permit it to idle down.

It will not be necessary to refer to more than four of the patents relied on by the defense. The Miller and Marx patent, No. 703,942, of July 1, 1902, and the Beswick patent, No. 828,083, of August 7, 1906, were mentioned in the answer and so may be relied upon as anticipations. The Bradbury patent, No. 17,460, is a British patent, which was applied for on August 8, 1902, and was accepted on August 8, 1903. It was not named in the answer, and was therefore received in evidence only as illustrating the prior art.

The Miller and Marx patent, No. 703,942, was issued on July 1, 1902, or almost nine years prior to the patent in suit. It is described as an invention which had for its object to provide an efficient electric motor power-transmitting device, more especially intended to be applied to sewing machine stands or tables, for the purpose of driving the sewing machines mounted thereon. The defendant claims that the device is identical in functional operation with that of the patent in suit. The Miller and Marx patent and the patent in suit both employ a box or casing having what is known as an electric rheostat having resistances to determine the strength of the electric current, and a pivoted contact arm passing over the contact points electrically connected with the various resistances. When the contact arm is in one of its extreme positions, no electric current flows, as the circuit is broken; and when the contact arm is in its other extreme position, the entire current may pass, as it does not flow through any portion of the resistance. Between these extreme positions, the pivoted arm engages contacts connected with resistances so graduated that, as the contact arm is moved from one extreme position to the other, the current pass-

ing through the circuit is increased or decreased. By moving the contact arm over the contacts, sufficient strength of current may be utilized, and, when a motor is connected in the circuit, the speed of the motor depends on the strength of the current; and it also provides a brake shoe. The Diehl box was made under this patent. This box was never sold separately from the motors. In the Diehl box the lever arm is pivoted to the cover, instead of to the base, with the result that, when the cover was removed for repairs the integrity of the box was destroyed. Then, again, the pivot point of the controller arm is inside of the box, which renders it necessary to leave an open slot in the end of the box, to permit the travel of the end of the contact arm.

The Beswick patent, No. 828,083, was granted August 7, 1906. It was for an invention designed to provide a compact portable attachment, which would be complete, self-contained, and capable of being readily set up and connected "to drive a sewing machine, polishing wheel, small lathe, or the like, and which will further serve when in position as a support for the table or bench upon which the machine is mounted." The Beswick box manufactured under this patent like the Diehl box, was never sold separately from the motor, and it could not be used, even with a Beswick motor, without the complete combination, including a metal frame cast for the purpose; and in the Beswick box, as in the Diehl box, the pivot point of the controller arm is inside the box.

The material difference between the starting boxes of the prior art and Taigman's box is the arrangement of the latter and the co-ordination of parts produced within a narrow compass in a container adapted for any kind of a machine on any kind of a stand. The Taigman box worked on all kinds of motors, and superseded both the Diehl box and the Beswick box. The record establishes the fact that Taigman was the first to give to the public a successful starting box for sewing machine motors, which was a unit complete in itself, adapted for attachment to any sewing machine stand, and for use in any sewing machine motor; and in the Taigman box the objectionable features previously pointed out in the Diehl and Beswick boxes have been overcome. The cover is removable without disturbing the integrity of the structure. The contact or controller arm is pivoted in one of the end walls, so that no open space is required for the movement of the projecting end of the arm, and there is no danger that sparks will escape therefrom. And it is very important that no sparks should escape from the control box, as they might readily set fire to the dress of the operators or the material upon which they were at work.

Claims 15 and 16 of the first patent require the contact arm to be pivoted in the end walls of the structure. That this might be accomplished it was necessary to enlarge the end wall near the opening for the reception of the contact arm, so that the spindle forming the pivot for the arm might be accommodated; and this feature of the device is not disclosed in the prior art.

As respects claim 3 of the second patent, the Miller and Marx patent does not disclose any brake. The Beswick patent shows a brake, but one mounted entirely separate from the starting box, and not form-

ing a part of the immediate combination. In the British patent we find a brake, and the brake and the control elements form a unit. But they are adapted for use on top of the sewing machine stand, and are intended to be operated by hand. The brake in this patent is supposed to operate on the fly wheel of the sewing machine rather than on the pulley of the motor. It is not intended to be connected with the treadle of the motor, and no means are shown for adjusting the brake.

The Wald, Britsch, and Taigman patent, No. 1,000,864, of August 15, 1911, was admitted, not as constituting a part of the prior art as to the first patent in suit, for it was not filed until April 15, 1911, but as against the second patent. Figure 8 of patent No. 1,000,864 discloses claim 3 of the second patent in suit, and the file wrapper of patent No. 1,000,864 shows that this feature was claimed in original claims 9 and 10 of the application. It appears, however, that before the patent was issued these two claims were canceled; and when the plaintiff made his application for the second patent in suit it was rejected on the Wald, Britsch, and Taigman patent, No. 1,000,864. The plaintiff thereupon filed an affidavit that he was the sole inventor of the device set forth in claim 3, and that it had been included in the former application by mistake, and Wald and Britsch also at the same time filed affidavits disclaiming the invention of claim 3 of the second patent in suit, or any part thereof.

It is plain that under the circumstances the disclosure made in connection with patent No. 1,000,864 cannot be used to invalidate claim 3 of the second patent in suit. Application for patent No. 1,000,864 was filed April 15, 1911, and application for the second patent in suit was filed April 3, 1912.

On the whole record, we hold that what Taigman did shows invention. He accomplished something which the prior patentees failed to accomplish, and contributed a practical advance to the art, which, though it may be slight, is sufficient to entitle him to maintain the validity of both patents, unless it appears that they are invalidated by prior use.

[3, 4] Several witnesses were called to show that, more than two years prior to the grant of the first of the patents in suit, the Taigman box was in public use. But the testimony upon which defendant relies to establish such use is not convincing or impressive. Such testimony was introduced in the first suit, and was regarded by this court as insufficient and too uncertain to establish the invalidity of the patent. In the present suit the defendant has called more witnesses than in the former suit, but their testimony remains open to the same objection. The witness Wald, called by the plaintiff, is mentioned in the opinion of the District Judge, who heard him give his testimony, as an "honorable, upright, and scrupulous" man, who impressed him most favorably. Wald, who was one of the original patentees of the first of the patents in suit, and should have known the truth as to any prior use, was asked: "Mr. Wald, have you any knowledge of the invention, which is the subject of the patent in which you are one of the joint patentees, having been sold, or publicly used, more than two years before you filed your application for that patent?" To which he an-

swered: "Not to my knowledge." The witness stated that neither directly nor indirectly did he have any financial interest in the patent at any time.

The District Judge, mindful of the criticism which the failure to call him in the first trial had called forth, expressed a desire to hear what the plaintiff, if he were available, could say on the subject of the prior use. His counsel thereupon stated that he was available, but that he was a man who did not thoroughly understand English, and that he was of a very excitable temperament, and that, as his business had been seriously interfered with by the acts of the infringers, if called to testify it was likely to excite him to a high degree. The District Judge stated that in the interest of winding up the litigation he thought it desirable to have him in court to be interrogated by the court as to the prior use. He accordingly appeared as a witness and was questioned by the District Judge. He stated that he had sold starting boxes prior to 1909, as he had all kinds of boxes, but that he had not sold any boxes like his patent prior to 1909, as his box had not been completed prior thereto.

Freedman, who was called by the defendant, testified also in the first suit, and we characterized his testimony in that suit as unreliable and improbable. In the present suit his testimony makes an equally unfavorable impression. The District Judge states that his present testimony "was absolutely unreliable," and states that he is convinced that he was trying to tell the truth, but that he had met with an injury which had gravely affected his memory. Desure, who also testified in the first suit, testified in this, and we characterized his former testimony as "loose," and pointed out why his testimony could not be accepted as establishing the prior use. That, of course, has no bearing upon his testimony in the present suit, with which we are now solely concerned. His testimony in this case on the direct is very brief. He states that he bought four starting boxes from Taigman in May, 1907, and that they were exactly like one of the exhibits which was asserted to be a Taigman box. But, after stating it was "exactly" the same as that box, he added: "The top was a little more straight. I cannot recollect whether this had a piece of wire, or had that thing in there (indicating)." Counsel for plaintiff did not deem his testimony of sufficient importance to cross-examine him upon how nearly the two boxes corresponded. In this he was contradicted by Taigman, who testified positively that his box was not completed until 1909. It could not, therefore, have been given away or sold prior to that time, if Taigman told the truth, and his testimony impresses us as that of a truthful man. As to the testimony of certain other witnesses, who thought they had Taigman boxes in 1907, the District Judge was far from satisfied that their memory was sufficiently reliable for the purpose of fixing dates which would defeat the patent.

The burden was upon defendant to establish prior public use and to establish it by proof beyond a reasonable doubt. This in our opinion defendant has not done. While we are not prepared to go quite so far as the District Judge went, and say that the prior uses were affirmatively disproved to our entire satisfaction, we think that the testimony

as to prior use is not sufficient to establish the fact beyond a reasonable doubt, which is what the law requires in such cases.

As respects claim 3 of the second patent, the lower court has held the prior use clearly established. In this view of the matter this court is unable to concur. In our opinion, the burden of proof has no more been sustained by the defense as respects the second patent than it was as to the first, either as to the exact mechanism of the device or as to its having been in prior use for the statutory period. So far as the proof is concerned, we are unable to see any difference between the use under the first patent and the use under the second. The one seems to us to be as good as the other.

The decree is therefore affirmed, with costs, in so far as it holds claims 15 and 16 of the first patent valid and infringed. It is reversed, with costs, in so far as it dismisses the bill for infringement of claim 3 of the second patent.

On Application for Reargument.

PER CURIAM. Defendant having contended that the second patent in suit (1,044,944) is anticipated by the prior Wald patent (1,000,864), and it appearing that the file wrapper and contents of said second patent in suit should in our opinion be put in evidence herein, as being material and relevant to said contention, it is ordered that the mandate herein contain the following directions:

Let the decree below as to the second patent in suit be vacated, and the issue as to that patent be remanded, with directions to reconsider said second patent, but only as to the anticipation alleged by said Wald patent; the court below, having considered the evidence offered in respect of such alleged anticipation, to make such final decree as to the validity and infringement of said second patent in suit as to law and justice may appertain.

Neither party shall recover costs in this court, costs below to be in the discretion of the District Court, and the directions as to costs, heretofore given, are modified accordingly.

## MATTEAWAN MFG. CO. v. EMMONS BROS. CO.

(Circuit Court of Appeals, First Circuit. September 12, 1918.)

No. 1319.

1. PATENTS ⇐112(5)—SUIT FOR INFRINGEMENT—DECISIONS OF PATENT OFFICE—WEIGHT.
When a court is asked to overturn a decision of the Patent Office on a question of fact, the proof should be clear and convincing.

2. PATENTS ⇐328—VALIDITY—METHOD OF STICKING FUR TO FELTED HAT BODY.
The Baglin patent, No. 508,462, for a method of sticking fur to a felted hat body, claims 1 and 2, *held* void for lack of invention.

3. PATENTS ⇐37—INVENTION.
It is not invention to apply an old force through known instruments used in their accustomed manner to known objects and producing known effects.

4. WORDS AND PHRASES—"CARROTED FUR."
"Carroted fur" is fur that has been treated by a solution of nitrate of mercury, so as to remove the water-repellent substance covering the fibers of the fur, causing the scales upon their surface to protrude to a greater extent than they do upon those of raw or uncarroted fur, and the body of the fiber itself to absorb moisture, making it more pliable and in this condition more easily to interlock with other fibers of fur, or of wool.

5. WORDS AND PHRASES—"STICKING"—"FELTING."
The processes of "sticking" and "felting," as applied to the manufacture of fur felt hats, only differ in the extent to which the fibers become interlocked. In the former process, only a part in length of the fur fibers becomes interlocked with the wool fibers, while in the latter process the fur fibers become interlocked with the wool fibers, or with other fibers of fur, for their whole length.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the Matteawan Manufacturing Company against the Emmons Bros. Company. Decree for defendant, and complainant appeals. Affirmed.

Fritz v. Briesen, of New York City (Briesen & Schrenk, of New York City, on the brief), for appellant.

Louis W. Southgate, of Worcester, Mass. (Charles T. Hawley, of Holden, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

JOHNSON, Circuit Judge. This is an appeal from the District Court of Massachusetts dismissing the bill of the plaintiff, which alleged infringement by the defendant of United States patent No. 508,462, issued November 14, 1893, to W. H. Baglin, whose title, by assignments, passed to this plaintiff February 2, 1909. Claims 1 and 2 of the patent are those which it is claimed were infringed, and this court has found them to be true method claims "whose validity and scope could only be

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

determined on final hearing." 185 Fed. 814, 108 C. C. A. 46. They are as follows:

"1. The herein-described method of sticking fur to a previously felted hat body, which consists in applying a layer of fur to the felted hat body and then subjecting the material to a combined pressing and vibrating jigging action, substantially as described.

"2. The herein-described method of sticking fur to a previously felted hat body, which consists in applying a layer of fur to the felted hat body and then subjecting the material to a combined pressing and vibrating jigging action, with heat, substantially as described."

The only difference between the two claims is that in the second the words "with heat" are added after the words "jigging action"; but nothing novel is claimed for the use of heat in the alleged method.

The validity of the patent was attacked on the ground that it was abandoned under section 4894 of the Revised Statutes (Comp. St. 1916, § 9438), which reads as follows:

"All applications for patents shall be completed and prepared for examination within two years after the filing of the application, and in default thereof, or upon failure of the applicant to prosecute the same within two years after any action therein, of which notice shall have been given to the applicant, they shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner of Patents that such delay was unavoidable."

Baglin filed an application for the patent on February 21, 1882. This application was placed in several interferences, and for more than seven years no action was taken in the Patent Office; but on December 9, 1890, the Commissioner of Patents entered an order for Baglin to show cause why his application should not be considered abandoned by failure to prosecute within two years, within the meaning of section 4894. In response to this order affidavits were filed, and on them the Commissioner of Patents held that Baglin's delay was unavoidable.

[1] The learned judge in the court below held, on the authority of Hays-Young Company v. St. Louis Transit Company, 137 Fed. 80, 70 C. C. A. 1, that the evidence introduced by the defendant was not sufficient to overcome the prima facie presumption in favor of the correctness of the commissioner's ruling, and we agree with him. We think that, when a court is asked to overturn a decision upon a question of fact by an executive officer of the government to whom the law has intrusted its determination, the proof introduced should be clear and convincing; and we do not find sufficient evidence to show that the decision of that preliminary question by the commissioner was so clearly wrong as to justify this court in setting it aside.

After the resumption of interference proceedings a decision was rendered in favor of Baglin and the patent issued November 14, 1893.

[2] The question presented for our consideration, and the only one which we find it necessary to consider, is whether the claims upon which the plaintiff relies are void for want of invention.

In manufacturing hats of wool and fur a layer of fur is placed or blown upon a felted hat body made of wool, the fibers of which have been compacted by a combined pressing and vibrating motion, usually with heat. The first step in the process is to make the layer of fur

stick to the hat body of felt, or to so unite them that, being subjected to pressure, scalding, and rolling, they may further unite.

Baglin, by his patent, claimed nothing new in the use of fur and wool to make a hat, or that there was anything novel in making the individual fibers of the fur, because of the scales upon them, penetrate the felted wool and stick to it until they could be made to penetrate still further by the pressing, rolling, and scalding processes to which the combined felt and fur were afterward subjected. Previous to his patent the preliminary sticking of the layer of fur to the hat body had been accomplished by hand with the use of brushes and hot water, by laying the hat body with the fur upon it on a perforated table through which steam was injected into the felted body, and by the dextrous use of a brush causing the fibers of the fur to penetrate the felt body to such an extent that the layer of fur and the felt body could thereafter be treated together, and a closer union of the fibers of the fur and those of the felt obtained. A jigging machine had long been in use in the manufacture of hats in felting fur and wool separately and in combination.

Baglin in his invention claimed to effect the old result of the preliminary sticking of the fur to the felt body by "a combined pressing and vibrating, jigging action," thus accomplishing by use of a jigger what had previously been done by hand by the use of brushes. For the success of this movement pressure was necessary, and with it a vibratory movement of the brush in the hand of the operator, because it is apparent that the skilled operator must have seen the necessity of separating the fibers of the fur by the short, vibratory movements of a brush before striking the fur with it to make the preliminary penetration of the felted hat body.

It is not claimed that Baglin invented the jigger or any new machinery, but that the process which he discovered was new. It had long been known that the exterior surfaces of hair fibers, as well as those of wool, were covered with scales, which all point in the same direction—away from the root or butt end, towards the tip of the fiber—and that because of these scales the fur fibers could be made to penetrate into a felted body, whether completely felted or only partially felted, and after this penetration they could not be removed.

In Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650, the structure of the fur fibers and the use of the same in the manufacture of hats is fully discussed, and it is there pointed out that the reason why the fibers of fur or of wool may be made to combine by pressure is due to the scales upon their surfaces, so that they may be made to interlock and combine. It is true that, by the use of the jigger, the process of sticking can be carried on more rapidly than by exerting the pressure by hand or with the old brush which had been long used; but the process is the same, and dependent upon the natural properties of the fur fibers, which, under pressure, can be driven into the interstices between the wool fibers, so that the fur will become sufficiently attached to the hat body to allow the two together to be subjected to other processes.

It is plain that the action of the jigger is not necessary to effect the result of sticking the layer of fur to the felt, and that what is meant

by "vibrating jigger action" is a vibrating action similar to that produced by a jigger; all of which movements counsel for the plaintiff admits in argument can be performed by hand, and we think were so performed before Baglin's patent issued.

We are unable to distinguish this case from Marchand v. Emken, 132 U. S. 195, 10 Sup. Ct. 65, 33 L. Ed. 332, in which a patent was held to be void for want of invention, which covered a method of making hydrogen peroxide that differed only from the prior method of making the same in that the liquids which were used to make the hydrogen peroxide were stirred by a revolving screw, mechanically operated, and given "a peculiar motion—one which cannot be given by hand—a continuous movement of rotation, horizontally in opposite directions from the center, or radially and vertically, or nearly so, according to the shape of the vessel." All the other steps were old. The novelty claimed was imparting to the liquid undergoing chemical change a rotary or eddying movement produced by the revolving screw. The court there held that "no intuitive faculty of the mind had been put forth in the search for new methods, creating what had not before existed or bringing to light what lay hidden from vision," and said:

"There is here no sufficient foundation upon which to rest a claim which, if construed as broadly as the complainant insists it should be, practically makes all pay tribute who stir the mixture in question by machinery, and by hand also, provided substantially the same movement can be produced by hand-stirring, and this seems to be a disputed question upon the proof"—citing Hollister v. Benedict Mfg. Co., 113 U. S. 59, 72, 5 Sup. Ct. 717, 28 L. Ed. 901; Dreyfus v. Searle, 124 U. S. 60, 8 Sup. Ct. 390, 31 L. Ed. 352; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 9 Sup. Ct. 83, 32 L. Ed. 390.

Nor can we distinguish this case in principle from Wright & Colton Wire Cloth Co. v. Clinton Wire Cloth Co., 67 Fed. 790, 14 C. C. A. 646.

If the plaintiff's patent is valid upon the ground that he has invented a new process, then not alone those who perform the operation of "sticking" fur to a hat body by a combined pressing and vibrating jigger action by use of machinery, but also those who by use of these movements effect the same result by hand, must pay tribute to the patentee. A combined pressing and rubbing by hand of the fur fibers against the felted hat body for the purpose of effecting a preliminary sticking of the fur to the felted body, it is admitted, is old in the art of making napped hats, and this is all that is effected by the use of the jigger.

[4] It was strongly urged in argument that the learned judge who heard the case below erred in his finding "that the use of vibrating jiggers for performing entirely analogous operations and securing entirely analogous results is proved to have been familiar in the art before Baglin's application," and that he had failed to distinguish between the art of "felting" and "sticking"; that in the former, carroted fur is used—that is, fur that has been treated by a solution of nitrate of mercury so as to remove the water-repellent substance covering the fibers of the fur, causing the scales upon their surface to protrude to a greater extent than they do upon those of raw or uncarroted fur, and the body of the fiber itself to absorb moisture, making it more pliable and in this condition more easily to interlock with other fibers of fur,

or of wool; while in the latter, where a napped hat is to be made, raw or uncarroted fur, which has not been so treated, is used.

While we do not doubt that the word "stick" means to those skilled in the art the preliminary union of the fibers of the fur with a felted hat body, and that sticking as a useful art may be the subject of a patent, it is nevertheless true that the manufacture of napped hats is old in the arts and that the method pursued by the manufacturer was to felt the roots of the fur fibers with the felted hat body. Burr v. Duryee, supra.

[3, 5] We think the process of sticking is analogous to the process of felting, and that the two processes only differ in the extent to which the fibers become interlocked. In that of sticking, only a part in length of the fur fibers becomes interlocked with the wool fibers; while in felting the fur fibers become interlocked with the wool fibers or with other fibers of fur for their whole length. It is not invention to apply an old force "through known instruments, used in their accustomed manner to known objects and producing known effects." All the forces applied by Baglin and covered by his claim were old. The jigger itself was a well-known instrument and used by him in its accustomed manner. The objects to which it was applied and the result produced were old. The old vibrating jigger was applied by Baglin to another use beside that of felting, and in its new use it introduced no new method in the art of sticking.

We therefore think, as did the learned judge in the court below:

"That the claims of the plaintiff are void for want of invention in that they purport to cover only the use of an old device for accomplishing by machinery the same pressure and rubbing which was formerly effected by hand."

The decree of the District Court is affirmed; the appellee to recover costs in this court.

## UNITED STATES v. SCHULZE.

(District Court, S. D. California, S. D. October 11, 1918.)

No. 1495.

1. CRIMINAL LAW ⊂⊃371(1)—EVIDENCE—INTENT.
Where the question of the intent and meaning of a defendant in using certain language is in issue, as in a prosecution for uttering pro-German sentiments, contrary to the Espionage Act, evidence that he used similar language on other occasions is admissible to show his mental attitude, but not as evidence of the fact that he used the language charged.

2. WAR ⊂⊃4—ESPIONAGE ACT—"SUPPORT OR FAVOR."
Under the provision of Espionage Act June 15, 1917, § 3, as amended by Act May 16, 1918, § 1, that "whoever shall by word or act support or favor the cause of any country with which the United States is at war * * *" shall be guilty of an offense, although not so stated in terms, intent is an essential element of the offense, as the words "support or favor" import willfulness and intent.

3. WORDS AND PHRASES—"SUPPORT."
"Support" means to vindicate, to maintain, to defend, to uphold with aid or countenance, and should be construed in practically the same sense as "favor."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Support.]

4. WORDS AND PHRASES—"FAVOR."
"Favor" means to regard with favor, to aid or to have the disposition to aid, to show partiality or unfair bias towards, and should be construed in practically the same sense as "support."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Favor.]

Criminal prosecution by the United States against Charles G. Schulze. On motion for new trial. Denied.

Robert O'Connor, U. S. Atty., and Lyle W. Rucker, Asst. U. S. Atty., both of Los Angeles, Cal.

A. J. Morganstern, of San Diego, Cal., for defendant.

TRIPPET, District Judge. At the time of the ruling on the motion for a new trial I promised the attorneys to file a written opinion, and this is in compliance with that promise. The defendant was convicted under an indictment charging him with violation of that part of section 3 of what is known as the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217, as amended by Act May 16, 1918, c. 75, § 1) which reads as follows:

"Whoever shall by word or act support or favor the cause of any country with which the United States is at war, or by word or act oppose the cause of the United States therein, shall be," etc.

The language of the statute does not read, Whoever with intent to favor the cause of Germany uses certain words; but the statute is, Whoever by word favors the cause of Germany. The statute does not by its terms require that the words should be knowingly and willfully spoken.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] The defendant moves for a new trial on the ground that the court admitted evidence that the defendant uttered pro-German sentiments on various occasions during the time from 1915 to the time the indictment was returned, over the defendant's objection. These statements of the defendant were admitted under the rule of evidence thus stated by Mr. Stephen:

"When there is a question whether a person said or did something, the fact that he said or did something of the same sort on a different occasion may be proved, if it shows the existence on the occasion in question of any intention, knowledge, good or bad faith, malice, or other state of mind, or of any state of body or bodily feeling, the existence of which is in issue, or is or is deemed to be relevant to the issue; but such acts or words may not be proved merely in order to show that the person so acting or speaking was likely on the occasion in question to act in a similar manner." Article 11, Stephen's Digest of the Law of Evidence.

There is no question here as to whether such evidence was admissible for the purpose of proving that the defendant said the things which the indictment charges he said. The court limited the effect of the evidence on the ruling admitting the evidence, and also in the instructions to the jury, to the purpose set forth in the above quotation from Stephen.

[2] The defendant argues that the government was not required to prove intent; that the mere utterance of the words constitutes the crime, and therefore this evidence was improperly admitted for the purpose of showing intent. (The word "intent" herein is used in the sense of malice, design, plan, purpose, and attitude of mind of the defendant.) The defendant argues that, where a statute denounces a certain thing as a crime, without specifying that the doing of the thing shall be done with a certain intent, then it is not necessary for the government to prove intent. The defendant's attorney illustrates his position by this:

If a defendant commits rape, prior acts cannot be introduced, because the crime is complete by committing the act, and the necessary intent is presumed; while, if the defendant commits assault with intent to commit rape, then prior acts may be proved to show the intent. In the section of the statute under consideration, nearly all the crimes denounced by this section specify that intent shall be a part of the crime. The word "intent" is used five times in this section, and the word "willfully" nine times. When the statute comes to prohibiting the use of words favoring the cause of Germany, it does not use the word "intent" nor the word "willfully."

The defendant says that the mere uttering of the words constitutes the offense. If that be true, then the witnesses who testified committed the crime denounced in the statute, because these witnesses on several occasions repeated the words of the defendant. Shall they be put to their purgation? If the mere uttering of these words by these witnesses made a prima facie case against them, then how can they defend themselves? Is the answer that they would defend themselves by proving that they did not intend to commit the crime, or that they were justified by reason of the fact that they were repeating this matter for the purposes of informing the authorities, or because they were compelled to? If so, why is that a

defense? Can a person commit rape, and defend on the ground that he was repeating an act that some one else had done? If the spoken words per se constitute the offense, then these witnesses could not defend by showing want of intent, any more than the defendant could defend by showing want of intent, when charged with rape. If these witnesses could defend by showing want of intent, it illustrates the necessity of reading into this statute the necessity of proving intent.

Intent is a necessary element of this offense, notwithstanding the absence of the words "willfully" and "intent." Words spoken in one set of circumstances may mean an entirely different thing from words spoken in another set of circumstances. If the American army are advancing and the Huns are retreating, and I say, "We cannot always hope to win," that is pessimistic. If the Huns are advancing, and the Americans are retreating, and I say, "We cannot always hope to win," that is optimistic. In order for the government to prove the crime, the government must give color to the words. One cannot look at these words uttered by the defendant, and say that they necessarily favor the cause of Germany. Some of the sentences would not convey that meaning at all, without intent being shown.

The government has charged that the defendant made the statements to support and favor the cause of Germany. The government was entitled to prove all the words uttered, and entitled to prove that each and every one of those words uttered were spoken to favor the cause of Germany. It might well be that the government would not be able to prove the entire charge, but might be only able to prove a part of the things uttered. Now, if that part proved, standing alone, unaided by the attitude of mind or the purpose of the defendant, would not show that the defendant uttered the words to favor the cause of Germany, then the government would have failed. The government did not know and could not tell which of these statements the jury would conclude that the defendant had said.

The government must negative in its proof the possibility of the words having been uttered without intending to support the cause of Germany, or opposing the cause of the United States. For example, the court uttered every word set out in the indictment at various times during the trial, in discussing this question. Then did the court commit a crime by uttering these words? The purpose of the defendant must be made manifest, and this can only be done by showing the circumstances and by proving the attitude of mind of the defendant.

**[3, 4]** The words "support or favor" import willfulness and intent. The common understanding of the meaning of these words is this: Support means to vindicate; to maintain; to defend; to uphold by aid or countenance. Favor means to regard with favor; to aid or to have the disposition to aid; to show partiality or unfair bias towards. These words should be construed in practically the same sense, "ejusdem generis." All the dictionaries give a definition of favor as a disposition to aid. This makes the attitude of mind or intent

an issue. Both words require action and purpose. One could not have the disposition to aid or show unfair bias towards, without intending to do so. To use the words willful and intent in the sentence defining this crime would be tautology.

The statute must have a sensible interpretation. To go no deeper than the words of the statute would be to stick in the bark. "For the letter killeth, but the spirit giveth life." Are we not justified in quoting Hamlet: "There is nothing either good or bad but thinking makes it so." The Supreme Court says:

"All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. It will always, therefore, be presumed that the Legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law, which enacted 'that whoever drew blood in the streets should be punished with the utmost severity,' did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the statute of 1 Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire, 'for he is not to be hanged because he would not stay to be burnt.' And we think that a like common sense will sanction the ruling we make, that the act of Congress which punishes the obstruction or retarding of the passage of the mail, or of its carrier, does not apply to a case of temporary detention of the mail caused by the arrest of the carrier upon an indictment for murder." United States v. Kirby, 74 U. S. (7 Wall.) 482, 486 (19 L. Ed. 278).

The Constitution provides:

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. * * *" Article 3, § 3.

It will be seen from this quotation that neither the word "willful" nor "intent" is used in the Constitution in defining treason. Intent is an indispensable element in the establishment of treason, and prior acts have always been admitted for the purposes of showing intent. Fries Case, 3 Dall. 515, 1 L. Ed. 701, Fed. Cas. No. 5,126; U. S. v. Burr, Burr's Trial, 1 Robertson, 472, Fed. Cas. No. 14,694; Respublica v. Weidle, 2 Dall. 88, 1 L. Ed. 301; United States v. Pryor, 3 Wash. C. C. 234, Fed. Cas. No. 16,096; Regina v. Deasy, 15 Cox's Crim. Cases (Eng.) 334; Regina v. Frost, 9 Car. & P. (Eng.) 129, 38 Eng. Com. Law, 70; Regina v. O'Brien, 7 State Trials (N. S.) 1, 75.

In the case of Fries, supra, the court said:

"However indisputably requisite it may be to prove by two witnesses the overt act for which the prisoner at the bar stands indicted, yet evidence may be given of other circumstances, or even of other overt acts, connected with that on which the indictment is grounded, and occurring or committed in any other part of the district than the place mentioned. Although the prisoner be not on his trial, nor is he now punishable, for any other than the overt act laid, other overt acts and other circumstances, parts of the general design, may nevertheless be proved, to show the quo animo—the intent—with which the act laid was committed." U. S. v. Fries, Wharton's State Trials, 82, 585, 594.

The court further said in the Fries Case:

"The intent is the gist of the inquiry in a charge of treason, and is the great and leading object in trials for this crime. The description of crimes contained in the act commonly called the Sedition Act [1 Stat. 596] lose their character, and become but component parts of the greater crime, or evidences of treason, when the treasonable intent and overt act are proved." Fries Case, 3 Dall. 515, 1 L. Ed. 701, Fed. Cas. No. 5,126.

In the trial of Burr, acts of treason elsewhere than as charged were held admissible, since they, "by showing a general evil intention, render it more probable that the intention in the particular case was evil." See 1 Wigmore on Evidence, § 367, note.

"In sedition (including seditious riot and seditious libel), other acts and utterances are receivable, under the present principles, to evidence seditious intent." 1 Wigmore on Evidence, § 367, p. 445.

See Respublica v. Weidle, 2 Dall. 88, 1 L. Ed. 301; R. v. Hunt, 1 State Trials (N. S.) 171; Regina v. O'Brien, 7 State Trials (N. S.) 1, 75.

My brother, Judge BLEDSOE, sat in the first trial of this case and the same evidence was admitted. Judge BLEDSOE advises me that, after a further consideration of the matter, he is clearly of the opinion that the evidence was properly admitted in the case.

Motion for a new trial will be denied.

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## THE JELLING.

## THE WILLIAM COBB.

(District Court, E. D. North Carolina, New Bern Division. September 27, 1918.)

No. 93.

1. SALVAGE ⊂=29—AMOUNT OF AWARD—RESCUE OF DISABLED VESSEL AT SEA. An award of $4,000, made to a steamship worth, with her cargo, $2,700,000, for the rescue of a schooner and cargo worth $12,000, from a point 50 miles off the North Carolina coast, where, after being driven 600 miles and disabled by a storm, she would have soon sunk, and was in effect abandoned by her crew, who came in a boat with their effects on board the steamer when she approached.

2. SALVAGE ⊂=26—ELEMENTS OF COMPENSATION—COST OF SERVICE. While the actual expense and loss of time of a salving vessel do not constitute claims for which payment may be demanded, they are items to be considered in fixing the amount of salvage compensation.

3. SALVAGE ⊂=26—ELEMENTS OF COMPENSATION—VALUE OF PROPERTY SAVED. Although the value of the salving vessel and of the time lost from her voyage may be large, yet the salvage award must be governed to a large extent by the value of the property saved.

In Admiralty. Suit for salvage by Carl F. Andersen, master of the Danish steamer Jelling, and others, against the schooner William Cobb. Decree for libelants.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

John D. Bellamy, of Wilmington, N. C., and J. P. K. Bryan, of Charleston, S. C., for libelants.

Julius F. Duncan, of Beaufort, N. C., for vessel owner.

J. O. Carr, of Wilmington, N. C., and Harrington, Bingham & Englar, of New York City, for cargo owner.

CONNOR, District Judge. The Danish steamer Jelling, owned by the Steamship Company Dannebrog, 2,639 gross and 1,673 net tonnage, 284 feet long, 42 feet beam, value about $2,000,000, Carl F. Andersen, master and agent, was on October 25, 1917, under charter to the Ward Line, at the rate of $40,000 a year, carrying a cargo of hemp, mahogany, cedar, etc., of 1,200 tons, valued at $700,000, on a voyage from Progreso to New York, passing up the coast of North Carolina, off Cape Lookout.

The Schooner William Cobb, an American vessel of 435 tons gross and 345 net, about 200 feet long and 30 feet beam, of the appraised value of $6,500, was carrying on October 25, 1917, a cargo of lump coal (500 tons) of the value of about $5,400. She sailed from Newport News, Va., October 11, 1917, for Ponce, Porto Rico. On the 18th day of October, when 150 miles southeast of Bermuda, she encountered a severe storm, described by members of her crew as a "tropical hurricane," which "brought the seas right over her decks continually," lasting about two hours, followed by heavy wind and rain, which continued about eight days. A member of her crew says:

"Her condition was getting worse. The crew didn't have to work night and day for the first three days, but after that they didn't know what it was to sleep. We had both hand pumps and gasoline pumps working. We had trouble with our pump continually; that was the aft pump. The forward pump was in good condition. We were kept working continually. We were pretty well puzzled as to where we were drifting, because we could not get a sight for four or five days. At times we did not know where we were. We went along doing as seamen should for the safety of navigation, pumping out our vessel and getting what sleep we could. There were times when we had no sleep, working as much as 22 out of the 24 hours to save our vessel. We watched for five days for a vessel to come along, but we couldn't see anything. One vessel passed us; we had signaled her, but she had never stopped. * * * On October 25th the vessel was leaking badly. We had already pumped her out at 3:30 in the morning, but the water was coming in at the rate of about six inches an hour. * * * The storms were so terrific at times that it was hardly possible for us to work our big pump. The sails at times, before we were able to get them in, had done away with one of our jibs, and another time it broke one of our brooms. The sails would not act at all. We merely kept up what sail we could to steady our ship; one gaff and one boom were broken."

Another member of the crew says:

"The storm was severe, and naturally the ship was leaking a little bit, and the storm makes her leak more, and the leaking was in the bow. Naturally by the storm we couldn't keep up to the wind, and we had to keep up to the wind for our course; but we couldn't do it because, every time a sea would come over, all the water would come through the bow, so we had to keep her off, and run her before the wind to keep her from sinking. We were trying to keep her from sinking for about seven days, pumping day and night. The storm took the flying jib. The foregaff was broken. The pump, before we left port, was not in proper order. The captain's mistake; he forgot. He took the measure for the top plunger, but when we went ashore he forgot to

bring it; for the pump to pump, we had to get on top and hold a broom down to hold the pump down. The hand pump could not keep the water down."

Capt. Sabean says that:

"The storm raged with great severity for about 36 hours. It continued to blow with severity, but not so great, up to the 23d of October; pumped both day and night to keep the water down; did this up to two days before the 25th. A couple of days before the 25th one of the pumps was put out of commission."

On the morning of October 25, 1917, the schooner was on the North Carolina coast, about 50 miles from Cape Lookout, and about 600 miles from where she first encountered the storm. The steamer Jelling was on her voyage to New York. The schooner was showing her distress —signal flag upside down. Capt. Sabean says:

"Between 2 and 3 o'clock on the morning of the 25th we sighted the steamer. I ordered my torch to be burned in order to communicate with the steamer. She came down on us about 3:30 a. m. * * * I shouted, and, as near as I could make out, the captain asked me what was the trouble. I said back that my vessel was in a sinking condition and would like to have some assistance, if not to be taken off my vessel. Some of my crew shouted out that the vessel was sinking, and I said, 'Don't shout out that we are sinking, because we are not, but sing out, if you want to say anything, and say we are in a sinking condition.'"

Capt. Andersen, of the Jelling, says that about 2 o'clock on the morning of the 25th of October, his second officer, on watch, sighted on the port bow a distress light of an unknown ship; called his attention, he being asleep; came at once; determined the vessel's course from the distress light; steered towards the schooner for about an hour; ten miles away, closing up under the stern of the vessel, heard some one shouting; could not understand what was said; used my megaphone, asking, "What is your trouble?" Answer came, "We are sinking and want to be taken off"; turned my vessel around, and distress signal was again shown on schooner's stern; came again close, and through megaphone asked, "Are you in imminent danger there? I will help you off, or can you wait until daylight?" The captain answered back, "Yes." Some of the crew said, "No; we want to be taken off right away." Turned my ship around and came near the ship's stern again. Still very dark, and very high sea; found that the schooner had lowered her boat and the crew got into it; asked, "Are you coming over in your own boat?" "Yes," was the reply; answer, "All right; we will stand by you." The boat was between the steamer and the schooner, on the off, or port, side of the steamer; ordered the boat to go round on her lee side, where there was smooth water.

Capt. Sabean, concurring substantially in the statement of Andersen, says that he told his men to put their clothes in the boat; there were provisions and water in the boat; to lighten her, ordered the water vessels thrown overboard; put his own clothes, chronometer, compass, charts, and some other little instruments; did this in case the captain would not give his tow line; would have to leave his vessel, because he did not think it safe to stay aboard, if he could not get any assistance, as his after pumps had been put out of commis-

sion by the storm and his gasoline was about gone; had no way to get to a port and was about 50 miles from this port. I said:

"We will leave our side lights up, leave her sails up, and have a light on her stern, so nothing will collide with her. We will not set the vessel on fire, will not destroy her, until I can see what the captain will do for me. If he doesn't give me any assistance, will not tow her; we would come back and spill what gasoline we had forward, and touch a match to her and burn her up."

The testimony in respect to the action of both captains, up to this point, is corroborated by all of the witnesses. Among other things taken over in the boat were the clothes of the crew and a parrot. When the small boat reached the lee side of the steamer, by direction of the captain and officers of the Jelling, several of the crew went on her by the ladder, and others were hoisted up with the boat by the tackle of the Jelling. The contents of the boat were taken off. There is some, although not material, difference of opinion in regard to the condition of the sea when the boat went to the side of the steamer. There was some swell, but "not heavy." The boat encountered no difficulty in going to the side of the steamer, as directed.

[1] Eliminating, for the moment, the testimony in regard to which there is some contradiction, it is conceded that the captain and crew of the schooner were invited to come on board—were given coffee and sandwiches; that the men were very weary and much exhausted by their experience on the schooner, and went to sleep. They reached the steamer at about 4:30 o'clock in the morning. Capt. Sabean says, after he boarded the steamer, and the small boat was hoisted up:

"I went up on board, shook hands with the captain, stopped there a few minutes on the main deck, and he and I went up on the second deck, where his chart room was. In his chart room, he and I went over the position we were in and our nearest port, and I approached the question to him that I would like for him to put a line to my vessel; but he didn't give me any decided answer about it. A short time after the subject was brought up again about doing something for my vessel, and in the conversation we were having the captain said, 'I will not put a line to your vessel unless you give me full charge.' I said, 'Captain, can't we make some arrangements; I am helpless, don't want to lose my vessel, and by having some gasoline and your assistance my fore pump will keep my vessel afloat, if it helps this vessel to reach port.' He said, 'No, captain, we cannot make any arrangements; the courts will have to decide that.' I said, 'If we could make an agreement, why would we have to settle in the court?' He said, 'I have got two owners; the vessel is owned by some people, and she is chartered by other people, and I would have to let them decide.' I said, 'I am willing to pay you a reasonable price to take my vessel in, or I will pay you at the same rate, whatever your vessel may be now earning, for the time of the service.' We could not come to any agreement, and rather than not have him put any line on my vessel at all, I agreed, or had nothing more to say at that time about saving my vessel, but let him go ahead and put his line aboard if he would."

Capt. Andersen says that, after the captain and crew of the schooner came on the steamer, he made up his mind to keep around her until daylight to investigate her condition. At about 6 o'clock he sent his chief officer, third engineer, a carpenter, and three seamen to the schooner to investigate conditions, take soundings in her bilges, and see if there was any possibility of saving her. They returned

about 7 o'clock and reported that she was an old vessel, in good condition, but had five feet of water in her hold and leaking heavily; thought it would be difficult to save her under the circumstances; the motor pumps were out of order; none of them were working; that he thought it would be possible to repair the forward motor pump and get it to run. He called his officers together on the bridge and consulted them in regard to trying to save the vessel. They agreed to try to do so. He says that, up to this time, nothing had been said to him by Capt. Sabean about saving, or towing, the schooner.

"When he saw I had a meeting of my officers about 7 o'clock, he came to the lower bridge and said, 'Are you going to save her?' I replied, 'I don't know, captain; I might do it.' He asked me how much towage would cost. I said, 'I don't know.' He said, 'Well, could you take her in for $5,000 or $6,000, which I could pay if you started towing her?' I said, 'Captain, you are aboard her now, and I don't know if I will save her; but, if I do take her in tow, the costs must be left with the proper authorities, if I get the ship into a safe port.' He had never asked me to tow her in any way. I personally decided to take that vessel in tow; he had never offered, or asked me, such a question about turning her over. When the captain came on board, it was about 7 o'clock, he asked me; but I told the captain that, if he and his crew was on board the ship, then I could not take the ship in tow, as there could not be any salvage money near the value of the cost of my ship, and delay and expense, and that I would not tow her into port under the present condition, if he stayed on board the ship. He never asked me for any gasoline."

There is evidence tending to corroborate both captains in regard to this conversation and the time at which it occurred. The weight of the evidence brings me to conclude that the conversation took place at the time fixed by Andersen. When the crew reached the steamer at 4:30 in the morning, they were physically exhausted; after getting coffee and sandwiches, they went to sleep. I am of the opinion that, when they left the schooner, they did not expect to return, or that it would be saved. The thought of towing, I think, came when Sabean found that Andersen had sent his men to examine the schooner and her condition, and heard the discussion and decision of Andersen and his officers to try to save her. This was natural and proper. Upon finding that there was a chance of saving his ship, it was his duty to the owners to try to make terms with the salvors. Andersen instructed his officers and seamen to get their breakfast and go aboard the schooner. At about 9 o'clock, they went aboard her with one day's rations and 10 gallons of gasoline.

Loeber, second officer of the Jelling, went to the schooner with Nielson and three sailors. He says:

"The pumps were in poor condition—would not work; told Nielson to go to work on them; took the sails down; foregaff was broken in two places; main boom was broken; at the aft pump water was about 4 feet 6 inches; at forward pump, about a foot and a half over the keelson; caulked the hand pump; water was rushing in; the two sailors worked the hand pump. The steamer came near, and we connected the hawser to the schooner and proceeded to tow under slow speed, in order not to part the hawser line; proceeded to Beaufort, the nearest port; she was leaking heavily, and the men were working the pumps; at about 11 o'clock proceeded under faster speed. At about 2 o'clock afternoon, reached Cape Lookout light vessel; water pump-

ed down to two feet, and sea had become smooth; from 9 o'clock a. m. until noon thought schooner could not be saved, and came very near abandoning her; water poured in so rapidly. At about 6 o'clock p. m. flashed for a pilot in bay of Cape Lookout; came at 6:35; the schooner was anchored at 7 o'clock; pilot advised not to enter bar during dark hours; second officer came on board steamer for consultation; said two feet water still in bilges; would have to pump all night; needed more gasoline, which was given him; got two pilots for both schooner and steamer. At 7:35 a. m. passed over bar of Beaufort; at the same time the schooner grounded and the hawser parted. In order to keep the vessel in position, her starboard anchor was dropped, with 15 fathoms cable. The pilot proposed to send a tug to save the schooner when it came at high water, but I told him that I would come back with my steamer and take her in myself. He said that it was a dangerous job; the tide was running at four knots, and the channel was very narrow, and the ship could not swim. Proceeded in the harbor with steamer; turned her around; came around and returned in the harbor; went over the bar again, and came back and anchored just ahead of the schooner standing at the bar; got a new tow line on schooner. The vessels were then in a very critical position, both vessels, about 10:30, as the wind changed from northeast to southeast, with a strong wind. At 11 o'clock ordered to cut the cable on the schooner; its motor windlass would not lift the anchor; when released from her anchor, the Jelling proceeded slowly ahead, the schooner floated, and at 11 a. m. she was anchored in Beaufort harbor. The cable was cut, because the vessel was in such a position that the anchor, which was standing from the starboard towards aft, could not be lifted with the schooner's motors and windlass. It was in bad condition—the steamer was in a critical condition and had to cut the cable; otherwise, it would have been stranded on the bar, and the schooner might have stranded as well, and possibly we would have torn a hole in her."

There was some contradictory evidence in regard to condition of the sea; it was "choppy"—not unusually rough. The schooner was turned over to the marshal on the 28th at 8 o'clock a. m. The captain and crew of the schooner remained on the steamer until she came into Beaufort. They were not requested, nor did they offer, to assist in bringing the schooner into port. The steamer consumed about 35 tons of coal in handling the schooner, worth $8 a ton, and 50 gallons of engine oil. The hawser was worth $355. A rail on the starboard side of the steamer was broken, worth about $50. The board of each of the crew of the schooner was worth $1.50 a day. The schooner was appraised at $6,500, and released upon bond. The coal was sold at public auction for $11.25 per ton, weighing 490½ tons, aggregating $5,518.12.

Libelants insist that the schooner was abandoned by her crew, and was, at the time she was taken in charge by the crew of the Jelling, a derelict. Respondents insist that the crew did not abandon her; that they intended, when they left to go to the Jelling, to secure her services in towing the schooner into port; that with a supply of gasoline they could have kept the water down. The evidence tends strongly to show that, in the absence of aid, the schooner would have sunk in a short time—a few hours. I am constrained to think that this fact was recognized by her captain and crew; that they were exhausted physically, and knew that their pumps were in "bad condition." They did not, in my opinion, formed upon considering all of the testimony and their conduct, expect to return to the schooner, except possibly to burn her, to prevent her becoming a menace to navigation. I do not doubt that, but for the action of the captain

and crew of the Jelling, she would have, in a few hours, been a total loss. It is not very material to inquire whether, under the conditions disclosed, she was a derelict. She was certainly in imminent peril—as her captain said, "in a sinking condition"—when overtaken by the Jelling on the morning of October 25th.

In view of the small value of the property saved, much less than libelants supposed at the time they undertook the work, as compared with the value of the steamer Jelling and her cargo, the amount of her earnings per day under the charter, and the time consumed in bringing the schooner into port, there is but a small margin for a bounty to the libelants. While but little aid is derived from adjudged cases, each depending largely upon the peculiar conditions, I find a very satisfactory statement of the principle or rule by which courts are guided in making awards, under conditions somewhat similar to those disclosed in this case, laid down by Judge Sanborn in The Western Star (D. C.) 157 Fed. 489. He says:

"The important considerations affecting a salvage service are whether the aided vessel could have saved herself, or was in probable danger of destruction or serious damage, and, if so, her value; what was the degree of danger to the vessel aided; * * * also whether the salvage service was rendered with promptitude, skill, vigor, and energy, and was successful; what was the danger or hazard in rendering the service, and what was the value so risked, the time spent, its value, and the damage or loss to the vessel by which the service was rendered. * * * Further, it should also be taken into account, although perhaps of minor relative importance, whether the owners of the property saved have acted reasonably in offering reward, or so unreasonably that the salvor is compelled to assume the delay, vexation, and expense of litigation to establish his rights."

Applying this standard for measuring the amount which should be awarded to the Jelling, it is manifest that the schooner was in imminent danger, without the aid rendered by the Jelling. She would have sunk very soon, resulting in total loss. The value of the schooner and her cargo is ascertained by appraisement and public sale. The value of the Jelling and her cargo, fixed by her master, is not controverted; they were, as compared to the schooner and her cargo, large.

I am unable to find that either the crew, or the steamer, or her cargo were in any serious danger, by reason of the deviation and service rendered. I am not impressed with the suggestion, somewhat exaggerated, that the sea was very "rough," or that there was any unusual "swell." The boats had no difficulty in going to and from the two ships. The schooner followed the Jelling, when taken in tow, without difficulty.

The service was rendered promptly, and with skill and energy. I do not think that there was any delay for which the captain and crew of the Jelling can be criticized. The service was skillful and, in all respects, successful. The question which has given me most concern is in fixing the amount which should be awarded by reason of loss of time sustained by the Jelling in rendering the service. Fixing the beginning of the period at, approximately, 2 o'clock on the morning of Thursday, October 25, 1917, that being about the hour at which she sighted the schooner, and stopped on her course, she completed the service—anchored the schooner in Beaufort harbor—at 11 o'clock Friday morning, October 26th. She took on a supply of coal at about noon

Saturday, October 27th, and on the same day filed the libel in the court at New Bern, about 37 miles distant from Beaufort, with a railroad connection—having two trains each day. The libel was served, and schooner taken into custody by the marshal, at 8 o'clock on Sunday morning, October 28th. The captain remained at Beaufort, for the purpose of having the deposition of himself and his crew taken, until the night of Monday, October 29th, getting back on his course at 10:30 p. m. of that day.

Passing the question whether, after anchoring the schooner at Beaufort and getting a supply of coal, he should not have placed one or more of his crew on the schooner, until an effort could be made to agree upon a reasonable amount for the service, or a libel filed, it is clear that he was entitled to remain at Beaufort until he secured and took on coal, noon of Saturday, October 27th. Conceding his right to await the coming of the marshal on Sunday, October 28th at 8 o'clock a. m., it would seem that, in view of the large expense incurred by the delay, he should, at a favorable condition of the tide, have resumed his voyage not later than midday of Sunday. He brought the schooner in on full tide at 11 o'clock on Friday. There is no suggestion that weather conditions prevented the Jelling from going out at or about the same hour on Sunday, October 28th. Counting from 2 o'clock a. m. on Thursday, October 25th, it would seem that the Jelling should have returned to the point from which she first sighted the schooner, 50 miles from Beaufort, by 2 o'clock on Sunday, thus being delayed 3 days and 12 hours from the time she began the service. This, of course, is but approximate. She claims that the time consumed was 4 days 20 hours and 15 minutes, making 1 day and 8 hours longer than would seem to have been necessary. I do not think that, in the absence of any effort to agree upon compensation with the captain of the schooner, who was at Beaufort, and who says that before the service was rendered he proposed to pay $5,000 or $6,000 to be taken into port, that the time consumed in taking the deposition should be charged to the schooner, at the rate of $1,333 a day.

[2, 3] While the actual expense incurred, or loss of time by the Jelling, do not constitute claims for which payment may be demanded, they are items to be considered. The rule by which courts of admiralty are guided in respect to them is stated by Kennedy:

"Whilst the amounts of damage, expense, or loss of profits ought not, under ordinary circumstances, to be taken as 'fixed figures,' or 'moneys numbered,' to be added to the amount of the reward for actual salvage services, the fact that such damage, expense, or loss has been caused by the performance of the salvage service is a fact which the court ought never to disregard in assessing the amount of the reward. But all the circumstances, of which this is only one, must be considered together, and it does not follow necessarily that, because the salvor proves such damages, expenses, or losses, the court should fix the sum awarded high enough to cover them. On the contrary, the salvage service may itself be so trivial as to make it unjust, or the property salved may be of so small a value as to make it impossible to cast the burden of such an indemnity upon the owner of the salved property. * * * When, however, meritorious salvage services have occasioned to the salvors serious pecuniary loss, and when the value of the property saved is ample, not only to defray the loss sustained by a salvor, in addition to an adequate sum for salvage proper, but also to leave a substantial surplus

for the owner of the property saved, the salvor should be remunerated with a sufficient sum, both to reward him for his risk, labor, skill, and conduct, and also to cover any damages, expenses, and losses incurred through rendering the service." Kennedy on Civil Salvage, 133.

If, in this case, the value of the schooner had been "between $50,000 and $75,000," as alleged, and as the captain of the Jelling supposed, when he "made the venture" of salving and securing a large award, if successful, instead of accepting the offer for towage service, for a fixed sum, he would have been entitled to a reward very much larger than the value of his prize, as now ascertained, justifies. It would be manifestly unjust to take practically the entire value of the schooner and cargo as a reward for services which could have been rendered by a ship of very much less value and "towing power" than the Jelling, because of the large amount which she was receiving under the terms of the charter party. While the salving vessel is to be rewarded liberally for salvage service, because of the risk which she takes of receiving nothing, if unsuccessful, she also takes the risk of error in the valuation which she places on the vessel saved.

There was, in the conduct of the captain and officers of the Jelling, every element of calculation and careful consideration of the conditions, with ample opportunity for estimating the chances of success and pecuniary reward. The only error made in their calculation was in respect to the value of the William Cobb. After the schooner was anchored, with a day's time and ample opportunity for examination, the captain in his libel swore that the value of the schooner was "between $50,000 and $75,000," and her freight money $7,500. It must be assumed that he honestly thought this was true and undertook the service on that basis. While the testimony is contradictory in regard to the time at which the captain of the schooner asked the captain of the Jelling to tow the schooner into port for an agreed price, it is clear that such a conversation was had, and that his proposal to enter into such a contract was declined.

I am not inadvertent to the fact that, by reason of the local conditions following the anchorage of the schooner, the coal sold for an amount in excess of its value on board. The delay in surrendering the William Cobb to her owners, from October 28, 1917, to January 16, 1918, was due to unusual weather conditions preventing an earlier delivery of the coal.

After a careful consideration of all of the factors entering into the situation, with which all parties were confronted, I am of the opinion that an award of $4,000 should be made to the Jelling and those of her crew who assisted in the service. Each party will pay its own witnesses, including costs of subpœnas, service, and taking depositions. The other court costs will be divided equally between libelants and respondents, each paying one-half. This will include the cost of appraisal rendered necessary by the excessively exaggerated valuation put upon the schooner in the libel.

The apportionment of the amount of the award to be paid by the schooner and cargo will be provided for in the final decree. The clerk will make and report to the court a statement of the cost and expenses incurred, when a final decree will be drawn.

In re REISWIG.

VALLELY v. GALBRAITH.

(District Court, D. North Dakota. October 10, 1918.)

1. BANKRUPTCY ⊜272—ADMINISTRATION OF ESTATES—DUAL ADMINISTRATION THROUGH GENERAL ASSIGNMENT AND BANKRUPTCY.
The practice of the Northwestern Jobbers' Credit Bureau, one of a number of corporations organized by jobbers, and whose stockholders usually own a majority in number and amount of claims against insolvent mercantile debtors in a number of districts, in handling the estates of such debtors, *held* to require careful scrutiny. Such practice has been frequently to pass the estate first through a common-law assignment, and then through an administration in bankruptcy, resulting in dual expenses of administration, to the detriment of creditors outside of the Bureau.

2. BANKRUPTCY ⊜288(3)—JURISDICTION OF COURT—SUMMARY PROCEEDINGS.
Where bankruptcy succeeds a common-law assignment within four months, based on the assignment as an act of bankruptcy, the bankruptcy court has jurisdiction by summary proceedings to call upon the assignee to account for funds withheld for fees and expenses.

3. BANKRUPTCY ⊜288(3)—SUMMARY JURISDICTION—ADVERSE CLAIMANT.
A common-law assignee holds the property as agent for the assignor, and where bankruptcy follows within four months the fact that he claims a certain part of the funds still in his hands for fees and expenses does not convert him into an adverse claimant.

4. BANKRUPTCY ⊜474—PROCEEDINGS BEFORE REFEREE—ALLOWANCE OF COSTS.
A person brought before a referee in bankruptcy by an order to show cause, on a successful defense, is not entitled to have his bill for expenses and attorney's fees taxed and paid from the estate.

In Bankruptcy. In the matter of Conrad C. Reiswig, bankrupt. On petitions of John Vallely, trustee, for review of order of referee, and of John P. Galbraith for review of second order. Reversed as to first order, and affirmed as to second.

Fisk & Murphy, of Minot, N. D., for petitioner.

Todd, Fosnes, Sterling & Nelson, of St. Paul, Minn., for respondent.

AMIDON, District Judge. Respondent, John P. Galbraith, was assignee under a common-law deed of assignment of the bankrupt's estate, dated August 18, 1917. He immediately took possession and sold the stock and fixtures for $12,340.09. From collections and other minor items, he brought the total of the estate up to $13,289.78. Within four months after the assignment, to wit, December 3, 1917, an involuntary petition in bankruptcy was filed, and on December 22d adjudication was made. The petitioner, John Vallely, was elected trustee, and qualified on January 21, 1918. On February 4, 1918, respondent, Galbraith, filed with the referee in bankruptcy his report and account as assignee, which showed receipts as above, and set forth a detailed statement of disbursements, amounting to $1,631.53, leaving a balance of $11,658.25, which he turned over to petitioner as trustee in bankruptcy. The residue, to wit, $1,631.53, Galbraith retained as legitimate disbursements and fees under the common-law assignment. The report closed with a prayer for an

order "approving and allowing said account, and approving all acts of your petitioner as such common-law trustee."

Upon this report and a brief petition by the trustee in bankruptcy, the referee, under date of April 18, 1918, made an order upon respondent to show cause why he should not pay over to the trustee $1,474.10 of the sum withheld by him as common-law assignee, embracing such items as his fees, $430.33, and expenses for taking the inventory and investigating the business condition of the bankrupt. In response to this order respondent entered a special appearance, and objected to the jurisdiction of the court on two grounds, to wit: (1) That respondent is a resident and citizen of the state of Minnesota, and not within the territorial jurisdiction of the court. This objection was not pressed, and was plainly untenable, in view of the fact that respondent by his report had submitted himself to the jurisdiction of the court. (2) That respondent is an adverse claimant to all moneys referred to in the order to show cause, and cannot be held to show cause in this summary proceeding. The referee withheld his ruling upon this objection, and thereupon, without waiving the objection, respondent produced his evidence, going fully into his administration of the estate as common-law assignee, and attempting to show that the sums charged were all reasonable and beneficial to the estate. At the conclusion of the hearing the referee dismissed the order to show cause, upon the objection to the jurisdiction of the court to proceed otherwise than by plenary suit. This ruling is certified to the court for review on petition of the trustee.

Respondent presented to the referee a cost bill for expenses and attorney's fees in connection with the order to show cause, amounting to $377.80, and asked that the same be taxed and that the trustee be ordered to pay the amount out of funds of the estate, as part of the expenses of administration. The referee denied this petition, and that ruling has also been certified to the court for review on petition of respondent.

[1] The case is of greater importance than the pecuniary interest indicates. It involves the power of courts of bankruptcy to deal by summary order with a practice that has become general of passing estates of insolvent retail merchants through both common-law assignment and bankruptcy. A brief summary of the facts disclosed by the record will be necessary to present this practice.

Respondent, Galbraith, is general manager, treasurer, and secretary of a corporation known as the Northwestern Jobbers' Credit Bureau, organized under the laws of Minnesota. Its stock is mainly held by jobbers located at Minneapolis and St. Paul. The objects of the Bureau are:

"First, the exchange of ledger information between subscribing members; second, the investigation of the estates of failing debtors and the liquidation of their affairs; third, the obtaining of evidence in order to assist in the efficient prosecution of fraudulent failures."

The Bureau is one of 65 similar organizations located in important wholesale districts throughout the United States, all of which operate under the general supervision of the National Association of

Credit Men of New York City. These bureaus co-operate with one another in liquidating estates of insolvent merchants, and in mercantile cases almost invariably represent a majority in number and amount of creditors. The Northwestern Jobbers' Bureau, although a corporation, having capital stock, does not pay dividends. Its earnings are first used to pay salaries of employés and the overhead charges. The surplus earnings are used in assisting in the prosecution of fraudulent bankruptcies. Mr. Galbraith is paid a salary of $6,300, and the numerous other employés are paid salaries ranging from $1,500 to $3,000 annually. The Bureau also has at its command a corps of experts upon whom it may call to take inventories, investigate business transactions of merchants, and dispose of stocks that come within the control of the Bureau. It also has a force of clerks, and such other assistants as experience has shown to be necessary in transacting its large business. In districts other than Minnesota it has one or more men whom it regularly elects as trustee in bankruptcy. Mr. Vallely usually acts for it in that capacity in North Dakota. The Bureau extends over the states of Minnesota and North and South Dakota, and parts of Wisconsin, Michigan, Iowa, and Montana, and handles about 300 estates per year. It collects a fee of 5 per cent. upon the amount distributed to creditors, or, in case a common-law assignment is succeeded by bankruptcy, 5 per cent. of the amount turned over to the trustee in bankruptcy. In addition to this fee it charges for the wages paid to special employés for conducting investigations, taking inventories, etc.; also for attorney's fees paid out by it, and numerous smaller sums for postage, stationery, stenographic work, etc.

In about one-third of the estates the practice has grown up of first taking a common-law assignment. Under this the estate is converted into cash, and the affairs of the merchant carefully investigated. Sometimes the estate is distributed under the assignment, but more frequently a petition in bankruptcy is later filed, and the estate finally distributed under the Bankruptcy Act. In these deeds of assignment, and in bankruptcy cases in Minnesota, Mr. Galbraith is named as assignee and trustee. He acts throughout as the agent and officer of the Bureau. All funds received by him are paid into a trust account of the Bureau. Against this Mr. Galbraith draws checks on behalf of the Bureau for the payment of dividends to creditors, or for turning over funds to a trustee in bankruptcy. Sums deducted for expenses, and the 5 per cent. fee of the Bureau are passed to an "expense account." The fee and all sums charged for by the Bureau belong to it, though they are presented in the accounts of the assignee and trustee as his fees and expenses. Out of the fund created in the so-called "expense account" the salaries of Mr. Galbraith and the other regular employés are paid. Thus it is clear that, while he acts as trustee under the deed of assignment, he in fact is acting simply as the agent of the Bureau, and all funds coming into his hands as assignee are held by him as its agent and officer.

It was stipulated upon the hearing that Mr. Galbraith and the Bureau are amply able to respond to any order made by the referee

or the court for the restoration of any part of the sum withheld under the common-law assignment.

From this statement it is plain that the power of the Bureau over the estates of insolvent retail merchants ought to be subject to the careful scrutiny of courts. It is a permanent organization and continuous in its activities. It thus acquires a skill and power such as other creditors do not possess. It is efficient, and I do not in this opinion make any reflection upon the integrity of its policies; but such agencies representing a single class, so long as human nature is what it is, are likely to develop practices such as are almost inseparable from a permanent bureau, and also such as press their rights beyond the limits of what is just and fair. While it is true in mercantile failures that wholesalers, constituting as they do a majority in number and value of creditors, are entitled to the influence which the law gives to those having such majority, it ought never to be forgotten that the power thus exercised is in the nature of a trust, and can never properly be used to secure to the wholesale merchants, or the agents of the bureau acting in their behalf, any unjust advantage. Their position is the same as that of a majority of stockholders with respect to the minority, as explained in the memorable opinion of Judge Sanborn in the case of Jones v. Missouri-Electric Co., 144 Fed. 765, 75 C. C. A. 631. It is also true that the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544) speaks in unmistakable terms against exorbitant or duplicate expenses. This feature of the act was emphasized by section 72, which was added by the amendment of 1903 (Act Feb. 5, 1903, c. 487, § 18, 32 Stat. 800 [Comp. St. 1916, § 9656]). Courts, whenever their attention has been called to unreasonable or illegal charges, have been prompt and firm in applying the remedy. They have also declared with equal emphasis that services rendered under a common-law assignment can only be allowed in case a petition in bankruptcy is filed within four months after the assignment, when the services are shown to have been beneficial to the estate, and then only to the extent to which they have been beneficial. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165, and the many cases in the lower federal courts which have followed that decision. It is manifest, therefore, that the practice of passing estates of insolvent merchants through both a common-law assignment and bankruptcy has the burden of justifying itself, unless the mere statement of account shows the practice to have beneficial as to a particular estate.

My attention has within the past few months been called to certain concrete cases by the clerk of court of this district, by some of the referees, and also by clerks of courts of other districts of the Eighth Circuit in which I have been sitting, which show clearly that these bureaus have already developed practices which need correction. Fortunately in this district the whole subject has been brought under examination by an able examiner of the Department of Justice, Mr. Delmas C. Stutler. He has submitted a detailed report to the Attorney General, a copy of which has been transmitted to me. I set forth in a note a quotation from this report, believing that it

will not only show the reason why I think there is cause for careful supervision over the conduct of this particular bureau, but in the hope that this full statement of the subject will lead to a more careful supervision of the practices of similar bureaus in the administration of insolvent mercantile estates in other districts.[1]

None of these practices have ever been brought to my attention by appeal or certificate. This is due to the fact that the interest of no individual creditor in any particular estate was sufficient to

[1] Regarding the Northwestern Jobbers' Credit Bureau, it is deemed proper at this point to call attention to certain of their methods and practices in the control and management of estates in this district that appear to be somewhat questionable. This appears to be an organization, co-operative in its nature, composed of the jobbers in various lines of business in the northwest section of the country, who as stockholders pay into the association certain dues or assessments to defray expenses, etc., of the association in protecting their various interests, by keeping in touch with business conditions, collecting claims of creditors, furnishing legal counsel and advice, and protecting their interests in all bankruptcy and other matters generally. No doubt it is a perfectly legitimate and beneficial establishment, composed of members who are well-meaning and at all times aiming, as regards the conduct and management of bankruptcy matters, to strictly comply with the requirements of the Bankruptcy Act, and in addition thereto lend every assistance of their association to the strict enforcement of the law.

However that may be, the examination of various accounts of trustees in closed cases on file in the clerk's office at Fargo invariably showed that in those estates controlled by the Northwestern Jobbers' Credit Bureau, and managed by their professional trustees the cost of administration was far in excess of costs of estates of similar magnitude administered by local trustees. In fact, cases were found which had been managed by the Bureau through its trustee (elected by its stockholder creditors), where the fees and expenses claimed and allowed appear absolutely unreasonable and exorbitant. As an instance of this, the Hilman Mercantile case is cited (Bankruptcy No. 1987), wherein the law firm of Todd, Fosnes, Sterling & Nelson, of St. Paul, representing Arthur R. Smythe, trustee, who was appointed by the association's majority control, filed a claim for professional services amounting to $2,006. A copy of said claim is attached hereto, marked Exhibit B and made a part of this report.

Referring to said exhibit, under date of December 10, 1916, is a charge of—

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|---|---|
| Mr. Fosnes at Grand Forks, N. D., to go over files with referee and secure order for payment of second dividend | $ 25.00 |
| Of April, 1917, 292 letters written | 146.00 |
| Of April, 1917, 220 letters received and examined | 110.00 |
| General conference with trustee and other services which cannot be specifically enumerated, consuming at least twenty days | 675.00 |
| The total of which is | $956.00 |

Mr. Sveinbjorn Johnson, the referee in this case, disallowed the above amount for very good reasons, apparently so, at least, and notified said attorneys of this disallowance under letter dated April 21, 1917. A copy of said letter is attached hereto, marked Exhibit C, and made a part of this report. Mr. Johnson states in his letter that these claims appear to be exorbitant, etc.; but it was found that later the trustee and his attorney prevailed upon him to allow the claim, on the argument, as Mr. Johnson advised me, that the Credit Bureau represented the majority of the creditors, and were therefore in position to dictate the payment of the trustee's attorney fee.

Not only are the fees and expenses of attorneys designated by the Jobbers' Bureau apparently set out of proportion to the ordinary or average fees and expenses incurred by local attorneys, but the cost for travel on the part of trustees which they elect, and of so-called experts sent from St. Paul to

lead him to assume the expense of conducting such a review, or carrying on a contest with an organization so powerful and skillful as the Bureau. It is hardly necessary to add that, upon the court's attention being brought to the subject by the report of the examiner, the rules of court have been modified so as to correct the evils pointed out, and the attention of referees upon whom the administration of the bankruptcy law must mainly devolve has been called to the necessity of exercising an independent judgment, and not allowing

North Dakota to prepare inventories, is enormous. All of these expenses are incurred by the Jobbers' Credit Bureau as a matter of course, without previous application to the referee or court to incur such expense. If the officer of the Bureau feels that it is advisable to send a man from St. Paul to Minot, N. D., probably 500 miles, to inventory stock of goods, or if they see fit to put a detective to work to unearth concealed assets at an expense of $400 or $500, they do it, without asking the court for previous authority. They pay the expense and present the bill to their trustee for payment as a matter of course. They may not have done this with all the referees, but the record indicates that the practice has been permitted under Referees Smith, Elton, Johnson, and O'Hare.

Mr. Elton, referee, who is now closing up his referee business, stated that he was of the opinion that the Northwestern Jobbers' Credit Bureau was a detrimental figure in the economical administration of bankruptcy estates in North Dakota; that fees have been actually claimed by the association's attorney for representing general creditors (not petitioning creditors), on the theory that the association, representing the majority of creditors, had, by experienced men and prompt administration, saved money for all creditors; that not only are expenses of their official trustee, for travel back and forth, enormous, but other expenses are incurred in proportion; that attorney's fees and expenses of travel to attend meetings to declare dividends have been paid when such attendance on the part of attorney is considered unnecessary.

Referee Lewis, at Minot, who is believed to be an excellent, high-grade, and up-to-date referee, appears to have had some of this business to contend with himself, as is evidenced by a rule which he promulgated for his court regarding attorney's fees, etc., and his letter of January 17, 1917, addressed to Bosard & Twiford, attorneys, regarding expenses incurred generally by the Northwestern Jobbers' Credit Bureau. Copy of this rule and letter are attached hereto, marked Exhibits D and E, respectively, and made a part of this report.

As a further illustration of possible unnecessary expenses incurred and paid in estates administered through the supervision of the Northwestern Jobbers' Credit Bureau, attached hereto, marked Exhibits F and G, are statements of account filed and allowed in the Kath Bros. case, for fees and expenses of Morphy, Bradford & Cummins, and statement of John Vallely, trustee in the same case, for expense of travel back and forth from Grand Forks, his residence, to Fargo, the official residence of the referee, and other places. This latter bill will give some idea of expenses usually incurred by the association's trustee, who is appointed possibly without regard to the distance from his residence to the headquarters of the referee or the location of the assets to be administered. In this case (Kath Bros.) the Northwestern Jobbers' Credit Bureau procured the service of Oswald Jones Detective Agency to investigate a shortage of stock of merchandise, paid for said service the sum of $493.47, and filed claim for same against the estate. Previous authority was not asked of the court to incur the expense, and the claim was filed and allowed as a matter of course.

It seems apparent that the minority creditors in estates handled by the association have been imposed upon, and it is very apparent that some of the referees have also been imposed upon somewhat, in permitting this association to take matters into their own hands and conduct the administration of estates according to their own ideas, regardless of the requirements of the law.

trustees who represent a majority of creditors, or their attorneys, to waste estates by unnecessary or illegal expenses, or to overawe referees in the firm performance of their duties.

[2] Turning, now, to the first certificate of the referee, the question is: Has a court of bankruptcy, in such cases as I have described, power to call upon a common-law assignee to account by summary process for funds deducted from the estate as fees and expenses, when a petition in bankruptcy is filed within four months, and is based upon the assignment as an act of bankruptcy?

It is the uniform holding of the federal courts that as to the capital of the estate the common-law assignee is not an adverse holder, but a mere agent of the assignor for the distribution of the estate among creditors. Bryan v. Bernheimer, 181 U. S. 188, 192, 21 Sup. Ct. 557, 45 L. Ed. 814; Davis v. Bohle, 92 Fed. 325, 326, 327, 34 C. C. A. 372; In re Bininger, Fed. Cas. No. 1,420, 3 Fed. Cas. 412, 417; In re Stuyvesant Bank, Fed. Cas. No. 13,581, 23 Fed. Cas. 207, 209; Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165. In the present case the assignee was not acting under the supervision of a state court, charged with the jurisdiction of examining his accounts and fixing his compensation. All these matters lay simply in the personal judgment of Mr. Galbraith and the Jobbers' Bureau, for which he was acting. May he, by his mere say-so, deduct from the estate such sums as seem to him just, and turn over the residue to the court of bankruptcy, and say that as to the sums deducted he is an adverse claimant, and can be called to account only by a plenary suit? The referee held that he may. The decision was made reluctantly, and upon the expressed opinion that such a practice is not consistent with sound administration of estates of bankrupts. But the referee felt that he was compelled to reach that conclusion by the decision of the Supreme Court in the case of Louisville Trust Co. v. Comingor, 184 U. S. 18, 22 Sup. Ct. 293, 46 L. Ed. 413. In my judgment that decision does not require such a holding. To understand the decision of the Supreme Court it is necessary to examine with some care the case, as more fully reported in Sinsheimer v. Simonson, 107 Fed. 898, 47 C. C. A. 51.

The controlling features of the Comingor Case are these: The bankrupts made a general assignment for the benefit of creditors in December, 1898. Comingor was the assignee. The administration upon the assignment was under the jurisdiction and control of the state court. By the local practice a suit had to be instituted immediately upon the execution of the assignment, by means of which parties concerned were brought before the court, and from that time forward the assignee acted under the court's supervision. The petition in bankruptcy was filed on February 14, 1899, two months after the assignment, but the case was pending in the District Court, and the Court of Appeals, until February 12, 1900, before the adjudication was actually made. In the meantime the estate had been converted into cash, amounting to $92,865.77. The assignee had paid out to attorneys representing him $3,200, and had credited himself and paid out as fees belonging to himself $3,300; that amount being such a sum as would have been due him under the established practice

of the state court. The trustee in bankruptcy had applied to the state court upon a petition stating, among other things, "that the officers of the court had been paid in full, and had no claims on the fund in court," and upon that statement had obtained an order for the turning over of $46,305.03, remaining in the estate after crediting disbursements as to which there was no objection, and also the fees of the assignee, $3,300, and his counsel, $3,200. Having thus obtained the capital of the estate without any formal action of the state court, settling the account of the assignee, the referee of his own motion cited Comingor to show cause why he should not pay to the trustee in bankruptcy the $3,300 deducted as his own fees, and $3,200 previously paid out by him to his counsel. In response to this order Comingor set forth that before the petition in bankruptcy was filed he had made the payments to his counsel, and had credited to himself and paid out the fees, believing them to be due according to the state practice; that he had none of the funds in his possession, and no means wherewith to pay them, and furthermore he stated, in one of his returns, that he had tried to borrow or raise the money with which to make the payment and found it impossible to do so. See 107 Fed. 901, 47 C. C. A. 51. The referee and trial court, in making the order absolute, did not question the amount of Comingor's fees under the state practice, and conceded that the amounts which he had paid to his attorneys were "usual and reasonable, according to the scale of compensation allowed for such services by the state court." Their theory, however, was that, as the assignment was an act of bankruptcy, it was void, and afforded no protection for any disbursements for fees or services made under it, and they ruled upon this legal theory that the money was "in contemplation of law" in Comingor's possession. Their legal theory as to the assignment was clearly wrong. While it was rendered void upon the filing of the petition in bankruptcy, it was not fraudulent, and acts done under it in good faith, and in the exercise of a reasonable discretion, would be fully protected if they were beneficial to the estate, and would in any case afford a shield against an order that the officer be committed to jail as for contempt for failure to return the money. Randolph v. Scruggs, 190 U. S. 533, 23 Sup. Ct. 710, 47 L. Ed. 1165; Summers v. Abbott, 122 Fed. 36, 58 C. C. A. 352; Bramble v. Brett, 230 Fed. 385, 388, 144 C. C. A. 527.

This brings us to the gist of the Comingor Case. Conceding the return of Comingor to be true, had the referee and District Court power to make the rule absolute and commit Comingor to jail for failure to return the money? The Circuit Court of Appeals and the Supreme Court held that no such power existed, but that Comingor, if he was liable at all, was only liable for debt, and could only be proceeded against by a plenary suit and a common-law judgment. The Circuit Court of Appeals bases its decision upon the ground that the return was a complete defense upon the facts, and reversed the case upon that ground, and directed that the order making the rule absolute should be set aside. The Supreme Court bases its decision

upon slightly different grounds. It holds that the assignee had acted in good faith, that he had not the funds in his possession, and that upon this showing the referee and District Judge were without power or jurisdiction to deal with the subject by means of the summary process, for under that the only execution that could be issued against Comingor would be a jail sentence, and the court holds that if Comingor was legally liable to make good the fund, because of the invalidity of the assignment, he could not be compelled to do so by a jail sentence, but could only be proceeded against by an appropriate action which would result in a common-law judgment for the fund, upon which collection could be made against Comingor's property, if he had any, or upon his bond if he had given a bond. In other words, the reason that underlies the decision is that, upon the showing made by Comingor, the jurisdiction of the referee and the District Judge to proceed to the absolute order ceased, and the only right of a trustee in bankruptcy against him for the recovery of the money must be by a proceeding for the collection of a debt.

[3] Such being the real decision in the Comingor Case, it is not an authority for the doctrine that a court of bankruptcy has no jurisdiction to cite a common-law assignee to account for moneys which have come into his hands under the assignment, but is only an authority against the abuse of the jurisdiction. The assignee, as to all moneys which come into his hands under the assignment, is the agent of the bankrupt, and the fact that he claims a certain part of the fund for fees and expenses, does not make him any more an adverse claimant as to those sums than the same claim would be for the residue of the estate. The assignee cannot by his mere say-so cause himself to cease to hold a part of the estate as the agent of the bankrupt, and convert himself into an adverse claimant. If, while acting in good faith as assignee, he had actually disbursed the moneys which he claims as fees and expenses, he cannot be committed to jail for failure to turn them over. When the summary proceeding has reached that stage, it cannot proceed to a jail sentence; but the trustee in bankruptcy, if there is a legal liability, as for debt, against the assignee, must proceed by plenary suit, so as to recover a money judgment which may be enforced against property by execution.

In the attempt to distinguish the Comingor Case there has been much refinement as to whether the payments were made by the common-law assignee before the petition in bankruptcy was filed, or after the petition, or, again, whether it was made before adjudication or after adjudication. These distinctions do not rest upon differences which go to the jurisdiction. The assignee at all times holds all funds that come into his hands as the agent of the bankrupt. He may be called upon by summary process to account for those funds. If he shows that he has acted in good faith, and parted with the funds, he cannot be committed to jail for failure to turn them over. If he is legally liable, either because his acts have not in the judgment of the bankruptcy court been beneficial to the creditors of the estate, or for any other reason, he is simply liable for a debt, and the trustee must resort to a plenary suit, in which the liability may be enforced by execution.

Any one dealing with the property of a bankrupt after a petition has been filed, or after such an act of bankruptcy as on its face is notice that the bankruptcy law is applicable to the situation, such as an assignment, or the appointment of a receiver on the ground of insolvency, must deal with it subject to the relating back of the trustee's title, and the supervision of the bankruptcy court over all acts since the date to which such title relates back. In such a case the jurisdiction of the court of bankruptcy exists, but what will be done in the exercise of that jurisdiction must depend upon the facts of each case. It must be borne in mind that here, as between state courts, and the court of bankruptcy, the jurisdiction is successive and not concurrent. In re Watts & Sachs, 190 U. S. 1, 27, 35, 23 Sup. Ct. 718, 47 L. Ed. 933; Randolph v. Scruggs, 190 U. S. 533, 537, 538, 23 Sup. Ct. 710, 47 L. Ed. 1165; In re Zier & Co., 142 Fed. 102, 73 C. C. A. 326; same case as Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, upon its return to the lower courts after the decision in 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933. "The bankruptcy jurisdiction, when properly invoked, supersedes the prior proceedings in the state court for winding up the corporation 'as to which the jurisdiction is not concurrent.'" 142 Fed. 103, 73 C. C. A. 327. While this important consideration modifies the doctrine of comity, it does not destroy it. In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933; Shannon v. Shepard Mfg. Co., 119 N. E. 768, 42 Am. Bankr. Rep. 12 (Sup. Court of Mass.); In re Neuburger (D. C.) 233 Fed. 701; s. c., 240 Fed. 947, 153 C. C. A. 633. The cardinal rule must always be: Has the dealing with the estate been beneficial to creditors? If not, then, in the light of the situation as it existed at the time the dealings occurred, would an intelligent business man have believed that the dealings would so result?

The assignee here, when cited to show cause, had not parted with the funds in any real sense. The transfer to a different account on the books of the Northwestern Credit Bureau was a mere matter of bookkeeping. It is conceded that he and the Bureau are amply able to respond to any order made in the summary proceeding for the return of any part of the fund involved in the order to show cause. The deductions were made as a part of the accounting at the time the balance of the estate was turned over by Galbraith as assignee. Such being the case, the referee was vested with jurisdiction to deal with the subject under the order to show cause, and to determine whether, under the facts and the law, an order ought to be made requiring respondent to turn over any part of the $1,474.10 withheld from the estate. The order of the referee, therefore, dismissing the order to show cause for want of jurisdiction, is reversed, and the cause is remanded for such further action as the facts justify.

[4] The question certified in the second certificate is plain. Neither the bankruptcy law nor the cost bill in equity prescribed by the federal statute authorized the referee to tax respondent's cost bill, or to order the same paid out of the estate. The order to show cause was nothing more than a motion. The prevailing party in such a proceeding is not

entitled to costs, unless the other party is "in mercy," so that the court can require the payment of costs as a condition of granting its further aid.

The order of the referee on this certificate is therefore affirmed.

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## THE MAGNOLIA.

(District Court, N. D. California, N. D. September 10, 1918.)

No. 16063.

1. SALVAGE ⊂⊃48—CONTRACT—AGREEMENT.
   Where libelant, who rendered services in salvaging a wreck, claimed an award as a salvager, evidence *held* insufficient to sustain the defense that the services were rendered under a contract under which compensation should be on the quantum meruit.
2. SALVAGE ⊂⊃4—SERVICES—WHAT CONSTITUTES.
   Where a launch rescued a vessel discovered floating, capsized, and bottom up, a short distance outside of a line of breakers off a bar, and the danger was considerable, *held*, that the service was a salvage service.
3. SALVAGE ⊂⊃19—SERVICES—AWARD.
   Where a schooner capsized, and close to breakers was rescued and towed out to the open sea, the fact the master of the launch allowed a tug under contract with the owners of the schooner to continue the towage to a point of safety *held* not to make the tug and launch, which first rescued the schooner, cosalvagers, although the towage service might be considered in determining the value of the launch's service.
4. SALVAGE ⊂⊃28—SERVICES—AWARD.
   Where a gasoline schooner, worth between $8,000 and $10,000, which had capsized and was floating a short distance outside of breakers off a bar, was rescued and taken in tow by power boat worth from $4,000 to $5,000, and the danger was considerable, etc., *held*, that $750 should be awarded for salvage services.

In Admiralty. Libel by William Crone against the gasoline schooner Magnolia. Decree for libelant.

Puter & Quinn, of Eureka, Cal., for libelant.
Coonan & Ricks, of Eureka, Cal., for claimant.

VAN FLEET, District Judge. This is a libel for the value of services rendered in salving a wreck. It grows out of these facts:

Early in the morning of the occasion in question, a vessel was discovered floating, capsized, and bottom up, a short distance outside the line of breakers off the bar at the mouth of the Klamath river, which flows into the Pacific on the coast of California about 48 miles north of Humboldt Bay. The sea was rough, and she appeared to be in great danger of going ashore. When first discovered, the identity of the vessel, by reason of her situation and submerged condition, could not be made out, but from her size and appearance it was thought to be the Magnolia, a gasoline schooner of 49 tons burden, which was known to ply between the port of Eureka and other ports along the northern coast. Word of the wreck was immediately brought to Requa, a fishing village situated on the Klamath a mile or so from

its mouth, where Capt. Crone, the libelant, was at the time lying at the wharf with the Coaster, a small power boat of some 14 tons burden, of which he was master; and upon being informed of the disaster he, in company with others, at once proceeded to a point overlooking the wreck at a distance of some half mile, the nearest she could be approached by land, and effort was made with a glass to ascertain her identity. While this could not be definitely determined, it was thought by the observers that there was some evidence of life aboard, and thereupon Capt. Crone immediately returned to Requa and prepared to make an effort to go out to the submerged craft, which by reason of the known dangerous character of the entrance, the condition of the tide, and the badly breaking bar, was regarded as exceedingly hazardous, if not impossible, at the time. His boat being loaded, he was required to first discharge cargo, or partially so, and secure an additional hawser and an extra man for his crew, all of which he did as expeditiously as possible, and then dropped down to the mouth of the river, where after several fruitless efforts, but watching his opportunity, he finally, in the neighborhood of 10 o'clock, by skillful maneuvering, succeeded, with great hazard to his craft and peril to her crew, in getting across the bar, when, by the aid of a skiff, he was able to get a line aboard the capsized boat. She proved to be the Magnolia, but no evidence of life was found aboard, and Capt. Crone proceeded to tow her off shore 3 or 4 miles to safety, and then headed south, with the intention to take her into Humboldt Bay. He had towed her some 8 or 10 miles on this course, when he was met by Capt. Coggeshall, one of her owners, who having, as hereafter appears, been informed of her plight, had procured a tug and life-saving crew and was proceeding to her rescue. After some parley, and a promise by Coggeshall that Crone should be compensated for his services, the latter surrendered her to the owner, and she was taken in tow by the tug and carried to Eureka, where she was subsequently righted and refitted. The time Crone was engaged in his work of rescue was from 8 to 10 hours. It is conceded that the value of the Magnolia, at the time she was rescued and taken in tow by the Coaster, was from $8,000 to $10,000, and that the value of the Coaster was from $4,000 to $5,000. In due course libelant presented a demand to the owners for compensation for his services, which not being honored, the libel ensued.

The defenses interposed are, in substance: (1) That the case is not one of strict salvage, but of contract service, wherein the basis of compensation is quantum meruit; (2) that, if a case of salvage, it is one of joint salvage, rendered by the Coaster and the tug, and that compensation must be apportioned and awarded accordingly.

[1] As to the first defense, it is based upon the claim that the rescue of the Magnolia was by agreement or understanding with the owners. The claim grows out of a telephonic conversation between Capt. Crone and Capt. Coggeshall on the morning of the wreck. On learning of the wreck, and that it was believed to be the Magnolia, Capt. Crone, who knew Capt. Coggeshall, called the latter on the telephone at Eureka and told him of the fact. He testified:

"I told Capt. Coggeshall that a boat was capsized outside the bar which appeared to be the Magnolia. He replied that it was not she, as she was in Crescent City. Then he said, if it was the Magnolia, could any one go out and get her; and I answered that it was too rough to go out."

And he testified that he did not agree to go out to the wreck. Asked how he came to go out, he said:

"After the conversation over the phone I went up on the hill to take a look at the vessel; there was quite a crowd there looking at the wreck; some claimed they could see persons clinging to the bottom, and remarks were made that some one should go out. After watching the wreck for a while, and listening to the talk, I concluded to take a chance and go out. My idea in going out was, first to save life, if there was any on the wreck, and next to save the Magnolia. After taking in the situation, I really went out because, as a seaman, I thought it was my duty. I did not go because of any conversation with Capt. Coggeshall over the telephone."

Capt. Coggeshall, on the other hand, testified that Capt. Crone agreed to go out after the submerged vessel; that the substance of their conversation was that, when Crone told him of the wreck and that it was supposed to be the Magnolia, he said to Crone:

"I would like to arrange to have you go right to sea. Do you think you would be able to go to sea right away?

"Capt. Crone: There is a little too much sea right now, and not enough water.

"Capt. Coggeshall: I wish you would make ready to go to sea, and let me know if anything can be done. I want you to go out if you possibly can.

"Capt. Crone: It is reported that there are men on board of the Magnolia.

"Capt. Coggeshall: If you possibly can get out, I wish you would go and first try to save life, and if you can't do that make fast to the ship and do the best you can with her, and whatever is right for your time and trouble I will pay you.

"Capt. Crone: That is all right; I think I will be able to get out.

"Capt Coggeshall: Go as soon as you can."

There was no other testimony as to what occurred at this conversation, and it is sufficient to say that I am unable to find in accordance with the version given by Capt. Coggeshall, assuming that it would tend to establish a contract rather than a voluntary salvage. See The Roanoke, 214 Fed. 63, 65, 130 C. C. A. 503. I am of opinion that the other circumstances in the case, and particulaly what occurred between Capt. Crone and Capt. Coggeshall when the Magnolia was taken in tow by the latter, and the further fact that Coggeshall proceeded to make other arrangements for rescue, tend to sustain the version given by Capt. Crone, and that I must find accordingly.

[2, 3] Considering the evidence as a whole, I regard the facts as disclosing a clear case of voluntary salvage, performed under circumstances of more than usual hazard to the property and lives employed in the service. It would subserve no useful purpose to discuss the circumstances in detail, but I may say that they wholly refute the contention that what was done by Capt. Crone was, as disclosed by the successful event, attended by little danger, and that the rescued boat was in fact at no time in imminent peril of being ultimately lost. The question is, not what the actual fact was, as judged by

subsequent events, but what it apparently was to the experienced and intelligent observer at the time the act was performed, since the work of a salver is to be estimated from conditions as they appeared to such observation, and upon which he is justified in acting. It is not to be judged by conditions as actually ascertained by the event. As said in The Roanoke:

"Wisdom born after the event is the cheapest of all wisdom."

Indeed, it is not seriously contended that any of the elements of a true salvage were lacking, if the service was not contractual. 35 Cyc. 720.

Nor is there anything of substance in the second proposition or defense, that the case is one of cosalvage as between the Coaster and the tug. The latter was not a participant in the rescue of the wrecked vessel from any imminent peril; she took her in tow in the open sea, after she had been rescued from the threat of immediate danger of destruction by going ashore; and while her service was of value in carrying her to a safe haven, and thus relieving the Coaster to that extent, and may be considered in determining the ultimate value of the services rendered by the latter, the service of the tug was admittedly rendered under charter or hire by the owner, and is to be regarded more in the nature of a towage than a salvage. The Roanoke, supra. The tug, therefore, cannot be considered in any proper sense as a cosalver.

[4] This leaves but one question for consideration, that of the award of just compensation to libelant for the service performed. While he is entitled to an award which will fully compensate him for the valuable service rendered, I do not regard it as a case justifying an allowance on the extreme basis contended for, that of 50 per cent. of the value of the vessel salved. The basis of such awards, as is conceded by counsel, has been greatly modified by modern conditions, and "there has been a decided tendency by the courts to qualify the grades of salvage services, and to reduce the amounts of awards to salvors from the standard of former days of wooden sailing vessels," etc. Guffey Petroleum Co. v. Borison, 211 Fed. 602, 128 C. C. A. 194, and other cases there cited.

Without further discussion, I am of opinion that under all the circumstances libelant will be reasonably compensated in this case by an award of $750. It would have been different, had he been required to carry the derelict the considerable distance through to Humboldt Bay, which it appears was the nearest point of a safe haven. But he voluntarily surrendered her to the owner, and therefore cannot claim upon the basis of a complete towage to that point. On the other hand, while the amount of the award is in excess of the compensation demanded by libelant before suit, obviously he is not to be circumscribed by the fact that he offered to accept a less sum in amicable adjustment of the controversy. Having been driven to the necessity of litigation, he is to have such award as in the judgment of the court will compensate the services performed, regardless of any previous offer on his part to accept less than that sum. His de-

mand was exceedingly reasonable, and it is unfortunate for the claimants that they did not see their way clear to meet it.

Let a decree be entered, awarding the libelant the sum above specified, together with his costs.

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## UNITED STATES v. MURPHY et al.

(District Court, N. D. New York. July 26, 1918.)

1. CRIMINAL LAW ⟸511(2)—ACCOMPLICE TESTIMONY—CORROBORATION—"CORROBORATING EVIDENCE."
   "Corroborating evidence" is evidence which is independent of the testimony of the accomplice, and, taken by itself, leads to the inference, not only that a crime has been committed, but that the person charged was implicated therein, etc.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Corroborating Evidence.]

2. CRIMINAL LAW ⟸510—ACCOMPLICE TESTIMONY—CORROBORATION.
   It is the better practice to require corroborating testimony before giving credence to the testimony of an accomplice.

3. CRIMINAL LAW ⟸780(1)—INSTRUCTIONS—ACCOMPLICE TESTIMONY.
   Cautionary instruction that it is the better practice to require corroborating testimony before giving credence to the testimony of an accomplice is proper.

4. CRIMINAL LAW ⟸1192—SECOND TRIAL—FOLLOWING DECISION OF APPELLATE COURT.
   Where, on a second trial, after reversal of a conviction, the evidence was different, and the testimony of an accomplice, on which the prosecution relied, was much shaken, the trial court is not bound to follow the decision of the appellate court on a former trial, to the effect that the jury's findings were conclusive.

5. CRIMINAL LAW ⟸742(2)—SUBMISSION TO JURY—ACCOMPLICE TESTIMONY.
   Where the only evidence on which a conviction could be sustained was the testimony of an accomplice, and he left the stand a thoroughly discredited witness, the case should not be submitted to the jury, even laying aside the fact that the prosecution relied on accomplice testimony.

6. CRIMINAL LAW ⟸308—PRESUMPTION OF INNOCENCE.
   The presumption of innocence remains with defendants throughout the entire trial, and so letters written by defendants and relied on by the prosecution are presumed, in the first instance, to be innocent.

7. CRIMINAL LAW ⟸753(2)—DIRECTED VERDICT FOR DEFENDANT.
   Where the evidence as a whole produced by the prosecution is consistent with innocence, and does not lead irresistibly beyond a reasonable doubt to a conclusion of guilt, a verdict should be directed for defendant.

8. CRIMINAL LAW ⟸742(3)—TRIAL—CORROBORATION OF WITNESS.
   Whether a discredited witness, on whom the prosecution relied, is sufficiently corroborated to take the case to the jury, is a question of law.

Richard Murphy, Baron Eugene Francois Ernest Oppenheim, and Howard J. Rogers were indicted for crime. On motion to direct a verdict of acquittal in favor of Oppenheim and Rogers. Motion granted.

See, also, 224 Fed. 554; 226 Fed. 512; 241 Fed. 625, 154 C. C. A. 383.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Edward Hymes, of New York City, for the motion.
Frank J. Cregg, Asst. U. S. Dist. Atty., of Syracuse, N. Y., opposed.

THOMAS, District Judge. The argument in support of this motion is based upon two substantial grounds, as reasons in law why it should be granted: (1) That Brice, a conceded accomplice, must be corroborated, even if not discredited. (2) That Brice, confessedly an accomplice, cannot be corroborated, if discredited, on the ground that then there would be nothing to corroborate.

[1-3] In support of the first contention cases are cited by counsel for defendants as against which the district attorney urges that the rule respecting the corroboration of an accomplice in this circuit, at least, is to be found in Hanley v. United States, 123 Fed. at page 850, 59 C. C. A. 153, decided in 1901, where Judge Lacombe says:

"It is * * * argued that the court erred in refusing to charge that the testimony of William A. Clark, he being a self-confessed accomplice, must be corroborated as to some of the material facts. The statutes of New York do not permit conviction in the courts of that state on the uncorroborated testimony of an accomplice. Those statutes, however, do not regulate proceedings in the federal courts, there is no similar federal statute, and in the courts of the United States the rules of law governing the reception and consideration of the testimony of accomplices are those of the common law. Upon this branch of the case the court called attention to the fact that the New York statute did not apply."

Reliance is also placed upon a subsequent decision of the Circuit Court of Appeals for this circuit, found in Ahearn v. United States, 158 Fed. 607, 85 C. C. A. 428, decided in 1907, when Judge Lacombe, speaking for the court, said:

"The court charged the jury as to the weight to be given to the testimony of an accomplice, as to felonious intent, and as to the presumption of innocence. The testimony of the accomplice was corroborated as to several material facts, although corroboration is not essential in the federal courts and could not have been withdrawn from the jury. It was for them to say what weight should be given to it."

Likewise reference is made to Richardson v. United States, 181 Fed. 9, 104 C. C. A. 69, decided August 22, 1910. There it was denied by the government that the persons whom it was sought to charge as accomplices were in any sense accomplices, and the court was asked to charge the jury that if these witnesses were accomplices their testimony was not to be regarded, unless corroborated by unimpeachable testimony in some material point, and while the court said that there was nothing which forbids the conviction of a defendant, at common law or in a federal court, on the uncorroborated testimony of an accomplice, yet it held that there is a well-established practice, sanctioned by long practice and judicial approbation, to caution juries about accepting the evidence of an accomplice without material corroboration, coming as it does from a polluted source. Then the court cites Holmgren v. United States, 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, which was decided May 16, 1910, about two months before the Richardson Case. In 217 U. S. at pages 523 and 524, 30 Sup. Ct. at pages 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778), Mr. Justice Day says respecting this subject-matter:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, *and to require corroborating testimony before giving credence to them.*"

If that rule is to be followed, corroborating evidence is evidence which is independent of the evidence of an accomplice, and which, taken by itself, leads to the inference, not only that a crime has been committed, but that the person on trial was implicated in it; or it must be evidence which corroborates as to some material fact or facts which go to prove that the person on trial was connected with the crime. With this as apparently the last word of the Supreme Court upon the subject, we may safely say it is the correct expression of the rule applicable here. Nor do I understand that this rule is in any way a violation of the decisions found in Gretsch v. United States, 242 Fed. 898, 155 C. C. A. 485, Fischer v. United States (D. C.) 245 Fed. 479, and Erber v. United States, 234 Fed. 225, 148 C. C. A. 123.

In this connection I direct attention to the fact that a careful reading of the cases upon this subject which we have been discussing does not hold, as contended for by counsel, that corroboration of an accomplice is not necessary, but they do hold that a conviction may be had without corroboration. A distinct difference. The principles enunciated in these decisions unquestionably apply to the testimony of an accomplice who has testified in a case and leaves the witness stand unimpeached. The Supreme Court, in such instances, as declared in the Holmgren Case, supra, holds that a trial court should caution juries against too much reliance upon the testimony of an accomplice and to require corroborating testimony before giving credence to such evidence. But I fear we have all devoted too much time to the consideration of these principles concerning which there can be little dispute.

[4] The learned district attorney urges upon the court and relies upon an extract from the opinion of the Circuit Court of Appeals on the appeal from the former judgment as an additional reason for the denial of this motion and directs the court's attention to the following passage found on page 627 of 241 Fed. (154 C. C. A. 383), in Judge Ward's opinion:

"The jury's findings of fact are binding upon us when there is any evidence to support them, and we think there was evidence both as to the conspiracy count and the aiding and abetting counts"

—and further quotation from that part of the opinion of Judge Hough, dissenting from the majority of the court upon other grounds, upon which a reversal was granted. If this court had the same record as confronted the Circuit Court of Appeals, this motion would receive no serious consideration.

The records in the two cases, so far at least as the testimony of Brice is concerned, are entirely different. It is impossible to predicate a conclusion upon the record of the former trial, and urge *that* as the basis for a conclusion to be formed upon the record of this trial. In the former trial the testimony of Brice stood practically unchallenged. I have examined it, and, when the cross-examination was concluded, Brice had emphasized his direct testimony, and there were few contra-

dictions and few inconsistencies, and such as existed were on unimportant matters.

These facts must be known to counsel who now urge upon the court that the opinion of the Circuit Court of Appeals reversing the former trial binds this court. So it is sufficient to say, as to this, that the Circuit Court of Appeals did not have this record before it for consideration, and it follows that the citation read has no force, no effect, and could have none; and while I yield to no one in having a greater regard for the opinion of our appellate court, I cannot be mistaken in saying that even that learned tribunal would not expect me to follow the conclusion there expressed, upon the record here.

[5-8] But even assuming that the first proposition or reason for granting this motion is not sound in law, and that no corroboration is necessary of an accomplice whose cross-examination leaves him a credible witness, we pass to the second proposition: But the serious question here under consideration is whether, if Brice, an accomplice, leaves the stand a thoroughly discredited witness upon many material points, it can be claimed that, in spite of that fact, there is any testimony here, aside from Brice, which connects Rogers and Oppenheim with the crimes charged, sufficient to submit the case to the jury. Where the government's case hinges largely upon the testimony of a confessed thief, who concededly might be an honest witness, *but who has here time and time again evaded, whose testimony was at times absurd, inconsistent and full of falsehoods, and who when confronted with the facts which pinned him upon either horn of a particular dilemma then confronting him failed to answer, and who on his own statement was torn apart, and of whom it is charitable to say falsified,* can it be that such evidence is sufficient legal evidence to go to a jury?

Leaving out the question of an accomplice, would a court not be justified—yes, required—to take such a case away from a jury, if the witness relied upon to substantiate the main parts of a case were simply a discredited witness and not a discredited accomplice as here. It needs the citation of no authority to sustain the proposition. It is not, as counsel contend, a question of corroboration of what we might call a good accomplice—good in the sense that he made what is commonly called a good witness, frank, open, truthful, such as would impress a trier of a question of fact, by his answers and his demeanor, that he spoke the truth. *But the case here is where we have a bad accomplice, who by his answers not only evaded and equivocated, who was utterly devoid of the sanctity of his oath, but who over and over again falsified upon material matters seeking to connect the defendants Rogers and Oppenheim, and without whose testimony there is nothing.*

In order to support the claims of the government connecting the defendants Rogers and Oppenheim with criminal participation, the testimony of Brice is indispensable; for all of the acts done and conversations had must be linked with Brice's version of what took place and what was said in order to submit the case to the jury. And, but for the demonstrated untruthfulness of Brice upon all material questions, there would be sufficient evidence to make it necessary that the defendants explain. Nor must we lose sight of the presumption of

innocence which remains with these defendants throughout the trial. *Brice endeavored to remove that presumption, and that was the main purpose of his testimony; yet, as I view it, his testimony was of such a character as to be unbelievable—shattered, as expressed by counsel*— so that all the letters, all the inferences in the letters, by virtue of the presumption of innocence, are presumed to have been innocent, and there is no other evidence to prove they were not.

It is announced by our Circuit Court of Appeals that where the evidence as a whole produced by the prosecution is consistent with the innocence of the accused and does not lead irresistibly beyond a reasonable doubt to a conclusion of guilt, then and in that event no question is presented for the jury, and it is the duty of the trial court to direct a verdict. In the case of Union Pacific Coal Co. v. United States, 173 Fed. 737, at page 740 (97 C. C. A. 578), the court said:

"There was a legal presumption that each of the defendants was innocent until he was proved to be guilty beyond a reasonable doubt. The burden was upon the government to make this proof, and evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction."

In Hayes v. United States, 169 Fed. 101, at page 103 (94 C. C. A. 449), the court said:

"While evidence to convict of crime, may be circumstantial and inferential in its character, it must always rise to that degree of convincing power which satisfies the mind beyond a reasonable doubt of guilt. This can never be the case when the evidence as produced is entirely consistent with innocence in a given transaction."

In the case at bar, without Brice, the sole question is: What inference will one draw from the statements contained in all the letters? They may be innocent, they may be sinister; but no trier of a criminal cause may be allowed to guess. The various transactions which the learned district attorney urges with so much vehemence as supporting his contention that he has Brice, an accomplice, corroborated, may be illustrated by a single transaction. Take the July 5, 1911, incident as illustration. His claim is that Brice is corroborated regarding the facts of the transaction, even though he be a discredited witness.

Oppenheim, he claims, was in Amsterdam; that he got $700; that the express receipt for $550, sent to Rogers, leaves no room to question the transaction. This is very likely true thus far; but to show criminal knowledge Brice is necessary, and he supports the claim that there was criminal knowledge by saying that he told Oppenheim that he would have to steal the money from the bank, and that Oppenheim said, "All right, steal it." Without discussing the probability or improbability of this story, because that is not the purpose of this discussion, but for the purpose of illustrating the point, eliminate the conversation between Brice and Oppenheim and what have we of the structure left? That Oppenheim was in Amsterdam and that he sent

$550 by telegraph to Rogers. Nothing appears but what the transaction was legitimate, and, if it were argued, it might well be claimed that Oppenheim, knowing he had a legitimate contract with Brice which called for certain money, and needing the money hurriedly took the train to Amsterdam, got it, and telegraphed it to Rogers. In the light of the familiar rule of law regarding the presumption of innocence, is not the inference suggested from the facts outlined equally as fair as the sinister one that he was in a crooked deal?

So it appears conclusively that Brice must be credible to support the sinister conclusion, and one must believe his version of the conversation had. Nor is this a question of fact for a jury to pass upon. It raises a question of law. So, too, as to all the transactions. Brice must be credible in order to give life and substance to the claim that all defendants knew Brice was stealing from the bank, for they involve his own relation of conversations, and without it the government's case falls.

This one illustration will have to serve to illustrate the various points raised and urged by the learned district attorney. He cannot, nor can any one associated with him, be blamed for the situation in which they find themselves, for, naturally, they could not control the evidence of Brice, nor could they prevent him from continually falsifying upon the witness stand. *It is inconceivable to me that a man who was honestly endeavoring to tell the truth concerning these many transactions could have presented such a hopeless and pitiable object. Brice, as I view it, is, so to speak, not in the case.* Without his truthful, or semblance of truthful, statements regarding all these various transactions, there is nothing to submit to the jury. *If there ever was a case where there was a complete application of the maxim "falsus in uno falsus in omnibus," it is right here.* This being the legal situation confronting us, it is inconceivable to me that this motion should be denied. The law compels me to grant such a motion, and I consider the application of the rule in the Sykes Case, 204 Fed. 909, 123 C. C. A. 205, apposite to the instant case. There the court said:

"And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by herself, contradicted by other witnesses, and inspired by the hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or participator in the perpetration of her crime, is not only insufficient to establish his guilt beyond a reasonable doubt, but that it presents no substantial evidence of it."

In other words, that if Brice is in the same situation as the witness referred to there, or substantially in that position, then this testimony does not give us any substantial evidence of what it seeks to relate. So, too, in the Mickel Case, 157 Fed. 229, 84 C. C. A. 672, the court said:

"The evidence in every criminal case should be sufficient to warrant a reasonable conclusion of the defendant's guilt; otherwise, it is the duty of the court to instruct a verdict in his favor. * * * We have carefully read all of the testimony submitted, and are of the opinion that the most that can be said for it is that possibly it might raise a conjecture or suspicion unfavorable to the defendant. But evidence only sufficient for this purpose

is not legal evidence, for the jury must be governed by the evidence of facts upon which the suspicion is based, not by the suspicion itself."

So, too, the Union Pacific Coal Case is now instructive, and it is not now necessary for me to read what the court said there, as I have already adverted to it. So, if the rule in the Holmgren Case be applied, all the more so is the conclusion here reached irresistible. Nor are the views herein expressed, or the conclusion reached, violative of any of the principles enunciated in the cases cited by counsel for the government and upon which reliance is placed, viz.: Caminetti v. United States, 242 U. S. 495, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, Ann. Cas. 1917B, 1168; Burton v. United States, 202 U. S. 373, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Hoke v. United States, 227 U. S. 324, 33 Sup. Ct. 281, 57 L. Ed. 523, 43 L. R. A. (N. S.) 906, Ann. Cas. 1913E, 905.

The motion as to Rogers and Oppenheim is granted, and, as there is other evidence independent of Brice as to Murphy, the motion is denied as to him.

Mr. Cregg: Exception.

The Court: Mr. Marshal call the jury.

(The jury returned at this point.)

The Court: Gentlemen of the jury, I excused you for the purpose of hearing argument on a motion. That motion was based upon propositions of law, and, because that is of no concern to you, you were excused. As the result of the argument and deliberations, the motion has been granted. The motion that was made was that the court direct a verdict of acquittal for the defendants Rogers and Oppenheim, and, as I say, after the argument and deliberations, I have granted the motion. You therefore will report a verdict of not guilty, so far as Rogers and Oppenheim are concerned.

(Jury return a verdict of not guilty as to defendants Oppenheim and Rogers.)

Mr. Hymes: Your honor, I move to have the defendants Rogers and Oppenheim discharged and their sureties released.

The Court: So ordered.

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## In re EL SEVILLA RESTAURANT.

(District Court, S. D. Florida. June, 1918.)

1. BANKRUPTCY ⟸98, 228—REPORT OF MASTER—EXCEPTIONS.

Where exceptions to the account of a receiver in bankruptcy were referred to a master, who reported thereon, his findings as to the account stand confirmed, unless exceptions to his report are filed within 20 days, as required by equity rule 66 (198 Fed. xxxvii, 115 C. C. A. xxxvii).

2. BANKRUPTCY ⟸113—LIABILITY ON BOND GIVEN ON APPOINTMENT OF RECEIVER.

A bond given by petitioners for appointment of receiver, conditioned to pay to bankrupts all costs, expenses, and damages occasioned by the appointment in case the petition was dismissed and the receiver discharged, does not cover claims of the receiver for expenses incurred.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. BANKRUPTCY ⇐99—DISMISSAL OF PETITION—DISCHARGE OF RECEIVER—LIABILITY OF PETITIONING CREDITORS.

The court has no jurisdiction, upon making of receiver's report after dismissal of petition for involuntary bankruptcy and discharge of receiver, to order payment of the amount found to be due by the report from the petitioning creditors to the receiver for expenses incurred by him, but the question is open to litigation between the parties upon proper proceedings.

In Bankruptcy. In the matter of Celestino Fernandez and Manuel Fernandez, doing business as the El Sevilla Restaurant and the El Moderno Restaurant, alleged bankrupts. On motion to open decree fixing liability of petitioning creditors and sureties. Motion granted, and decree modified.

M. Caraballo, of Tampa, Fla., for receiver.

J. T. Watson, Jr., of Tampa, Fla., for objecting creditors.

CALL, District Judge. This case comes on to be further heard upon a petition for a rehearing upon the decree entered herein on February 28, 1918. The facts as they appear from the record may be stated as follows:

A petition in bankruptcy was filed against Celestino Fernandez and Manuel Fernandez, doing business as El Sevilla Restaurant and El Moderno Restaurant. In this proceeding an application for the appointment of a receiver was made and granted, and a bond for $1,000 with sureties given. The condition of the bond was that the petitioners should pay to Celestino Fernandez and Manuel Fernandez all costs, expenses, and damages occasioned by the appointment of such receiver in case the petition in bankruptcy should be dismissed. Under the order of appointment the restaurants were operated at a loss. Subsequently upon a hearing by the court the petition was dismissed and the receiver discharged. Upon the coming in of the receiver's report exceptions were filed to certain portions, and subsequently an additional and supplementary report was filed. Whereupon an order was made referring the matter to a master to take testimony on said exceptions and such other testimony as may be offered, to state and clarify the account of the receiver, with power to report his findings to the court on the receiver's account, together with the evidence. Hearings were had before the master, and testimony taken; the parties in interest having notice and participating in the same.

[1] The master made his report to the court on November 7, 1917, with the evidence taken before him, sustaining certain exceptions, which had been cured by the supplementary receiver's report, and disallowing certain items claimed to have been paid by the receiver, but not stating the account of amounts still due and incurred by the receiver in the operation of the business. Whereupon on the motion of the receiver it was re-referred to the master on November 14, to state the account as required in the first order of reference; and pursuant to this last order the master on December 24, 1917, filed his report, showing the amount of $987.54 due by the petitioning creditors incurred in the operation of the restaurants by the receiver. This report remained without exception until February 28, 1918, when, after notice to the

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

attorney of the petitioning creditors, the court passed the decree sought to be reheard by petitioners.

This decree, after reciting the filing of the reports and the fact that no exceptions had been filed thereto, decreed a confirmation of said reports, and sustained the first and sixth exceptions, and, while overruling the fourth exception, reduced the amount of the item excepted to. The decree then proceeds to order the payment of the amount found to be due by the last report by the petitioning creditors to the receiver. The decree also proceeds to fix the liability of the sureties on the bond theretofore filed by the petitioners on the appointment of the receiver at said amount so found by said master.

The prayer of the petition for a rehearing is that the petitioners may have a rehearing upon the exceptions filed to the receiver's report. The matter of the exceptions to the receiver's report, which exceptions all went to particular items (except the general exception that the report was not sworn to), objecting that the receiver should have credit for same on his account. The master had all the parties in interest before him, took testimony, and made his report allowing some of the items objected to in whole or in part and disallowing others. His last report was on file from December 24 up to February 28 following, without exception being filed. Under rule 66 of the Equity Rules (198 Fed. xxxvii, 115 C. C. A. xxxvii) the report stood confirmed in the absence of exceptions filed within 20 days from its filing. Therefore so far as the allowance of the items in the receiver's report, and the allowance or disallowance of the exceptions filed by the petitioners, further consideration is precluded by the failure of the petitioners to file exceptions within the 20 days as required by rule 66.

[2, 3] On presentation of the petition for a rehearing the main contention was that the petitioning creditors were not liable for the expenses of the receivership, and the decree sought to fasten the amount upon such petitioning creditors, and further undertook to fix the liability of the sureties on the bond of the petitioners given upon the appointment of the receiver. As before pointed out, the condition of the bond was to pay the bankrupts their costs and damages. This was not a claim for costs and damages by the bankrupts, so clearly that portion of the decree of February 28, 1918, should not have been entered. Nor do I think was the question of the liability of the petitioning creditors for the expenses of the receivership presented in such manner as authorized the court to adjudicate their liability for the same. This question, it seems to me, is open to litigation between the parties upon proper proceedings.

The petitioning creditors came in and litigated the receiver's accounts, and to that end and no further are they bound by the proceedings had thereon, and therefore the petition to open up the decree of February 28, 1918, will be granted, but the petition for a rehearing on the exceptions will be denied.

An order to this effect, and modifying the decree of February 28, 1918, in the respects pointed out above, will be entered.

## Ex parte PLATT.

(District Court, E. D. New York. September 23, 1918.)

1. ARMY AND NAVY ⟸20—SELECTIVE DRAFT LAW—DECISIONS OF LOCAL BOARD—REVIEW.
   The determination of a local draft board in a case where it has authority to act is final, unless appealed to the district board or the President.

2. CERTIORARI ⟸24—HABEAS CORPUS ⟸66—CERTIORARI INCIDENT TO WRIT.
   The writ of certiorari may be used to bring up the record, where basis for a writ of habeas corpus is shown; but the law courts have no power to issue such writ to an executive or administrative board, for the sole purpose of reviewing the correctness of its decision.

3. HABEAS CORPUS ⟸16—SELECTIVE DRAFT LAW—REVIEW OF DECISION OF LOCAL BOARD.
   The action of a local draft board in holding a person subject to service after a hearing on evidence is not reviewable on habeas corpus, unless it is shown that the hearing was unfair, or that there was no evidence to support the finding.

Petition of Morris Platt for writ of habeas corpus and of certiorari. Writs denied.

Edwin T. Taliaferro, of New York City, for petitioner.
Melville J. France, U. S. Atty., of Brooklyn, N. Y., opposed.

CHATFIELD, District Judge. The petitioner seeks a writ of habeas corpus and a writ of certiorari, alleging that he is an alien, born in Russia, who has never taken out first papers; that he applied to his local board in August, 1917, claiming exemption from military service on those grounds; that he later filed his questionnaire, and received, on or about August 16, 1917, a notice to the effect that he was discharged from immediate liability for military service; that shortly before July 13, 1918, he received a further notice to report before the local board, and on that day was certified for induction into the army; that on July 25, 1918, he was sent to Camp Upton, where he is now, and therefore alleges that he is in custody without authority of law.

According to the petition, the petitioner on June 21, 1918, asked his local board to reopen and reconsider his classification. He filed in support of this petition affidavits, one of which was verified July 24, 1918, evidently subsequent to notice to report for induction, and also affidavits verified June 21, 1918, which were offered to substantiate his claim of alienage. He did not appeal to the district board from the order of August 16, 1917, which he considered to be in his favor, nor does he appear to have appealed from the reclassification, which was followed by order of induction.

Two points are made in his behalf: First, that the local board could have had no evidence before it on which to base an assumption that the applicant was not a nondeclarant alien; and, second, that the decision of the local board did not make the matter res judicata, and that for this reason failure to take an appeal should not be held

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binding as evidence that the petitioner acquiesced in the decision of the local board.

[1] There seems to be no merit to this second contention. The Selective Draft Law Cases, 245 U. S. 366, 38 Sup. Ct. 159, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, establish the proposition that the local board has the power to exercise certain judicial functions, even though it is not a court, and subject to the Judiciary Law as a whole. The construction of the Draft Law (Act May 18, 1917, c. 15, 40 Stat. 76), as indicating the intention of Congress, makes it certain, in the opinion of this court, that the determination of the local board is final, except by appeal to the district board or the President, in any case where the local board has authority to act. Such determination involves an exercise of judgment based upon such evidence as is before the board. It is like the determination of an executive officer or of a board of inquiry in an immigration hearing, and, when made final by Congress, is not the subject of appeal to the courts.

The question is therefore limited to the familiar proposition, based upon the decision in Angelus v. Sullivan, 246 Fed. 54, 156 C. C. A. 280, that the courts have jurisdiction over any official presuming to act under a statute, to the extent of restricting him to his powers given by that statute, and to prevent, by writ of habeas corpus, wrongful detention where the authority of that statute has been exceeded. Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

[2] The writ of certiorari may be used to bring up the record, where basis for a writ of habeas corpus is shown; but the law courts have no power to issue a writ of certiorari to an executive or administrative board, for the sole purpose of reviewing the correctness of the board's decision.

[3] This application, therefore, comes back to the proposition that sufficient ground is shown for the issuance of a writ of habeas corpus. The petition shows that there was a hearing upon notice to the petitioner. There was evidently a reclassification. This was a determination upon the evidence, including the petitioner's own statement before the local board. The local board, in the first place, indicated that it had deferred classification. The various reasons other than alienage, which might have entered into the situation, would have sufficiently explained this delay. But the determination that the petitioner was liable to induction was based upon a hearing on evidence, and the petition does not show that the local board disregarded all the evidence before it, that it held an unfair hearing, or that it acted upon anything except its conclusion upon the testimony and the witnesses before it.

Under these circumstances, this court sees no reason to interfere with its determination, and the application for a writ will be denied.

## THE QUEVILLY.

(District Court, E. D. New York. September 23, 1918.)

COLLISION ⇐ 81—MOVING AND ANCHORED VESSELS—ENTERING ANCHORAGE GROUND IN FOG.

A bark turning into the anchorage grounds on the Staten Island side of the Narrows in a dense fog, without giving more frequent fog signals to give warning of the movement, *held* solely in fault for collision with an anchored vessel sounding signals at regular intervals.

In admiralty. Suit for collision by the Norton-Crossing Company against the French bark Quevilly. Decree for libelant.

Robert Strange, of New York City, for libelant.

Kirlin, Woolsey & Hickox, of New York City (Robert S. Erskine and L. De Grove Potter, both of New York City, of counsel), for claimant.

CHATFIELD, District Judge. At about 9 a. m. on the morning of February 18, 1916, the Quevilly was proceeding up through the Narrows, when it became evident that the fog made it unsafe for her to proceed further, and she sought an anchorage. She had been sounding a fog horn and heard fog bells from vessels at anchor on the Staten Island side. From these the Sandy Hook pilot endeavored to locate an open space into which he might proceed within the anchorage lines along the Staten Island shore. The testimony shows that he passed a steamer whose bell was plainly heard, and that he heard no bells above this steamer, from which he inferred that he could safely turn in at that point. The tide was running flood, and he starboarded his helm to pass under the stern of this steamer. He then ported his helm to turn against the tide, when the Urann was sighted practically dead ahead. He starboarded sharply again, and succeeded in almost clearing the Urann, but caught the jib boom with some portion of the mizzen rigging of the Quevilly. At just this time a tug was coming out from the Staten Island shore in search of the Urann, being guided by the sound of the Urann's fog bell, and the captain of the tug called to the Quevilly to go astern, and to drop anchor in order to avoid running into the Indra, which was lying directly in the path of the Quevilly and inshore of the Urann. Just at this moment the pilot of the Quevilly brought his ship to anchor, and she was stopped so near the Indra that, as she swung to the tide, her stern carried away the bobstay of the Indra. The Quevilly had previously stopped her engines, but started ahead again just as she made the turn into the anchorage grounds. She was moving, according to the testimony of the witnesses, at about a two-knot speed, but was evidently drifting sideways with the flood tide more rapidly than the pilot estimated. He testified that he heard no bell from the Urann or any other boat further up the harbor.

The testimony of witnesses whose statements are entirely dependable, and are in no way contradicted, shows that the bell of the Urann was ringing at frequent intervals, and that other boats in the imme-

diate vicinity and further up the harbor were also ringing bells, and it is apparent that the Sandy Hook pilot's recollection of whether he heard bells, and at what distance, must be at fault. It would appear that the side drift of the Quevilly, when making the turn into the anchorage ground, brought him too close to the Urann, and that he had probably paid no attention to the Urann's bell, on the assumption that it was not within dangerous proximity.

There is testimony that none of the persons on the Urann, or on the tugs alongside, heard the whistles of the Quevilly, and this bears out the theory that, when the Quevilly began to turn in, she was not close enough to the Urann to attract attention, so as to indicate that she was coming out of the channel.

There is also evidence that the Urann was observed by one of the inspectors of the anchorage at a point just outside of the anchorage boundaries; but this does not enter into the case, for the Sandy Hook pilot was navigating by sound, and if the Urann was, at some conditions of the tide, swinging outside of the anchorage line, it did not enter into the causes of this collision. The Quevilly had already turned inside of another boat, and was straightening up to come to anchor before reaching the Urann.

The burden was upon the pilot of the Quevilly (when leaving the channel and running into the anchorage ground, where he knew that vessels were likely to be met) to estimate correctly the various matters which had to be taken into account. The burden was therefore upon him, either to avoid running into any boat which might be encountered, or to indicate by more frequent fog signals the movements of the Quevilly. If he had done this, the attention of the mate ringing the bell of the Urann, and the attention of the other boats in the vicinity, might have been attracted in such a way that they would increase the frequency of their own fog signals, and the Quevilly might thus have avoided the danger in time; but there is nothing in the case to indicate that the Urann was negligent, when lying either on or very close to the anchorage ground, and when sounding its bell at regular intervals, in not anticipating that a boat would come in from the channel and run her down, without sounding its own approach by more frequent signals than the regular fog horn at stated intervals.

The libelant may have a decree.

## SIDEBOTHAM et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. September 10, 1918. Rehearing Denied Oct. 14, 1918.)

No. 3098.

1. INDICTMENT AND INFORMATION ⟸129(1)—FRAUDULENT USE OF MAILS—JOINDER OF CHARGES.
   A charge, under Penal Code, § 215 (Comp. St. 1916, § 10385), for using the mails for a scheme to defraud, and a charge, under section 37 (section 10201), for a conspiracy to commit such offense, may be joined, under Rev. St. § 1024 (Comp. St. 1916, § 1690), relating to several charges for same transaction or for two or more transactions connected together.
2. CRIMINAL LAW ⟸1149—DISCRETION OF TRIAL COURT—ELECTION—REVIEW.
   The disposition of an objection that defendants were or had been embarrassed in their defenses by a denial of their motion to require prosecution to elect would be within the discretion of the trial court, and reviewable only if that discretion was abused.
3. CRIMINAL LAW ⟸1167(2)—REFUSAL TO REQUIRE ELECTION—HARMLESS ERROR.
   In prosecution, under Penal Code, § 215 (Comp. St. 1916, § 10385), for using mails to defraud, and for a conspiracy to commit such offense, refusal to require prosecution to elect was not prejudicial, where defendant was convicted only of the first offense and sentenced for 13 months and to pay costs, where the statute authorized a fine of not more than $1,000, or an imprisonment of not more than five years, or both.
4. POST OFFICE ⟸49—SCHEME—EVIDENCE.
   In a prosecution upon counts under Penal Code, § 215 (Comp. St. 1916, § 10385), for using the mails for a scheme to defraud, evidence *held* to show that an envelope, circular, and application for stock in a corporation were placed in the post office under the direction and with the knowledge of the defendants.
5. CRIMINAL LAW ⟸787(1)—INSTRUCTIONS—REFERENCE OR FAILURE TO TESTIFY.
   In a prosecution under Penal Code, § 215 (Comp. St. 1916, § 10385), for using mails to defraud, instructions defining intent, and stating that no one had denied a witness' testimony, were not objectionable as referring to fact that defendants did not take stand and testify in their own behalf.
6. CRIMINAL LAW ⟸1172(1)—COMMENT ON DEFENDANT'S FAILURE TO TESTIFY—PREJUDICE—EVIDENCE.
   In a prosecution under Penal Code, § 215 (Comp. St. 1916, § 10385), for using the mails to defraud, where court is alleged to have commented on defendant's failure to testify, evidence *held* to show that the verdict was based upon the direct and positive testimony of witnesses and documents and the legitimate inferences, and not from any prejudice because defendants did not testify in their own behalf.

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

R. R. Sidebotham and J. G. G. Wilmot were convicted of using the post office for a scheme to defraud and they bring error. Affirmed.

Wellington D. Rankin, of Helena, Mont., for plaintiffs in error.

B. K. Wheeler, U. S. Atty., James H. Baldwin, Asst. U. S. Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

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MORROW, Circuit Judge. The indictment in the court below contained 11 counts. Ten counts, numbered 1 to 10, inclusive, charged the plaintiffs in error and 13 other defendants with the offense of devising a scheme and artifice to defraud certain persons by false and fraudulent representations and pretenses in the sale of certain shares of stock of the Northwestern Trustee Company, a corporation organized under the laws of the state of Montana; that having devised the scheme and artifice to defraud, and for the purpose of carrying the scheme and artifice into execution, the defendants deposited in a post office of the United States certain letters concerning the stock of the Northwestern Trustee Company, the letters being addressed to the persons intended to be defrauded by the scheme and artifice, in violation of section 215 of the Penal Code of the United States. Act March 4, 1909, c. 321, 35 Stat. 1130 (Comp. St. 1916, § 10385). The eleventh count charged the defendants with the offense of having conspired together in violation of section 37 of the Penal Code (Comp. St. 1916, § 10201) to commit the offenses described in the other counts.

[1] It is assigned as error that the court erred in denying the motion of the plaintiffs in error requiring the United States attorney to elect between the eleventh count and the other counts of the indictment on the ground of duplicity. The trial of the case was commenced on January 10, 1917, and the verdict of the jury was rendered on January 27, 1917. This motion was made on January 24, 1917, and after the case had been on trial on all the counts for two weeks. On the same day the court directed the jury to return a verdict for the defendants on counts numbered 1, 2, 3, and 4, and later the court instructed the jury to acquit the defendants on counts numbered 5 and 6. The case was finally submitted to the jury on counts numbered 6, 7, 8, 9, and 11. No objection had been interposed on behalf of the defendants to the introduction of testimony in support of all the counts of the indictment, and no objection was made at the beginning of the trial, or at any time, that the defendants would be or were embarrassed in their defense by this procedure. The objection now interposed is that the indictment is duplicitous, not that the plaintiffs in error were embarrassed in their defense.

The scheme and device to defraud as charged in the indictment, and the conspiracy to commit that offense, grew out of the same transaction, and were so connected together that the evidence to sustain one charge was evidence in support of the other charges, except to establish the conspiracy count, it was necessary to prove the conspiracy. Such charges may be joined under the provisions of section No. 1024 of the Revised Statute (Comp. St. 1916, § 1690), which provides:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

The case of Pointer v. United States, 151 U. S. 396, 14 Sup. Ct. 410, 38 L. Ed. 208, is cited by the plaintiffs in error in support of their ob-

jection that the conspiracy charged cannot be joined in the same indictment with the charge to commit the offense which is the object of the conspiracy. The Supreme Court did not so hold. In that case the indictment contained four counts:

"In the first count it was charged that the defendant, on the 25th of December, 1891, at the Choctaw Nation, in the Indian country, within the above district, did, with an ax, feloniously, willfully, and of his malice aforethought, 'strike, cut, penetrate, and wound' upon the head one Samuel E. Vandiveer, a white man, and not an Indian, inflicting thereby a mortal wound, * * * the same offense, and differed from the first only in using the words 'beat, bruise,' in place of 'cut, penetrate.' In the third count the defendant was charged, in the words of the first count, with having, in the same manner, on the 25th of December, 1891, feloniously, willfully, and of his malice aforethought, at the Choctaw Nation, in the Indian country, within the same district, killed and murdered one William D. Bolding, a white man, and not an Indian. The fourth count differed from the third only as the second count differed from the first."

[2, 3] The defendant moved to quash the indictment upon various grounds, one of which was that it charged two distinct felonies. The motion was overruled. Before the case was opened to the jury for the government, the defendant moved that the district attorney be required to elect on which count of the indictment he would claim a conviction. That motion having been overruled, he was required to go to trial upon all of the counts. Upon the conclusion of the evidence, the defendant renewed the motion that the government be required to elect upon which count of the indictment it would prosecute him. This motion was overruled. The jury found the defendant guilty upon the first and third count of the indictment. Upon writ of error to the Supreme Court of the United States, the judgment of the trial court was affirmed. In the opinion of the court, after referring to the rule established by authorities:

"That the court in its discretion may compel an election when it appears from the indictment or from the evidence that the prisoner may be embarrassed in his defense if that course be not pursued"

—the court says:

"It is therefore clear that the accused was not confounded in his defense by the union of the two offenses of murder in the same indictment, and that his substantial rights were not prejudiced by the refusal of the court to compel the district attorney to elect upon which of the two charges he would proceed."

The plaintiffs in error in the present case did not raise the objection that they were or had been embarrassed in their defense, and, had that objection been made, the disposition of the objection would have been in the discretion of the court and reviewable only if that discretion had been abused; and as it does not appear that the court abused its discretion in denying the motion, there is nothing for us to review; but, further than that, it does not appear that the plaintiffs in error were in any way prejudiced by the procedure. The jury acquitted the plaintiffs in error upon the conspiracy charge, and found them guilty only on the sixth count, charging them with the scheme to defraud, and depositing a letter in the post office to carry out the scheme. The judgment of the court was that the plaintiffs in error should each be im-

prisoned for the period of 13 months and pay the costs, amounting to $4,120. The punishment prescribed for the commission of the offense set forth in the sixth count is by a fine not more than $1,000, or imprisonment not more than 5 years, or both. The objection cannot be sustained.

[4] It is next assigned as error that the evidence was insufficient to support a conviction under the sixth count, and that the motion for a directed verdict in favor of the plaintiffs in error should have been sustained. The sixth count charged that the defendants, to carry out their scheme to defraud, placed and deposited in a certain post office in the United States, to be sent and delivered by the post office establishment of the United States, a certain envelope, upon which the postage was fully prepaid; that the envelope was addressed to the person therein named and contained a circular letter and blank application for stock. The text of the letter and blank application are set out, and it is charged that the letter was signed, "Sidebotham & Wilmot, Sole Fiscal Agents, by J. Hosking," that the letter related to the stock of the Northwestern Trustee Company, and that the letter and blank application were a part of the scheme to defraud.

The plaintiffs in error contend that the evidence does not show that Sidebotham and Wilmot actually deposited in the mails the circular letter and blank application referred to, or that the same was deposited by their agent under their direction, with their knowledge. The envelope, circular letter, and blank application were introduced in evidence, and marked, respectively, Exhibits 97, 98, and 99. Jessie Hosking testified that she was a stenographer; that she was employed by Sidebotham and Wilmot in the capacity of stenographer and bookkeeper; that while she was in the employ of Sidebotham & Wilmot in the office of the Northwestern Trustee Company, she had occasion to send out or assist in sending out circular letters, and when circular letters were sent out they were mailed to the stockholders and subscribers; that she identified her signature at the bottom of the letter Exhibit 98 and that she had seen circulars or letters similar to that in the office signed "Sidebotham & Wilmot, by J. Hosking" which were mailed out to stockholders and subscribers; that she was J. Hosking; that Exhibit 97 was the Northwestern Trustee Company's envelope. She recognized No. 99 (blank application for stock). She had seen that in the office of the Northwestern Trustee Company; that it accompanied the letter she had identified as No. 98, and was sent out through the United States mails with it. She didn't know whether it was gotten out by the Northwestern Trustee Company or by Sidebotham and Wilmot. It was sent out by Sidebotham and Wilmot. She was asked, "Who was it that actually sent Exhibits No. 98 and 99—mailed them?" She answered, "Sidebotham and Wilmot." She was asked, "Did you do it for them?" and she answered, "Yes, I did it; it was my instructions to send it out for them." She was asked how they were sent out, and she said, "Through the mail." She was asked how they were mailed out, and she answered, "As far as I can remember, they were dropped in the United States post office." This testimony and the legitimate inferences to be drawn therefrom as to acts of an authorized agent are, we think, suffi-

cient to establish the fact that the envelope, circular, and application for stock were placed in the post office under the direction of the plaintiffs in error and with their knowledge.

[5, 6] The objection that the court, in its instructions to the jury, referred to the fact that the defendants did not take the stand and testify in their own behalf, has no other basis than the court's definition of the "element of intent" in its instructions to the jury. The court instructed the jury upon this question as follows:

"What is intent? Intent is the quality of mind with which an act is done. It is the mental process, the design, the aim, the purpose or object of the act. How is this intent arrived at? Being a mental process, you cannot penetrate to the mind of a man, if he will not tell you, unless you can infer from his conduct; so that the law is: A man's intent is manifested and shown by all the circumstances connected with the offense."

The court also instructed the jury as follows:

"In September, 1914, Wiggins testified that Wilmot stopped him on the road, and sold him 10 shares at $30, and told him the company had been paying dividends the past year at the rate of 8 per cent., and he would guarantee that this year, when Wiggins did buy, that it would be 30 per cent. or better. No one has denied Wiggins' testimony, and there it stands for your consideration."

The instruction did not in any ordinary or legal sense call the attention of the jury to the fact that the plaintiffs in error did not testify in their own behalf, and we do not think the jury so understood it. None of the defendants testified in their own behalf.

The indictment charged 15 defendants with the offenses described in the indictment. The indictment contained 11 counts. The case was submitted to the jury against 7 defendants on 5 counts in the indictment. Had the court's instructions referred to been understood as calling the attention of the jury to the fact that the defendants did not testify in their own behalf, and had the instructions, as thus understood, prejudiced their defense in this respect, no such discriminating verdict, upon the evidence before the jury, would have been rendered against the plaintiffs in error, while acquitting the other 5. In other words, the evidence in the case clearly indicates that the verdict was based upon the direct and positive testimony of witnesses and documents and the legitimate inferences to be drawn therefrom, and not from any prejudice because the plaintiffs in error did not testify in their own behalf.

Finding no error in the record, the judgment of the District Court is affirmed.

## TOYO KISEN KAISHA v. HARTMAN.

(Circuit Court of Appeals, Ninth Circuit. October 7, 1918.)

No. 3136.

1. APPEAL AND ERROR ⊂⊃784—FEDERAL COURTS—DISMISSAL BECAUSE OF ERROR IN METHOD OF REVIEW.
   By the express terms of Act Sept. 6, 1916, § 4 (Comp. St. 1916, § 1649a), a federal appellate court having jurisdiction to review a cause may not dismiss a writ of error solely because an appeal should have been taken, but must disregard the error.
2. MASTER AND SERVANT ⊂⊃316(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—INDEPENDENT CONTRACTOR.
   Where a steamship, lying in a harbor and being unable to reach the docks, employed and paid a firm to carry passengers and others to and from the shore in launches, such firm was not an independent contractor as to one injured in a launch, but its employés were pro hac vice employés of the ship.
3. MASTER AND SERVANT ⊂⊃89(1)—MASTER'S LIABILITY FOR INJURY TO SERVANT—SAFE PLACE TO WORK.
   The rule respecting a safe place to work and approaches to it does not apply to the case of a seaman in returning to his ship from the shore, where he had been on his own business, not connected with his employment.
4. MASTER AND SERVANT ⊂⊃120—PERSONAL INJURIES—LIABILITY OF SHIP.
   Injury to a seaman by falling, while attempting to step from a launch to the gangplank of the ship in rough weather and carrying packages in his arms, *held* not due to negligence of the ship.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Wm. C. Van Fleet, Judge.

Action at law by A. L. Hartman against the Toyo Kisen Kaisha. Judgment for plaintiff (244 Fed. 567), and defendant brings error. Reversed.

Samuel Knight and F. E. Boland, both of San Francisco, Cal., for plaintiff in error.

Edgar D. Peixotto, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The defendant in error, who brought in the court below this action against the plaintiff in error to recover damages for personal injuries, was employed on the steamship Shinyo Maru, owned and operated by the plaintiff in error between San Francisco and certain Oriental ports, including Nagasaki, Japan. He was on the ship's articles at a salary of $1 a month, being the barber of the ship, and receiving the proceeds of the shop. On the occasion in question the ship was at her accustomed anchorage at Nagasaki, at which place ocean-going vessels are not able to go to the dock. The firm of Holmes, Ringer & Co., of Nagasaki, was employed by the plaintiff in error for the transportation of passengers and others, and their baggage, between their ships and the shore, using launches for

the purpose—usually large launches, but sometimes, as in the present instance, small ones.

On this occasion the defendant in error, having gone ashore on his own business, when ready to return to the ship, went to the dock, where he found one of the small launches, in which he took passage with the ship's physician, Dr. Wemple, and one Japanese. He had with him two bundles, one of which was 2 feet long and 2 inches wide, and the other about 12 by 8 inches. A heavy wind was prevailing, necessarily resulting in rough weather—some of the witnesses saying very rough. When the launch reached the ship, the doctor and the Japanese went aboard; but when the defendant in error undertook, with the two bundles under his left arm, to step from the launch to the gangplank, he lost his balance and fell, his left leg being caught in the hawse hole of the launch, resulting in his injury, for which he sued and recovered the judgment here complained of—the court below having awarded him $700 for medical and other expenses incurred by him, and a like sum for his suffering and loss of time, $1,400 in all, besides costs.

Among the defenses interposed by the defendant were denials that the crew of the launch was employed by the defendant, or was guilty of any of the negligence alleged, but, on the contrary, alleging that it was employed by an independent contractor, and as an affirmative defense set up contributory negligence by the plaintiff, and as a further and separate defense that the rights, duties, and liabilities of the parties were prescribed and to be measured by the laws of the empire of Japan in force at the time of the accident, which laws the answer set forth at large.

[1] A motion has been made on behalf of the defendant in error to dismiss the writ of error, on the ground that the action was really in admiralty, and the judgment reviewable only by appeal. In denying the motion, which we do, we think it sufficient to cite section 4 of the act of September 6, 1916 (39 Stat. 726 [Comp. St. 1916, § 1649a]), which provides as follows:

"That no court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

The plaintiff in error contends that the firm of Holmes, Ringer & Co. was an independent contractor, for whose negligence, if any, it is not responsible; that, if not such independent contractor, then its employés were pro hac vice the employés of the plaintiff in error, and therefore fellow servants of the defendant in error, for whose negligence, if any, the former is not liable; that there was no negligence on the part of the plaintiff in error, and, if so, that the injury was proximately caused by the negligence of the defendant in error; that the court below erred in holding that the laws of the empire of Japan did not measure the rights and liabilities of the parties, and erred in refusing to apply the general rule of the maritime law in fixing the amount of recovery allowed.

[2] We have no difficulty in agreeing with the trial court that the firm of Holmes, Ringer & Co., being under contract with the steamship company to furnish means of communication back and forth between the dock and ship, cannot be properly regarded as an independent contractor, but that the plaintiff in error must be taken to have held out to its employés, as well as to its passengers aboard the ship, that they were to use the means of transportation thus afforded; indeed, it was the only means—provided and paid for, as the record shows, by the plaintiff in error. The crew of the launch were therefore pro hac vice employés of the plaintiff in error.

[3] Assuming that there was some evidence tending to show negligence by them, and therefore sufficient to sustain the finding of the court that they were negligent, we are still unable to sustain its conclusion that the plaintiff in error was liable for the injury. The learned judge based his conclusion upon the well-established rule regarding the duty of an employer to furnish his employé with a reasonably safe place for the performance of his labor, adding in his opinion that it "includes reasonably safe means of access to his place of employment—so far, at least, as the circumstances require such means to be furnished by the employer."

We are of the opinion, however, that the rule referred to has no application to the facts of the present case; for, as shown by the evidence without dispute, neither in going from or returning to the ship was the defendant in error traveling for any purpose connected with the business of his employer, but solely for his own pleasure and purposes. Ellsworth v. Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, presented a case to the Circuit Court of Appeals for the Sixth Circuit where a coal miner, during the noon hour and while not engaged in work, went to visit another miner in another part of the mine, and in going along one of the passageways was killed by coming in contact with a wire claimed to have been improperly insulated. The trial court instructed the jury, in effect, that the deceased, in going and returning from the visit during the hour set apart for dinner and rest, was "in the line of duty within the meaning of the law."

In holding that view erroneous, Judge Day (now a Justice of the Supreme Court), with whom concurred Judge Lurton (later also a Justice of the Supreme Court) and Judge Severens, said:

"It is to be borne in mind in this connection that Metheney was not going from, or coming to, his work. He was not engaged in the business of his employer at the time of the injury, but came to his death during the noon hour, while returning from a visit undertaken, upon his own volition, outside the part of the mine in which he was employed."

See, also, Ocean Accident, etc., Co. v. Industrial Accident Com., 173 Cal. 313, 159 Pac. 1041, L. R. A. 1917B, 336; Kennedy v. Chase, 119 Cal. 637, 52 Pac. 33, 63 Am. St. Rep. 153; Wright v. Rawson, 52 Iowa, 329, 3 N. W. 106, 35 Am. Rep. 275; 1 Shear. & R. Neg. § 190.

[4] But, if the law were otherwise, we are of the opinion, after a careful consideration of the question of the alleged negligence, that but one conclusion can be reasonably reached upon the evidence, and

that is that the unfortunate accident was not due to any negligence on the part of any employé in the operation of either the launch or ship, but to the attempt of the defendant in error to step from the launch to the gangplank, in the then condition of wind and water, with the bundles under one of his arms. It would serve no useful purpose to review the evidence, but, reaching that conclusion, it is obviously our duty to disregard the finding of the trial court to the contrary. It being unnecessary to consider any of the other points relied upon by the plaintiff in error, the judgment is reversed, and the case remanded to the court below for a new trial.

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UNITED VERDE COPPER CO. v. KUCHAN.

(Circuit Court of Appeals, Ninth Circuit. June 3, 1918.)

No. 3089.

MASTER AND SERVANT ⊂=184—MASTER'S LIABILITY FOR INJURY TO SERVANT—UNSAFE PLACE TO WORK.

Under Civ. Code Ariz. 1913, par. 4071, requiring warning to be given before firing a blast in a mine, and Const. Ariz. art. 18, § 4, abrogating the fellow servant doctrine, a mining company is responsible for a failure to give such warning, whereby an employé is injured.

In Error to the District Court of the United States for the Distrcit of Arizona; Wm. H. Sawtelle, Judge.

Action by Nick Kuchan against the United Verde Copper Company. Judgment for plaintiff, and defendant brings error. Affirmed.

This is an action for damages for personal injuries received by the defendant in error while employed by the plaintiff in error in its mine in Yavapai county, Ariz. At the time of the injury the defendant in error was employed upon the 700-foot level of the company's mine, where another servant of the plaintiff in error was engaged in blasting and discharging explosives. While the defendant in error was passing, with others, from one place upon said level to another place on the same level, where they were to have lunch, a large quantity of dynamite or other high explosive placed in a hole by the servant of the plaintiff in error engaged in that work was suddenly exploded and discharged, without any warning to the defendant in error that such explosion and discharge was to be made. As a result of the explosion, the defendant in error was struck with a quantity of rocks and stones, whereby he sustained severe permanent injuries, among others, the loss of both of his eyes, the total loss of the hearing in one ear and impairment of the other, some destruction of the molar bones of the jaw and a wounding of the left shoulder; the latter probably not a permanent injury. At the trial the injuries were proven as stated, and, at the conclusion of the testimony, counsel for the plaintiff in error stated that, notwithstanding he contended there was no negligence on the part of the plaintiff in error, he was willing that the jury should bring in a verdict of $7,500, but that he was not willing that they should bring in a verdict for more than $7,500, unless the jury believed defendant was guilty of negligence. No claim was made that defendant in error was guilty of contributory negligence. The jury returned a verdict for $25,000 and costs.

G. P. Bullard, of Phœnix, Ariz., and Le Roy Anderson and Anderson, Coleman & Nilsson, all of Prescott, Ariz., for plaintiff in error.

F. C. Struckmeyer and J. S. Jenckes, both of Phœnix, Ariz., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

MORROW, Circuit Judge (after stating the facts as above). It is assigned as error that the court gave the jury the following instruction:

"You are instructed that the law requires a mining company, such as the defendant, before firing charges of explosives, to give warning in every direction from which access may be had to the place where blasting is going on. This is a duty imposed upon mining companies, and the failure to give warning as required by statute constitutes negligence on the part of the defendant; and if you find from the evidence that warning of the intention to fire the charges of explosives which caused the injury to the plaintiff was not given to the plaintiff, and that the failure to give such warning constituted the proximate cause of such injury to the plaintiff, then the plaintiff is entitled to recover in this action."

The instruction was based upon subdivision (e) of section 4071 of the Civil Code of Arizona (Revised Statutes of Arizona 1913 and Civil Code, p. 1365). The section provides, among other things:

"Before firing charges, warning must be given in every direction from which access may be had to the place where blasting is going on."

The question is: Does the law place the duty of giving the warning before firing a charge of explosives upon the mining company? The appellant contends that the duty of giving the warning must be definitely fixed upon the company to make it liable, and as there are no words in the statute designating the mining company as the person or company on whom the duty to give the warning falls, the duty is not so placed, and must fall upon the employés or servants, failing to do that duty; but the "common-law doctrines of fellow servants, so far as it affects the liability of a master for injuries to his servants resulting from acts or omissions of any other servant," was abrogated by section 4 of article 18 of the Constitution of the state. It follows that, if it be conceded that the statute fails to place the duty to give the warning upon the mining company, nevertheless the Constitution of the state, construed in the light of the general law, makes the company responsible for the neglect of such duty, and the same result is reached as though the statute had directly placed the duty of giving the warning upon the mining company. This responsibility of the mining company arises under the general law requiring all employers to use ordinary care to furnish a reasonably safe place within which their employés are required to work.

The Supreme Court of Iowa, in Hendrickson v. United States Gypsum Co., 133 Iowa, 89, 110 N. W. 322, 9 L. R. A. (N. S.) 555, 12 Ann. Cas. 246, after stating the general rule that it was a masterial duty to provide employés a safe place to work, and that this duty was one which could not be delegated in such a way as to release the master from responsibility for failure to perform it, gives this clear and logical construction of the rule as applied to the use of explosives in a mine, the question before the court in that case. The court says:

"It must at all times be remembered that defendant was using a highly dangerous explosive in its mine, and that, by reason thereof, the place was unsafe, unless proper rules were made for the handling thereof, and proper warnings given of the blasts."

In Belleville Stone Co. v. Mooney, before the New Jersey Court of Errors and Appeals, the plaintiff an employé in defendants' quarry was

injured by a piece of rock thrown out by a blast. The plaintiff was not warned of the blast soon enough to enable him to reach a place of safety. In discussing the question of the employer's liability for the neglect of an employé in failing to give timely warning of the blast, the court said:

"The danger of blasting was one frequently recurring, and its occurrence could always be foreseen, not by workmen scattered about the quarry, but by any person charged with the duty of watching for it. If the danger was not foreseen, and proper warning given, the quarry became an unsafe place for the workmen; but it was made reasonably safe if such warning was given. It seems clearly to follow that on him whose duty it was to take care that the place should be kept safe was cast the duty of giving timely warning. We conclude, therefore, that it was part of the defendant's duty to the plaintiff that proper care should be exercised in giving warning of an expected blast." 60 N. J. Law, 323, 38 Atl. 835; 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834.

To the same effect is Hjelm v. Western Granite Contracting Co., 94 Minn. 169, 102 N. W. 384; Jacobson v. Hobart Iron Co., 103 Minn. 319, 114 N. W. 951.

In Iowa, New Jersey, and Minnesota the fellow servant rule prevails in other than railroad employment. It will thus be seen that, in using such a dangerous agent as an explosive in those jurisdictions, the safe place rule required of the master is made superior to the fellow servant rule, and determines the master's responsibility for injuries arising from negligence. It follows that the use of explosives in a jurisdiction where the fellow servant rule has been abolished the law with still greater force and certainty imposes upon the employer, under the safe place rule, a responsibility he cannot delegate to others and determines his liability for the negligence of a fellow servant. This we believe to be the correct interpretation of the provision of the Constitution and Civil Code of Arizona upon that subject.

This conclusion is a sufficient answer to the other questions discussed in the brief of the plaintiff in error. We think the questions involved in the writ of error were of sufficient importance to be brought to this court, and the defendant ought not to be subjected to additional damages on that account.

The judgment of the court below is affirmed.

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## AMERICAN MINERAL PRODUCTION CO. v. HELSLEY.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3184.

SALES ⊂359(1)—ACTION FOR PURCHASE PRICE—SUFFICIENCY OF EVIDENCE.
Evidence *held* to sustain a verdict finding that there was a sale and delivery to defendant of personal property and its acceptance.

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

⊂For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Action at law by F. M. Helsley against the American Mineral Production Company and another. Judgment for plaintiff, and defendant named brings error. Affirmed.

Post, Russell, Carey & Higgins, of Spokane, Wash., for plaintiff in error.

Zent & Powell, of Spokane, Wash., and L. C. Jesseph, of Colville, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. This action was brought by Helsley against Cole and the corporation, American Mineral Production Company, for the purchase price of six motor trucks. The two defendants jointly denied all material allegations of the complaint and pleaded the statute of frauds. Upon the trial, the court granted the motion of defendant Cole for judgment, upon the ground of lack of evidence to show joint purchase by Cole and the corporation, but denied the motion for judgment in favor of the corporation, holding that there was evidence of an agreement of sale with the corporation and a delivery under the agreement. The jury were instructed upon this theory, and there was verdict, and thereafter judgment, in favor of Helsley.

The assignments of error present the question of the sufficiency of the evidence to show a contract between Helsley and the corporation. There was evidence to the effect that Cole was president of the corporation defendant; that in July, 1917, after negotiations, he purchased the interest of Helsley in the trucks, and agreed to pay $5,500 therefor; that there was delivery to the agent of the corporation, and that the corporation used the trucks and put them under the immediate supervision of one of its employés; that at the time of the negotiations referred to the corporation was party to a contract with Helsley to deliver to him at least 600 tons of ore a week for transportation, at $2 per ton; and that upon consummation of the sale Helsley was relieved of the obligations of the contract.

The court in its instructions to the jury explained that under the law of the state of Washington a sale of personal property to the value of more than $50 is void, unless there is a written memorandum of the sale signed by the party to be charged, or unless some part of the purchase price has been paid, or unless there has been a delivery of the property or some part of it, and charged that the plaintiff was obliged to prove that a sale was made as alleged, and that the trucks were delivered to and accepted by the corporation. Inasmuch as the charge was directly upon the issues presented, and plaintiff in error took no exceptions to the law as stated, its rights have not been injured.

We cannot sustain the contention that Cole was not acting for the corporation. The court was correct, we think, in dismissing the case as to Cole as an individual; but the question whether Cole was acting for the corporation when the negotiations were had was properly submitted to the jury.

We find no error, and affirm the judgment.

## CHICAGO, M. & ST. P. RY. CO. v. CHAMBERLAIN.

(Circuit Court of Appeals, Ninth Circuit. June 3, 1918.)

No. 3097.

1. EVIDENCE ⊂⊃122(6)—RES GESTÆ—STATEMENT CONNECTED WITH EVENT.
A statement made by plaintiff, shortly before he fell from an unlighted station platform on defendant's railroad and was injured, that he was there to take an incoming train, *held* admissible as part of the res gestæ.

2. EVIDENCE ⊂⊃155(11)—COMPETENCY—SIMILAR EVIDENCE BY ADVERSE PARTY.
Testimony in rebuttal that plaintiff in personal injury case was not intoxicated, relevent in contradiction and explanation of testimony introduced by defendant over plaintiff's objection, *held* properly admitted.

3. NEW TRIAL ⊂⊃6—DISCRETION OF COURT.
The denial of a motion for a new trial in the federal courts is within the discretion of the court.

4. APPEAL AND ERROR ⊂⊃977(1)—REVIEW—NEW TRIAL.
Where the court exercises its discretion in denying a motion for new trial, and there is evidence supporting the judgment, motion is not reviewable on writ of error.

In Error to the District Court of the United States for the District of Idaho; Frank S. Dietrich, Judge.

Action by Bartholomew Chamberlain against the Chicago, Milwaukee & St. Paul Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Action to recover damages for personal injuries. The defendant in error received injuries as a result of falling from a platform owned by the plaintiff in error, located at a point on its line of railway designated as Herrick, in the state of Idaho. The parties to the action will be designated as in the court below.

It is alleged in the complaint, in substance, that prior to October 1, 1916, there was at Herrick, in Idaho, a depot building with a platform in connection therewith for the convenience of passengers arriving and departing on the trains operated by the defendant over its line of railway; that the depot and platform at this time were constructed between the main line and a siding adjoining, and were elevated above the natural lay of the ground about 10 feet; that the depot building was constructed upon posts about 10 feet high, and the platform in connection therewith extended from the depot building proper out to the main line, a distance of about 11 feet; that on the west side of the depot building the platform was extended from the main line to the side track for the purpose of transferring freight and passengers from the main line to the side track, and completely bridged the low land between the side track and the main line on the west side of the depot building; that about the 1st of October, 1916, the defendant removed the depot building and that portion of the platform west of the building from the station to some other point on its line of railway, but left the platform, which had extended from the depot building to the main line, being about 11 feet in width and 80 feet long; that on the side of the platform where it formerly joined the depot building it was elevated above the natural lay of the ground about 10 feet, and that the ground below was thickly covered with rocks, boulders, and logs; that after moving the depot building the defendant maintained a station at that point as before, and sold tickets to and from the station, and continued the platform for the use and convenience of passengers, but left the platform along the space where the depot building stood unguarded and unrailed; that on November 15, 1916, the plaintiff, intending to board a west-bound passenger train as a passenger, went

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

upon the platform about 7 o'clock in the evening, just before the arrival of the train; that the evening was dark and the platform unlighted, and because of the unguarded and unrailed condition of the platform, along the space where the depot building had been, the plaintiff fell from the platform about 10 feet to the ground below and was injured, as charged in the complaint.

The defendant in its answer denied the allegations of the complaint. Upon the trial there was evidence on the part of the plaintiff tending to establish all the material allegations of the complaint. The court charged the jury upon the issues of fact. No exceptions were taken to the charge, and the jury returned a verdict in favor of the plaintiff for $7,500, and a judgment was entered accordingly. A motion for a new trial was denied.

George W. Korte, of Seattle, Wash., and J. F. Ailshie, of Cœur d'Alene, Idaho, for plaintiff in error.

R. B. Norris, of St. Maries, Idaho, and Corkery & Corkery, of Spokane, Wash., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] The answer of the defendant denied that the plaintiff went upon the platform at the station for the purpose of becoming a passenger on defendant's train. This denial raised the issue as to whether or not the plaintiff did intend to become such passenger. On the trial the plaintiff testified that he went upon the platform, intending to take passage to another station on the west-bound train. This testimony was uncontradicted, but in support of it a witness was called, who testified, among other things, that he saw the plaintiff at the station upon the arrival of the train; that the witness was about to shake hands with him and bid him good-by, when the plaintiff stated that he "was going on through with" the witness "on the train as far as Plummer Junction." It was objected that this testimony was hearsay, self-serving, and incompetent. It was not self-serving, unless it can be presumed that the plaintiff anticipated falling from the platform, and that he knew it was necessary that he should have the rights of an intending passenger to enable him to recover for whatever injuries he might receive. We cannot indulge in such a presumption. We cannot assume that the plaintiff knew that he was about to fall from the platform, or that as an intending passenger the company owed him a duty he was not otherwise entitled to claim.

In a sense, the testimony of the witness was hearsay, but it stood "in immediate causal relation to the act—a relation not broken by the interposition of a voluntary individual wariness seeking to manufacture evidence for itself." Wharton on Evidence (3d Ed., 1888) par. 259. In this sense it was a part of the res gestæ.

"These surrounding circumstances, constituting part of the res gestæ, may always be shown to the jury along with the principal fact, and their admissibility is determined by the judge according to the degree of their relation to that fact and in the exercise of his sound judgment; it being extremely difficult, if not impossible, to bring this class of cases within the limits of a more particular description." 1 Greenleaf (12th Ed.) par. 108; St. Clair v. United States, 154 U. S. 134–147, 14 Sup. Ct. 1002, 38 L. Ed. 936.

We think the testimony was unimportant, but its admission was properly within the discretion of the court.

[2] In support of the defense of contributory negligence on the part of the plaintiff, evidence was introduced, over the objection of the plaintiff, tending to show that he had been at another station on the line of the road earlier in the day drinking with friends; that, returning in the afternoon along the railroad track in the direction of Herrick, the party had been overtaken and picked up by employés of the road operating a motorcar; that the employés on the motorcar did this as a matter of safety for the men taken on the car. The plaintiff was called in rebuttal and testified that he was not drunk, and over the objection of the defendant testified that the party paid the employés on the car for the ride.

It is contended that the admission of this testimony was error tending to prejudice the jury against the defendant. The testimony was admitted by the court as tending to meet the defense that these men were picked up because they were in an intoxicated condition. The car ride having been brought to the attention of the jury over the objection of the plaintiff, it was not error on the part of the court to permit him to show the circumstances connected with the ride, and the fact, if it was a fact, that, instead of being taken onto the car for his safety, it was because he paid for the ride to Herrick. It was testimony in rebuttal, and under the circumstances was properly admitted.

The evidence on behalf of the plaintiff upon the issues of the case were sufficient to go to the jury, and the court properly denied the motion of the defendant for an instructed verdict.

[3, 4] The denial of a motion for a new trial in the federal courts is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the judgment, as in this case, a motion is not reviewable on a writ of error. Hedderly v. United States, 193 Fed. 561–571, 114 C. C. A. 227; Pickett v. United States, 216 U. S. 456–461, 30 Sup. Ct. 265, 54 L. Ed. 566; Holmgren v. United States, 217 U. S. 509–521, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Shepard v. United States, 236 Fed. 73–77, 149 C. C. A. 283; Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364–367, 153 C. C. A. 290.

The judgment of the court below is therefore affirmed.

## BALLARDVALE SPRINGS CO. v. UNITED METAL SEAL CO.

(Circuit Court of Appeals, First Circuit. September 12, 1918.)

No. 1341.

1. PATENTS ⟸328—VALIDITY—CAP FOR BOTTLES.
The Recht patent, No. 796,356, for improvement in caps for bottles, *held* void for lack of patentable novelty, in view of the prior art.

2. PATENTS ⟸42—IMPROVEMENT PATENTS—VALIDITY.
In considering the claims of a first improver upon a specific device, when asserted against third persons, it is often useful to inquire whether his claims could have been asserted by the improver against the inventor and patentee of the specific device upon which the improvement was made.

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit in equity by the United Metal Seal Company against the Ballardvale Springs Company. Decree for complainant, and defendant appeals. Reversed.

James Q. Rice, of New York City (Alfred H. Hildreth, of Boston, Mass., on the brief), for appellant.

Harrison F. Lyman, of Boston, Mass. (Fish, Richardson & Neave, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and BROWN, District Judge.

BROWN, District Judge. This is an appeal from a decree of the District Court, holding valid and infringed claims 1 and 5 of letters patent to F. Recht, No. 796,356, August 1, 1905, for improvements in caps for bottles.

Claim 1 is typical:

"1. The combination, with a metal cap adapted to be locked over the mouth of a bottle, of a tenacious metal disk contained within the cap, and a disk of compressible material interposed between the cap and metal disk, the whole organized to effect a sealing contact between the metal contained in the cap and the mouth of the bottle."

The "tenacious metal disk" is the element claimed to be new; the other elements being contained in prior art devices.

The manufacturer of defendant's device has taken a bottle cap of the old type, described in the earlier patent to W. Painter, No. 468,258, February 2, 1892, consisting of a cap of hard metal with a corrugated flange and a sealing disk of cork, a kind of bottle closure in very extensive use, and known as the "Crown Cork and Seal," and for the purpose of preventing contamination of the contents of the bottle, and to prevent leakage through the pores or defects of the cork sealing disk, has applied to the side of the disk which comes in contact with the contents of the bottle a disk of tin foil or a thin sheet of tin.

[1] The defendant relies upon the patented art prior to Recht as disclosing this protective means, and as justifying its use by defendant, irrespective of the patent in suit.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The use of a "thin sheet of pure tin" for this purpose in sealing devices for bottles, jars, and other vessels, is shown in the British patents to Weissenthanner, No. 7,597 of 1893, and No. 13,352 of 1879. The use of tin foil is described in the Laurent British patent, No. 6,920 of 1887, the Jovignot British patent, No. 12,957 of 1902, the United States patent to Chrysler, No. 51,020 of 1865, and other patents.

The District Court said:

"The use of cork disks covered with a tin foil coating was old, as is not denied; such coating being intended to prevent contact between the cork and the liquid contents of the bottle—a contact found liable to injure carbonated or other waters when so contained."

The plaintiff seeks to avoid the disclosures of the prior art by contending that the Recht patent relates to the special art of "crown caps" for bottles, which began with the Painter patent, No. 468,258, and which involves the use of considerable pressure in applying the caps to the bottles.

It seems clear that Painter, the prior patentee of the crown cap, who had invented a new form of bottle cap, could not be deprived of the right to use in connection with that invention the familiar and well-known means of avoiding contamination, which was applicable to the general art of bottle closure upon which he improved. In the present case it appears that the problem of preventing the contamination of the contents of a bottle by a cork, or by reason of imperfections of a sealing disk, had been solved by interposing a sheet of tin between cork and contents.

The mere fact that, after Painter, Recht, or any one else may have been first to do this for a crown cap, does not in the least assist in showing that invention was involved in so doing. Nor does the fact that it has proved very useful, because so many crown caps are used, tend to show invention. It is useful with crown caps, exactly as it was useful with caps of other kinds, and for the same reason.

The idea of using with Painter's new type of cap the same protection—tin—which was commonly used for that purpose was not an inventive idea, unless the new construction presented obstacles to its use nonexisting in old forms and requiring to be overcome by a new idea of means.

The new feature introduced by Recht is said to be "a tenacious metal disk"—i. e., a disk which will not be torn when it is subjected to the considerable pressure used in attaching crown caps to bottles. The patentee says of his protective disk:

"It is of such thickness, usually three to five thousandths of an inch, and of such tenacity that when the requisite pressure is applied for fixing the cap and the metal disk is clamped between the wood disk and the mouth of the bottle the metal disk will properly fold and adjust itself to the mouth of the bottle without tearing and effect a proper sealing contact."

There is no evidence from which it can be inferred that the problem of preventing disruption of a protective disk presented any practical difficulty that required more than ordinary common sense for its solution.

Assuming that there was presented the problem of providing a lining that would withstand a pressure heavier than that applied to former battle caps, and that this problem was solved by thickening the material already selected by prior art users on account of its insolubility, we are unable to regard this as involving invention.

In estimating the value of the defendant's argument that the patent in suit was for an improvement in a special class of bottle closures, we must remember that the crown cap was an old and complete invention, which in common with other closures uses a cork which comes into contact with the liquid. The means for obviating the direct contact between cork and contents was well known. Tin or tin foil had been selected because of the quality of insolubility, and it performed the protective function in the devices of the prior art exactly as in the crown caps protected by the same kind of substance. The fact that there are many patents for other means of protection for corks, whether in crown caps or in caps of other kinds, and that various experiments were made to find other means, does not detract from the fact that tin was already described in prior patents, relating to the art of sealing devices for bottles and other vessels, as suitable for this purpose.

[2] In considering the claims of a first improver upon a specific device when asserted against third persons it is often useful to inquire whether his claims could have been asserted by the improver against the inventor and patentee of the specific device upon which the improvement was made. The inventor of a specific improvement in the art of sealing bottles does not by securing an improvement patent cut off himself or others from resort to the prior art upon which he improved. That he established a new art or subart by his species improvement must be shown by contrasting what he did with the devices of the prior art upon which he improved. Upon the question of the scope of his invention the prior art may be cited against him, and against all improvers upon his specific device. The crown cap patents do not begin that branch of the art of bottle closure which has to do with protection interposed between cork and contents. This is an old and special feature of the general art, and in order to show that what was old when applied to other structures is new when applied to a crown cork we must consider first whether any new function was effected. So far as appears, the function of the insoluble tin was the same as before.

We may next inquire whether there was any mechanical difficulty in applying tin to a crown cap which did not exist in applying it to prior devices, and which had to be overcome by inventive skill. It is said that, as the crown cap was subjected to greater pressure, it had to be made of material sufficiently tenacious to resist that pressure. The Weissenthanner patents and the Jovignot patent show the protective sheet of tin conforming to pressure and adapting its form to the compression of the cork which it covers and keeps from contact with the contents, and are a sufficient indication to a mechanic that the protective sheet must be strong enough to withstand such strains as are used to compress the cork. Aside from this we think it obvious that a protective sheet applied to cork which is to

undergo pressure must be strong enough to withstand the degree of pressure to be applied, and that this would be obvious to any person of ordinary skill who was seeking to apply to crown caps the same kind of protective covering used on caps of other descriptions.

The history of the experiments and failures of others is much relied upon to prove invention. It is true that the argument that apparent simplicity in means shows noninvention may be met by the answer that many tried and nobody thought of it; but this avails nothing against prior patents which describe the means and show that, even if there was reinvention at a later time, there was nevertheless no patentable novelty.

As we are of the opinion that the claims in suit are invalid for want of patentable novelty, it is unnecessary to consider the defenses of double patenting and laches.

The decree of the District Court is reversed, and the case is remanded to that court, with instructions to dismiss the bill. The appellant recovers costs in both courts.

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## HUEBNER-TOLEDO BREWERIES CO. v. MATHEWS GRAVITY CARRIER CO.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1918.)

No. 3125.

1. PATENTS ⟸26(1)—INVENTION—ADAPTATION OF OLD DEVICES.
   To adapt an old and familiar device to another structure equally old and well known is not to exercise the inventive faculty, but to apply the skill of the mechanic.
2. PATENTS ⟸19—INVENTION—IMPROVED RESULT.
   A mere carrying forward of the original idea, a change in form, an improvement in degree, without substantial change in either means or result, is not invention.
3. PATENTS ⟸26(2)—INVENTION—COMBINATION OF OLD ELEMENTS.
   The selection and putting together of the most desirable parts of different machines in the same or kindred arts, making a new machine, but in which each part operates in the same way as it operated before, and effects the same result, cannot be invention.
4. PATENTS ⟸36—INVENTION—COMMERCIAL SUCCESS.
   Commercial success is never a safe criterion of invention, except in cases of doubtful validity of the patent.
5. PATENTS ⟸328—VALIDITY—GRAVITY CARRIER.
   The Mathews & Lister patent, No. 890,917, and the Mathews patent, No. 978,466, each for improvements in gravity carriers, are both void for lack of invention, in view of the prior art.

Appeal from the District Court of the United States, for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Suit in equity by the Mathews Gravity Carrier Company against the Huebner-Toledo Breweries Company. Decree for complainant, and defendant appeals. Reversed.

Russell Wiles, George A. Chritton, and Wm. H. Dyrenforth, all of Chicago, Ill., for appellant.

A. C. Paul, of Minneapolis, Minn., and Wilber Owen, of Toledo, Ohio, for appellee.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

WARRINGTON, Circuit Judge. This suit is based upon alleged infringement of two patents; it is met in the answer, not only by denial, but particularly by allegation that the claims of these grants are "wholly and entirely void, as not involving anything more than ordinary mechanical skill over what is common knowledge in the art," and a great many prior patents are referred to. The patents in suit are (1) No. 890,917, issued June 16, 1908, to Mathews & Lister, assignors to Mathews Gravity Carrier Company, and (2) No. 978,466, issued December 13, 1910, to Mathews, assignor to the same company. That company was a Minnesota corporation, and its rights, so far as this suit is concerned, have passed to the appellee, a Pennsylvania corporation. The patents were each in terms granted for "improvements in gravity carriers," and will be mentioned hereafter, in the order of their dates, as the first patent and the second patent. Claims 2, 4, 5, 6, 7, 8, and 9 of the first, and all the claims of the second, patent are in issue; and both patents, as respects the claims in issue, were held valid and infringed by the court below. The cause was referred for an accounting and damages, and perpetual injunction was issued. By consent the master reported that appellant had purchased from a company named (though not a party to the suit), and had used in its business, "material found by the court in its decree to be an infringement," and stated the amount of appellee's loss of profits thereon. The Breweries Company appeals.

We may as well say at the outset that, if the patents are valid, they are, at least as to some of the claims in issue, infringed. The important feature of the case is found in the issue of validity. This issue in the end is one of fact. It is whether the disclosures of the patents, when compared with the prior art, amount to anything more than the natural developments of the skilled mechanic. The first patent relates, in the language of the specification, "to carriers designed particularly for transporting brick and similar articles of comparatively small dimensions by gravity." Generally speaking, the carrier comprises two parallel side rails, with a series of transverse metal tubular rollers having ball bearings at their ends and having rods extending through their longitudinal centers, and also through the side rails, where they are held by means of lock nuts; the rollers so mounted rotating freely on their respective rods or axles. The carrier is constructed in sections of lengths suitable for removal from one place to another, and the sections are provided with projecting ends adapted to fasten one section to another, and so to form a continuous structure of such length, along such courses, and at such a grade as the convenience of the user may require. Another feature of this patent is that the rollers are provided with flanges or rims at the ends, on which packages of greater width than the length of the rollers may be placed and transported. The specification states: Side guards or other frictional interference with packages moving on the carrier are dispensed with; the packages follow "the line of least resistance" and travel "in the direction of rotation of the

wheels," and may thus be moved from one point to another along the roller surface of the carrier, when maintained at a slight grade. The character and details of the structure will be readily understood by reference to the following drawings which accompany the letters patent:

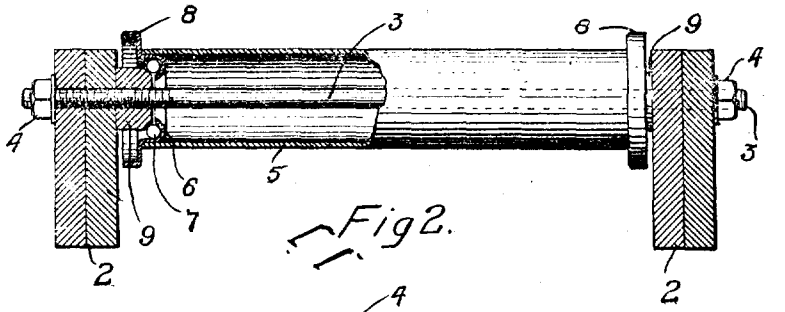



Fig 2.

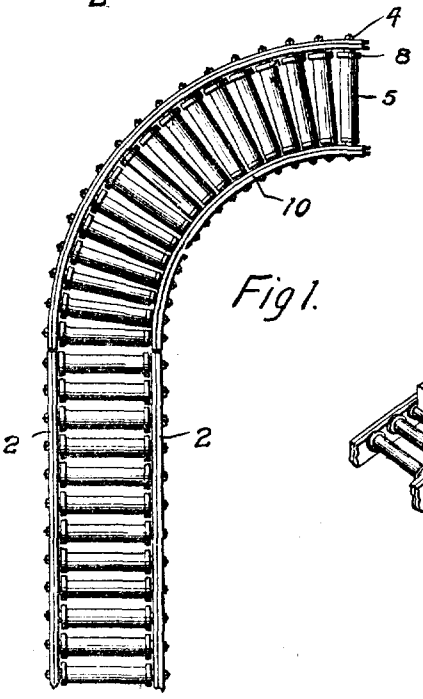



Fig 1.

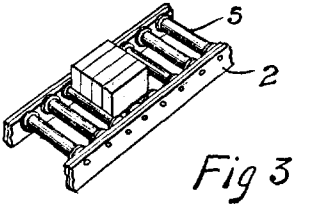



Fig 3

"Fig. 1 is a plan view of a brick carrier embodying our invention. Fig. 2 is a transverse sectional view, one end of a roller being broken away to illustrate the bearing for the same. Fig. 3 is a perspective view showing a portion of a carrier and the bricks thereon." [1]

[1] Although claim 1 is not in issue, yet the flanged rollers displayed in the drawings will be explained by that claim:

"A gravity carrier comprising side rails, rods connecting said rails at intervals, metal rollers having flanged ends and ways and balls fitting there-

It will be observed that the rods with threaded terminals not only pass through the rolls (including the ball-bearing appliances), but also through the side rails, upon the outside of which they are fastened by lock nuts *4*. This seems to have rendered it inconvenient to remove a single rod with its accompanying roller, since it required removal of one of the side rails entirely. It was sought to overcome this by the second patent. The chief difference between the two patents is thus stated by counsel for appellee:

"The second patent differs from the first principally in the provision of convenient means for removing a single rod with its accompanying roll without in any way disturbing the adjustment of any other roll. This is accomplished by having the side rails provided with slots or notches in the upper edges, with the rods detachably mounted in such notches, thus making it possible to immediately remove any roll from the carrier without disturbing the other rolls."

The means so provided in the second patent may be seen in Fig. 2 of the drawings accompanying the letters patent. It follows:

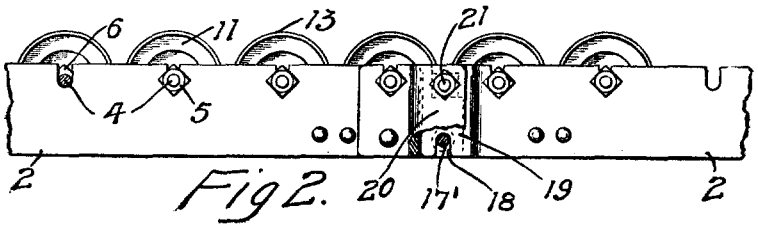


Fig 2.

"In the drawing, 2 represents the side rails of the carrier, composed preferably of flat steel bars. These bars are provided at intervals in their upper edges with vertical slots or notches *3* adapted to receive rods *4* having threaded ends and provided with lock nuts *5* and *6*, the former on the outside of the bars and the latter between them. * * * Any roller can be easily removed from the carrier by loosening the lock nuts *5*."

We may mention one or two other changes that were made in the device of the second patent. One involves the sectional coupling. It is said in the specification of the first patent that the sections are made of any suitable length and "coupled together at their ends"; while in the second patent it is stated that various forms of coupling devices may be provided, but preference is given to "a tongue *19* on the end of

in, cones mounted on said rods and having bearing surfaces, and between which surfaces and said ways said balls are arranged."

And as further explanatory of the elements comprised in the patented device we think it sufficient for present purposes to add a claim that is in issue:

"2. A gravity carrier comprising side rails and means connecting them at intervals, and rollers having anti-friction bearings at their ends upon said connecting means and forming a way over which comparatively small articles such as brick may be transported, said rollers being of substantially uniform diameter between their ends and extending above the tops of said rails, substantially as described."

each rail *2* bent outwardly to offset it from the plane of the rail and adapted to fit between a plate *20* and the end of the abutting rail." These parts may be riveted or bolted together. Another change was made through the use of additional braces. Apparently three within each section are disposed at right angles with the side rails and fastened to them, and between these braces are two sets of diagonally crossing braces; the object being to hold the sides of the carrier in "parallel relation with one another." Claims 1 and 4 are copied in the margin further to illustrate the second patent.[2]

Appellee offered in the court below one section of the Mathews gravity carrier as an exhibit. This exhibit, as we understand, and additional sections of the carrier, were displayed and operated as a unitary structure at the hearing in our court. The exhibit seems to comprise the main features of the two patented devices in suit, except in two or three respects: The rollers have no flanges, but are disposed so that their upper plane is above that of the side rails; thus flanges are rendered unnecessary for transporting "articles of greater length than the width of the carrier"; the flanges were distinct features of the first patent, and of the specification and drawings of the second patent, though they appear to have been given up in the structure exhibited. Further, this exhibit omits lock nuts *4* of the first and *5* and *6* of the second patent, and also the threads upon the end portions of the cross rods passing through the rollers of both patents. The notches of the second patent, it is true, are preserved in the side rails of the exhibit; but instead of lock nuts *5* a metal bar, extending throughout the length of a section and having slots disposed therein so as to engage the ends of the cross rods, is bolted to the outer and upper surface of each side rail. Lock nuts *6* are replaced in function by (a) notches cut into the cross rods near their ends so as to fit into and be held fast by the notches of the side rails, and (b) tubular portions of the ball-bearing devices surrounding the cross rods and extending from the ends of the rollers almost to the side rails; the purpose seems to be to hold the rails in "parallel relation with one another" and also free from the ends of the rollers. This substitution of a slotted metal bar and notched cross rods apparently has the further purpose of facilitating the separate removal of rollers. Whether we have or not rightly interpreted the objects of these differences between the patents in suit and the exhibit, the changes serve to characterize methods of progress which may well be considered in trying under the facts of this case to distinguish between skill and invention. We come now to an inquiry into the state of the art prior to the dates of the patents in suit.

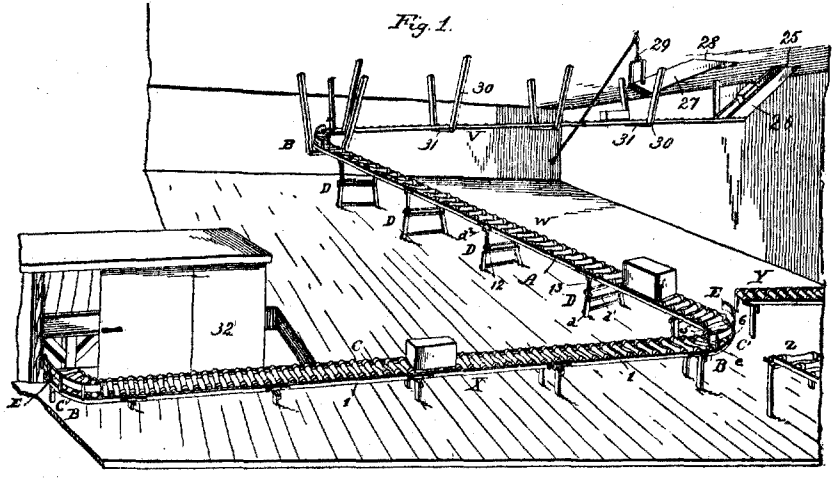
[2] "1. A gravity carrier having side rails composed of flat metal bars having slots or notches in their upper edges, rods detachably mounted in said slots and connecting said rails, and rollers having anti-friction bearings on said rods, substantially as described."

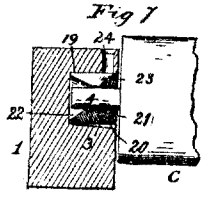
"4. A gravity carrier comprising side rails, diagonally arranged brace bars connecting said rails, cross rods also connecting said rails, the upper edges of said rails being provided with vertical slots or notches and rollers detachably mounted in said notches."

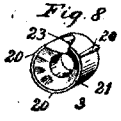
(1) *Gravity Carriers Old.*—In point of equivalency more of the present elements, whether considered singly or in combination, are perhaps to be found in Alvey's gravity conveyer, patented in 1902, No. 714,432, than in any other prior patent. Alvey stated in his specification:

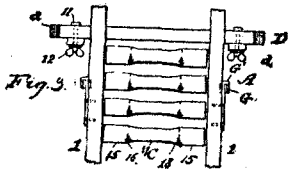
"My invention relates to conveyers for the purpose of transferring goods from place to place—such as boxes, barrels, and packages—the movement of the packages or other articles being ordinarily effected by gravity; but it is to be understood that the invention is not confined necessarily to a conveyer on which the articles are moved by that force alone. * * * The invention has for its objects to enable goods to be transferred from one point to another, as in a warehouse, expeditiously and with a minimum of hand labor and to allow of the apparatus being adjusted to receive goods at different points, and to deliver them at different points as may be required, expeditiously and with certainty."

Among the drawings accompanying the letters patent are the following:




"Fig. 1 is a perspective view showing a conveyer of portable character embodying my invention set up in a warehouse for the transfer of goods from one point to another. * * * Fig. 3 is a plan view of a portion of the same. * * * Fig. 7 is a sectional view of the roller bearing. * * * Each of the straight sections *A* comprises side pieces *1*, of wood or other suitable

material, united at suitable points by transverse connecting members or tie rods *2*. These side pieces have formed in them or attached to them bearings *3* for the shafts or journals *4* of the transverse rollers *C*. The latter are spaced apart, but are sufficiently close together to enable the goods to be conveyed to pass from one roller to the next without falling through. The curved sections *B* are constructed on similar principles, but with inner and outer curved side pieces *5* and *6*, the rollers *C'* of said curved sections being arranged on lines radial to the center of the curve on which the section is constructed. * * *

"It is highly important that the rollers should revolve freely under packages of relatively light weight, to which end the rollers must not be too heavy or have too much inertia. On the other hand, they must be strong enough to carry heavy weights when required. I have constructed the rollers, after much experimentation, of a material which meets both these requirements. They are made from a pulp of hard fiber of relatively light specific gravity, known as 'leatheroid.' They are thus also seamless, without grain, and not liable to crack."

As illustrative of the combinations and essential elements involved, two of the claims are copied in the margin.[3]

Alvey further developed the gravity carrier art through his patent of May 23, 1905, No. 790,776, under an application filed September 5, 1904. He introduced a spiral gravity conveyer adapted to carry all kinds of articles usually stored in warehouses, from any of the upper floors to the basement or shipping room, and to discharge packages at any of the intermediate floors. The spiral conveyer is adjusted to and supported by a vertical post extending through such floors of the building as may be desired, with suitable openings through which to maintain the conveyer and carry packages; in order to distribute packages at intermediate floors, gravity switches are removably connected with the spiral portions of the conveyer; provision is made for carrying articles to the spiral parts by gravity conveyers, which, as also the switches, are similar in form to the structures above shown in Alvey's patent of 1902, No. 714,432. Alvey went still farther in 1905, under an application of September 5, 1904, through his patent, No. 790,81[illegible] There he provided for lifting, instead of lowering, packages from floor to floor. The conveyer is maintained at an ascending grade and driven by power. It is to be observed of both of Alvey's later structures that the carriers are divided into sections with angle iron side rails.

Some 14 years before the issue of Alvey's first patent, Pusey secured a patent, No. 387,733, upon a structure called an "artificial toboggan or coasting hill," which is instructive in the gravity carrier art. The specification states:

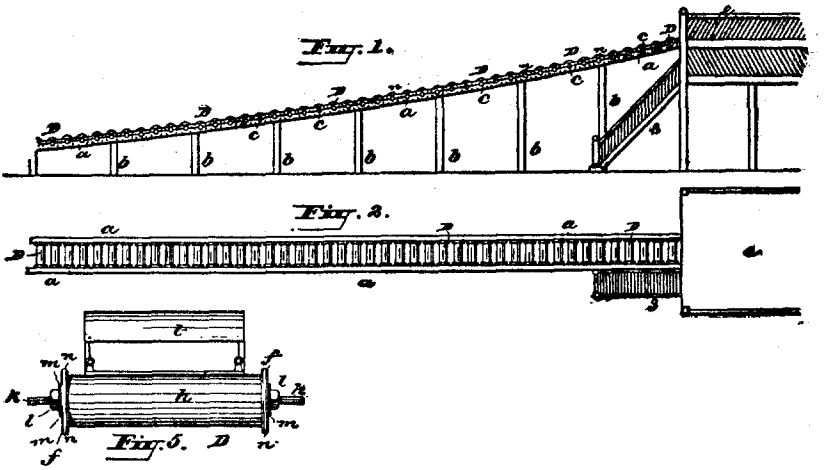
"The trackway consists of a series of rollers journaled transversely in a suitable framework."

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[3] "1. In a portable conveyer, the combination of a plurality of sections provided with transverse rollers, and supports for said sections, the upper part of each support being hinged to the conveyer-section and the lower part of each support being adjustable on said upper part."

"6. In a gravity conveyer, the combination of a series of separately and freely rotatable rollers, and means for supporting the same to form an inclined way, said rollers being constructed with shoulders *16* and intermediate recessed portions, and adapted to automatically maintain packages in the middle of said way, substantially as set forth."

The simplicity of the structure will be seen by reference alone to some of the accompanying drawings:




"Fig. 1 is a side elevation. Fig. 2 is a plan. * * * Fig. 5 is an elevation of roller detached, with end view of the toboggan thereon. * * * *a*, Figs. 1 and 2, represents longitudinal frames or stringers supported by a trestlework or posts, *b*, and provided with bearings *c*, for the journals of the series of wide transverse rollers *D*."

The cylindrical portions of the rollers are made of waterproofed paper or strawboard, or similar light and strong material. The patentee states in his specification:

"I am aware of the fact that roller trackways for sleds are old, * * * in which trackway were inserted rollers or balls for the runners of the sleds to descend upon; and I do not therefore claim broadly, as new, an inclined trackway with rollers therein."

The patentee's idea of the scope of invention open to him is important and is sufficiently explained by claim 1 copied in the margin.[4]

In 1885 Hinds & Mace received a patent on a portable chute, No. 312,468, saying in their specification:

"The invention relates to inclined slideways, and is specially adapted to transfer tiles, bricks, or similar articles from the drying shed to the kiln, or from the kiln to the yard. The slideway is made in sections, each of which has its floor composed of rollers having bearings in the sides of the sections."

Palmer obtained a patent in 1888, No. 376,340, on an elevator, which may properly be regarded as a distributing contrivance; it was designed for carrying goods or other materials up or down in a warehouse, store, manufactory, or other similar place of business, and automatically

[4] "An artificial coasting course or toboggan slide, consisting of the combination of the inclined longitudinal frames or stringers, the supporting frame or trestlework, and the series of rollers journaled in and between said stringers, adjacent to and out of contact with each other, substantially as and for the purpose set forth."

delivering them at different floors or stations, and there depositing them upon an "inclined series of rollers" disposed transversely between parallel side rails, whence they were moved by gravity to the place desired; the particular use illustrated by the drawings related to the manufacture and handling of bricks.

(2) *Metal Side Rails and Rollers.*—It will be noticed that none of the prior patents thus far considered in terms calls for metal rollers; but it is to be remembered that the last two Alvey patents mentioned call for metal side rails. Assuming that a change of material, say from wood to metal, was important in a frictional sense or otherwise, there were kindred power-driven conveyers which expressly provided for metal rollers; and we think such conveyers may fairly be treated as part of the prior art in question. They are certainly of a closely analogous art. Holman provided for the use of metal rollers in 1885 in his power-driven railway track layer, patent No. 315,034. He fastened to the outer sides of cars a sectional tramway, comprising parallel side rails, called "parallel bars," with transverse metal rollers journaled in the bars. The rollers were used to convey ties and rails from the cars to points in front of the train in the line of the proposed railway construction. Again, in Hanna's carrying roll, patented October 28, 1902, No. 712,061, we find a design for metal tubular rollers of uniform diameter, with integral journal portions, which are intended as carriers of belts for "elevators, conveyers, and similar classes of machinery." The patentee made no provision for side rails or other familiar bearings upon which to operate his rollers as carriers; nor was such omission unusual. See, for instance, the carriage with rollers in the brick and tile machine of McKenzie, patented in 1878, No. 203,284, and in Aiken's feed table for rolling mills, patented in 1890, No. 439,925. Further, Alvey emphasized in the portion of his specification above quoted the importance of rollers that would revolve freely under packages of relatively light weight and yet be strong enough to carry heavy weights when required; and he says that "after much experimentation" he adopted a material for rollers called "leatheroid," which was "seamless, without grain, and not liable to crack." [5] Pusey had pointed out years before, that rollers might be made of "suitable light material," saying that the "ease with which the inertia and friction of the rollers are overcome * * * of course depends mainly upon the weight" of the rollers. He preferred "compacted waterproofed paper or strawboard," and as we have seen used such rollers in his gravity toboggan. The experience of Alvey and that of Pusey as expressed by each in his specification, and more particularly the use made of the metal rollers as above stated, were manifestly suggestive of the adoption of metal rollers for gravity carriers. Wright v. Tobacco Co., 252 Fed. 146, —— C. C. A. ——, decided by this court August 3, 1918.

(3) *Stationary Axles with Revolvable Rollers.*—Appellee points out a difference between the patents in suit and the gravity conveyers of

[5] Alvey's roller metal journals and metal bearings with oil-retaining chamber *22* to lubricate them, are another important feature to be observed. They are illustrated in Figs. 7 and 8 of his drawings, supra.

the prior art as respects the relations between the axles and rollers of the two sets of structures. True, as we have seen, the axles of the former are stationary and the rollers with ball bearings revolve upon them; while the rollers of the latter have rigid and axially connected journals which are mounted on bearings in the side rails and revolve with the rollers. Apart from the ball bearings of the patents in suit, considered later, the plan of an exterior roller (composed of "sleeves") distinct from an interior part axially carried by side bearings was shown, for instance, by McKenzie in 1878 in his brick and tile machine before pointed out. Holman, above mentioned, provided metal rollers with annular flanges at their ends; but he also stated in his specification that he "proposed to make these rollers hollow, and of metal, and to mount such construction of roller on a stationary axle which passes through the closed ends of the roller, whereby the bearing is entirely at the ends of the roller." Perhaps the commonest examples of this latter construction are found in the ordinary road wagon, having rigid axles and spindles with hubs turning upon the spindles, and in the idle wheel to which a belt is shifted when not in use for transmission of power, while the bicycle furnishes a complete illustration, as for instance, the Douglas bicycle, patented in 1892, No. 469,627.

(4) *Sectional Carriers.*—In view of what has been pointed out it is scarcely necessary to allude to this feature of the patents in suit. We have seen that Alvey's patent, No. 714,432, divides the carrier into sections with "firm connection of the various sections end to end," the connecting parts being described in the specification and shown in the drawings; this in substance is true of Alvey's patent, No. 790,776, of the Hinds & Mace patent, and also of the Spence portable conveyer, Pat. No. 779,139. We do not stop to consider the horizontal and diagonal braces of the sections, because such bracing is familiar in structures of everyday use, such as the ordinary stepladder, trestle or scaffold.

(5) *Notched Frames.*—It is contended that the patentee of the second patent in suit "introduced for the first time the feature of the slotted side rails whereby any through shaft and roller could be removed separately." This is to overlook Winter's provision of the same character in his skid for moving rails, patented September 19, 1905, under application of 1904, No. 799,699. The rollers are there mounted in open slots and, as his specification states, "may be easily removed when broken or worn out and replaced by others." Such slots or notches were old when Winter adopted them. The drawings of the McKenzie patent of 1878, before cited, plainly show notches in the upper edges of the side bars in which the rollers were journaled, though the patentee does not seem to have thought it worth while even to mention the notches in his specification or claims. However, the notches must be regarded as "described" in a "printed publication" within the meaning of the patent act (Keene v. New Idea Spreader Co., 231 Fed. 701, 708, 145 C. C. A. 587, and citations [C. C. A. 6]); this is true of the drawings of Aiken's and Spence's patents, supra. Apart from Winter, these patentees do not state, though it is manifest, that the notches shown were designed in part to admit of separate

removals of rollers. Further, the convenience of open slots with parallel sides adjusted to corresponding sides cut upon stationary axles near their ends was in practical purpose shown in the Douglas patent; indeed, in the respects mentioned the slots and axles of the gravity carrier exhibit offered in evidence closely resemble the slots and axle of the Douglas bicycle.

(6) *Ball Bearings.*—The ball bearings of the patents in suit and the carrier produced in court differ in some details, but in essential respects they are all like those commonly used in bicycles; in fact, these carrier rollers with their ball bearings are clear equivalents of the hubs and ball bearings of the ordinary bicycle. This is sufficiently shown by the following patents: Teetor in 1891 for "ball bearing," No. 456,664; Douglas, supra; Sturgis in 1897 for a bicycle training device, No. 581,835; Svensson in 1897 for anti-friction journal bearings, No. 580,994; and it appears in Teetor's specification, besides being well known, that bicycle ball bearings were old in 1891. The analogy to appellee's designs for ball-bearing rollers found in the Sturgis bicycle training device is very persuasive. This device comprises three rollers mounted transversely between uprights fastened to the longer sides of a rectangular adjustable frame; the rollers are provided with axles passing through and beyond their longitudinal centers and journaled in the uprights. A sprocket chain connects the middle and forward rollers, and the three rollers are so disposed upon the frame as to engage the wheels of a bicycle and to enable the rider to operate it the same as if riding on a road; and although the body of the bicycle remains stationary, its wheels revolve upon the rollers. The specification states:

"The rollers are journaled on their respective axles by means of suitable ball bearings."

The ball bearings are not otherwise described except as they are shown in Fig. 4 of the drawings. They appear to be of the usual bicycle type and to be operated similarly to those of the appellee's carrier. It is to be noticed however that the Sturgis ball-bearing device is for the most part extended beyond instead of being countersunk into the ends of the roller; the cups seem to be integral parts of the roller, while the cones are threaded upon the ends of the axle, and opposed annular rings are provided in the cups and cones for ball races or containers. Although the material of which the rollers are composed is not shown and is not very important, yet apparently it is metal.

We have thus been at pains to point out earlier devices as means for testing the issue of fact concerning the validity of the patents in suit; and we are unable to find in these patents any advance over the prior art except in degree. The idea of a gravity carrier was not new. In one form or other such carriers had been designed, patented and, inferentially at least, put into use. Alvey had designed them for purposes precisely similar to those of the patents in suit. Even the kinds of business which Alvey's carriers and those of appellee were intended to aid, the emplacements of the carriers and their modes of

operation, the results to be attained, all are practically the same. The marked resemblances in matters of equivalency between the two sets of devices cannot escape attention. In a word, the devices themselves, the new and the old, as they are shown in the drawings and in the descriptions of the patentees, speak in terms amounting to a demonstration.

We understand it to be admitted, it certainly is true, that every element of the claims in suit is old. What has been done here is to adapt and substitute some old and familiar devices in place of certain parts of the earlier gravity carriers, particularly Alvey's. This involved for the most part simply a change in the material of parts comprised in the earlier carriers; and these substituted devices practically perform, not only the same functions as had been performed by the replaced parts, but also the same functions as they themselves had performed in devices of the prior art. It may not be amiss to show again where some of the important substituted parts may be found in the prior art: Appellee's metal roller was described by Holman, in 1885, and the rigid axle (with whatever incidental support the axle furnishes to the side rails) and ball bearings were shown by Sturgis, and the perfectly plain equivalency of the bicycle hub with its ball bearings and rigid axle should also be borne in mind; the notches or slots of the side rails and the facilities they afford for separate removal and replacement of rollers were shown and explained by Winter and Douglas; as to the metal side rails, it is necessary only to recall those of Alvey's last two patents; the remaining parts of appellee's devices are negligible; and after all the old and the new carriers in precisely the same way transport packages by gravity.

[1] It must, of course, be conceded that patentable novelty may exist in a combination of old elements; but here the combination claims in suit are lacking in the usual and essential tests of invention. No new function of elements or new method of operation is evolved, and the result achieved is exactly the same as the old one. The settled rule under such facts is that to adapt an old and familiar device to another structure equally old and well known is not to exercise the inventive faculty; it is to apply the skill of the mechanic. Aron v. Manhattan Railway Co., 132 U. S. 84, 88, 10 Sup. Ct. 24, 33 L. Ed. 272; Peters v. Active Mfg. Co., 129 U. S. 530, 537, 9 Sup. Ct. 389, 32 L. Ed. 738; Crescent Brewing Co. v. Gottfried, 128 U. S. 158, 169, 9 Sup. Ct. 83, 32 L. Ed. 390; Penn. Railroad v. Locomotive Truck Co., 110 U. S. 490, 494, 4 Sup. Ct. 220, 28 L. Ed. 222; Weir Frog Co. v. Porter, 206 Fed. 670, 676, 124 C. C. A. 470 (C. C. A. 6); Frederick R. Stearns & Co. v. Russell, 85 Fed. 218, 226, 29 C. C. A. 121 (C. C. A. 6); Indiana Novelty Mfg. Co. v. Crocker Chair Co., 103 Fed. 496, 502, 43 C. C. A. 287 (C. C. A. 7).

[2] It may further be conceded that appellee's carriers are better than the Alvey carriers or any others of the prior art; this, too, is unavailing. It is met by the old rule that a mere carrying forward of the original idea, a change in form, an improvement in degree, without substantial change in either means or result, is not invention. Railroad Supply Co. v. Elyria Iron Co., 244 U. S. 285, 292, 37 Sup.

Ct. 502, 61 L. Ed. 1136; Wagner v. Meccano Limited, 246 Fed. 603, 608, 158 C. C. A. 573 (C. C. A. 6), and citations. Superiority is not enough. Grinnell Washing Machine Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196. It can scarcely be doubted that the defects if any in the Alvey structures might have been remedied by the skilled mechanic. Keene v. New Idea Spreader Co., 231 Fed. 701, 710, 145 C. C. A. 589 (C. C. A. 6). This derives emphasis from the changes made in appellee's carrier, as we have pointed them out in the exhibit produced in court.

[3] It is said that appellee's carrier is not anticipated by any single patent; but it is not necessary to show complete anticipation in a single patent. The selection and putting together of the most desirable parts of different machines in the same or kindred art, making a new machine, but in which each part operates in the same way as it operated before and effects the same result, cannot be invention; such combinations are in the nature of things the evolutions of the mechanic's aptitude rather than the creations of the inventor's faculty. Thompson v. Boisselier, 114 U. S. 1, 11, 5 Sup. Ct. 1042, 29 L. Ed. 76; Luten v. Whittier, 251 Fed. 590, — C. C. A. —, decided by this court May 7, 1918; Elite Mfg. Co. v. Ashland Mfg. Co., 235 Fed. 893, 895, 149 C. C. A. 205 (C. C. A. 6); Kelly v. Clow, 89 Fed. 297, 303, 32 C. C. A. 205 (C. C. A. 7); Keene v. New Idea Spreader Co., supra, 231 Fed. at pages 708, 709, 145 C. C. A. 589.

[4] Assuming, as counsel claim, that large sales have been made of the carriers in issue, still commercial success is never a safe criterion, except in cases of doubtful validity of the patent; such success cannot aid claims that are clearly without patentable novelty. Olin v. Timken, 155 U. S. 141, 155, 15 Sup. Ct. 49, 39 L. Ed. 100; Grinnell Washing Machine Co. v. Johnson Co., supra; Keene v. New Idea Spreader Co., supra, 231 Fed. at page 710, 145 C. C. A. 589.

[5] We conclude that the claims in issue under the first patent in suit and all the claims of the second one are null and void for want of invention; the decree is accordingly reversed, and the cause remanded, with direction to dismiss the bill; and appellant will recover costs, except such as arise from one-half the copies of letters patent introduced by it, 60 in all, and embodied in the record.

## WINDSOR v. MERCIER.

(Circuit Court of Appeals, Sixth Circuit. October 8, 1918.)

No. 3126.

PATENTS ⟸328—INVENTION—DUMPING BODY FOR VEHICLES.

The Windsor patent, No. 1,181,192, for a dumping body for vehicles, *held* void for lack of invention.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by James G. Windsor against John A. Mercier. Decree for defendant, and complainant appeals. Affirmed.

Stuart C. Barnes, of Detroit, Mich., for appellant.

Barthel & Barthel, of Detroit, Mich. (O. F. Barthel and C. R. Stickney, both of Detroit, Mich., of counsel), for appellee.

Before KNAPPEN and DENISON, Circuit Judges, and COCHRAN, District Judge.

DENISON, Circuit Judge. The plaintiff below appeals from the decree dismissing his infringement bill, based upon patent to Windsor, No. 1,181,192, issued May 2, 1916, and covering a dumping body for vehicles. The patent has two claims. The District Court held them both invalid. The plaintiff rests his appeal upon the second claim, as to which infringement is better made out, and only that claim need be considered. The construction involved is clearly enough indicated by the language of the claim, which is as follows:

"The combination with a vehicle, a horizontal transverse way on said vehicle, a body V-shaped in cross-section having sides converging downward toward a center, a rocker engaging said way shaped in approximately the arc of a circle extending under and adjacent to the lower portion of said body at its center, and extending farther from the surface of said body and rising above the lower part of said body toward each end, the sides of said body, when in its upright position, being inside of the other lateral limits of said vehicle, said rocker being adapted to carry said body laterally of the vehicle so that its dumping edge shall be beyond said limits when said body is rocked to its dumping position and said side along the surface of which the load is discharged shall have its inner edge elevated because of the said extension of the rocker beyond the surface of the body, so that the load shall slide therefrom by gravity."

The general plan of supporting the dumping body upon curved arms, which rock upon a horizontal base, so that as the body is tilted there is a tendency to carry the whole of it sidewise and enable it to dump clear of the base, reveals an obviously useful idea; but Windsor was not the first to adopt this general plan. His invention, if there is any, consists only in refinements and improvements. Windsor thought he had made the broader invention to which we have referred, and expressed this thought in his first claim as filed, which was:

"The combination of a body, a rocker secured to said body and passing under the lower portion of the same, and a transverse way upon which said rocker may roll."

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Successive rejections in the Patent Office eventually led to injecting into the claim the limitations that the sides of the V body, when in its upright position, should be inside the other lateral limits of the vehicle, and that the rocker should have such a high degree of curvature and should project out away from the V sides of the body so far that when the V body was tipped over in dumping position the apex of the V should be lifted high enough to cause the contents of the body to slide out by gravity. It is plain, at least after our attention is called to it, that the extent to which this apex is swung up from the bottom, and therefore the extent of the tendency of the contents to slide out by gravity, will depend upon the shape and extent of the rocker. It was in effect conceded in the Patent Office—or, if not conceded, it is entirely clear—that proportioning the dump body so as to keep it, when upright, within the lateral limits of the vehicle, is a matter that cannot contribute patentability to an otherwise nonpatentable combination; and hence the second distinction and characteristic above noted indicates the decisive question. Did the addition of this element of construction to combinations otherwise existing or obvious create a new and patentable combination?

Windsor has developed the commercial use of his invention in connection with highway vehicles, like motor trucks and trailers; but his patent relates to dumping bodies without limitation, and dumping bodies for railway cars are within the fields of infringement and of prior art. From this conclusion, it follows that all the elements of his claim are old and have been associated in the same general relationship to bring the same general result. Such novelty as his structure has pertains to specific relationship and degree of result. It was old to make dumping bodies of V shape or with square bottoms or with curved bottoms; it was old to mount them on rockers, either at each end, in trunnion form, or underneath like a child's cradle; they were made low or high or narrow or wide as desired; tracks for the rockers had been provided of shape and length appropriate to the specific rocker used; the bodies had been arranged to dump from one side only or from either side, and to dump automatically when released, and to return automatically to vertical position when empty; and the rockers had been of different shapes and sizes.

Windsor desired to use a V-shaped body; he did not wish it to overhang the sides while the vehicle was in motion, and so he made it narrow. He desired that when it was tilted into dumping position the side edge which had become the lower edge should project laterally beyond the sides of the vehicle, and so he made the rockers with a sufficient degree of curve to insure lateral travel of the dumping body when tilted on the rockers. He wished the body to discharge its contents completely by gravity when it was tilted, and therefore made the rockers of such shape that the edge which had been the bottom of the V and which became the inner edge when tilted, should then be elevated well above the outer edge. He wished the body to dump automatically by gravity when the fastening was removed which held it against opposite tilting, and to return automatically to vertical position when the load was discharged, and there-

fore he so proportioned the parts that when the body was loaded the center of gravity would be above the rocking center, and when the vehicle was empty the two centers would have relatively reversed position.

The modifications and limitations found in the second claim are only descriptive of the shape and arrangement of the parts which produce these results, and in each instance the dependence of the result upon the shape and relationship of the parts had either been illustrated or pointed out in the older patents or was too obvious to have required statement or illustration. Nothing was involved, excepting elementary principles of mathematics and of familiar construction. We are satisfied that Windsor did not accomplish any new result in the sense in which that term is rightly used as indicative of invention. On the other hand, we think his adaptation of existing structures, in order to make a dumping body that, when applied to road vehicles, would be in some degree better than the old forms, was well within the limits of mechanical skill.

The specific thing most urged upon us as evidence of invention is that older structures, with underneath rockers, had the rocker at its central point farthest away from the dumping body, while Windsor made this the nearest point of approach; but this is merely the inevitable effect of using a V-shaped body sufficiently extended downward. Whether the V is sharp enough to produce the desired relation or is too obtuse for that purpose is of no substantial importance; and patentability cannot rest on an unimportant selection of form.

Though we should hesitate to describe Windsor's product, in strict nomenclature, as an aggregation, yet we think the rightfulness of our conclusion is illustrated by the latest expression of the Supreme Court in Grinnell Co. v. Johnson Co., 247 U. S. 426, 38 Sup. Ct. 547, 62 L. Ed. 1196, filed June 10, 1918. See, also, Huebner Co. v. Mathews Co., 253 Fed. 435, —— C. C. A. ——, this day decided, and some of our own opinions cited therein.

The decree is affirmed.

## POLITZER TOY MFG. CO., Inc., v. NATIONAL FRENCH FANCY NOVELTY CO., Inc.

(District Court, S. D. New York. February 19, 1916.)

1. PATENTS ⟸179—CONSTRUCTION—COMPOSITION OF OLD MATTER.
A claim of a patent for a child's toy, which did not display any new principle of mechanics, or any new application of any principle, but was for a mere composition of old matter, the pleasing feature of which depended upon a concealed switch, which would cause the eyes to blink, should receive a narrow construction, limited to the exact form of the toy shown.

2. PATENTS ⟸179—CONSTRUCTION OF CLAIM—"CONCEALMENT."
The word "concealment," in its application to a claim of a patent for a toy for children, the pleasing feature of which was a concealed switch, which would make the eyes blink, means hidden from ordinary observation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Concealment.]

In Equity. Suit by the Politzer Toy Manufacturing Company, Incorporated, against the National French Fancy Novelty Company, Incorporated, involving patent No. 844,577, to Martha Borchardt, dated February 19, 1907. Decree for complainant.

Stephen J. Cox, of New York City, for plaintiff.
George L. Wheelock, of New York City, for defendant.

HOUGH, District Judge. It is held that the patent to Borchardt now in suit is a valid patent, disclosing the statutory requisites of novelty, etc. It is also held that the defendant has infringed upon this patent by the manufacture and sale of the article, a specimen of which is here produced and marked Plaintiff's Exhibit A.

[1] This is the kind of patent, however, which may be (and in many cases in the past has been) made the subject of unnecessary and expensive proceedings before a master. Therefore, in order to prevent, so far as in me lies, such proceedings, I go further than the requirements of this present hearing, and hold that the claim of the patent must be interpreted with the utmost narrowness.

What is it that enabled Mrs. Borchardt to get a patent upon this toy? The patent covers a new article of manufacture; a composition of matter. There is not shown or displayed in it any new principle of mechanics, or any other branch of science, or any new application of any principle of mechanics or science.

Without being able to define "invention," one may at times attempt to describe it, and the claim which undoubtedly operated on the minds of the officials of the Patent Office, and which operates on my mind to show invention, is the neat union, especially attractive to the childish mind, of familiar principles and old appliances in the form of a toy; for this composition of matter can only be useful to and among children. This adaptation of means to end, this embodiment of the means in a new form, certainly possesses some of the attributes of invention. But when a person does this, and no more than this, the inventive idea is so small that it must be confined to the exact form in which it is advanced; and this is especially so when the claim is

so narrowly drawn as this one. Indeed, it is only by such a narrow view of one's own invention that small patentees can get their devices through the Patent Office; and it is singularly unjust to the public to permit one whose application reveals no other invention than the smallest to enlarge or seek to enlarge the very narrow language of the claim as allowed.

Therefore I point out that Mrs. Borchardt's patent claims particularly that all of the parts which produce the pleasing result shall be concealed, and that the switch is described as having "a flexible part thereover"; that is, over the switch. Technically, I think, and certainly as described in the Borchardt patent, that that which is pressed in order to produce the desired illumination is a part of the switch. I refer for this to Fig. 2 of the patent, and to lines 55 et seq. of page 1 of the specifications.

Therefore, if an accounting is insisted upon in this matter, I direct that the interlocutory decree shall be so drawn that the master must hold, upon the accounting, that the toy, as made in substantial compliance with the method shown by Exhibit 13, does not infringe upon the Borchardt patent. With this limitation the plaintiff may take the usual decree.

Mr. Cox: Would it be too much for me to ask of your honor some definition of the word "concealment"? I do not, of course, ask it; I simply make that suggestion, because, if you will refer to the file wrapper, you will see that the patent is unnecessarily limited. There was nothing in the prior art which showed any kind of concealment, and it seems to me that is really a very important part of the invention, because, as I said, it makes the source of illumination a mysterious one.

The Court: [2] In answer to Mr. Cox's question, I shall hold, and make it the law of this case in this court (in order that exception thereto may be taken and appeal facilitated), that unless the external covering of the toy conceals, within the ordinary meaning of that word, the mechanical contrivance which produces the blinking eyes, the Borchardt patent is not infringed; and I submit and hold that the word "concealed" means "hidden from the ordinary observation" of those persons who would be likely to use and handle the appliance or contrivance to which the word "concealed" is applied. To take an actual example, I think that the apparatus shown and marked as an exhibit for identification, wherein the push button or switch is situated within the ear of the toy, is a concealment, because it is where it will not be observed by the child or children who are to be amused by the contrivance.

## GAS & ELECTRIC SECURITIES CO. v. MANHATTAN & QUEENS TRACTION CORPORATION.

In re BEGG et al.

(District Court, E. D. New York. September 9, 1918.)

RECEIVERS ⟸82—OPERATION OF STREET RAILROAD—FARES.

A court cannot authorize its receivers for a street railroad company to charge a higher rate of fare than that fixed as a maximum by the company's franchise.

In Equity. Suit by the Gas & Electric Securities Company against the Manhattan & Queens Traction Corporation. On petition of William R. Begg and Arthur C. Hume, receivers of defendant, for permission to charge an increase in fare and increase wages of employés. Denied.

Frueauff, Robinson & Sloan, of New York City (Robert S. Sloan, of New York City, of counsel), for receivers.

William P. Burr, Corp. Counsel, of New York City (John P. O'Brien and Vincent Victory, both of New York City, of counsel), for city of New York.

CHATFIELD, District Judge. Receivers appointed by this court ask for authority to charge 7 cents fare for carrying a passenger on the street railroad now being operated by them. The city of New York opposes the application on various grounds.

One objection urged is that section 181 of the Railroad Law of New York (Consol. Laws, c. 49) limits a fare within an incorporated city to 5 cents. The receivers claim that the charter of the Greater City has repealed this statute by later contradictory or limiting provisions. But, even if this be so, the franchise provides for the same rate of fare. The sole basis for operation of the road is the franchise, and without that franchise the receivers could do nothing but liquidate the property, and must cease operation. In the meantime they have the right, by order of the court, to continue to carry passengers, and they undoubtedly have a reasonable time to decide whether they will undertake the carrying on of the franchise contract.

But if they can disavow the obligation, or temporarily postpone operation under it, the court would then have property in its hands which can be operated only within the law. Possession of the property gives the court the right to enjoin any attempt to interfere with that possession, or to restrain any illegal exercise of authority. But this court cannot prevent the city from enforcing in a proper tribunal the rights which the receivers are standing upon as the basis for having anything to receive. The receivers cannot treat the right to operate a road as property in their possession, and then ignore or disregard the essential limitations showing of what the property consists. In other words, the receivers have a property right to hold and operate a 5-cent fare collecting business, with its physical accessories and implements. But the plant cannot be put to another use

without the making of a new contract. This court has not the power to force such a new contract on the city, nor to regulate fares upward beyond the limits fixed by the contract creating the right to act at all. The court has not the power to fix the rate at which the city must allow the road to be operated. Simpson et al. v. Shepard, 230 U. S. 352, 433, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18. Nor can the court proceed to exercise the franchise while holding it unconstitutional.

There is no vested right to operate a road for public convenience, unless that right be the one which the contract establishes. The court may prevent a breach of contract by the city in reducing rates; it may hold a statute unconstitutional, as confiscatory, if a proceeding is brought under section 266 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1162), as amended by Act March 4, 1913, c. 160, 37 Stat. 1013 (Comp. St. 1916, § 1243); but it cannot abrogate a contract by holding unconstitutional the law under which the contract was made, and thereupon enlarging the terms of the contract, in order to avoid the consequences of ceasing to act under the contract. Nor should the court order its receivers to treat the public unequally by allowing them to collect an excess fare from those passengers who do not refuse to pay.

The remedy must be sought by application to the city or to the Public Service Commission for a modification of the franchise, if the receivers deem it to the interest of the creditors to continue the franchise rather than to liquidate. The rights and convenience of the public must be looked out for by the receivers and the city, from the standpoint of the consequences if the receivers stop operating. But the end will not justify the means, so as to give the court jurisdiction to prevent the proper authority from deciding what franchise the public should grant for its own welfare.

The application must be denied, but without thereby preventing or hindering the receivers from seeking any source of relief from the terms of the franchise itself.

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## In re BISHOP.

(District Court, E. D. New York. August 30, 1918.)

BANKRUPTCY ⊂=415(½)—DISCHARGE—CONCEALMENT OF PROPERTY.

Application for discharge by a bankrupt, who listed his wife as a creditor for money borrowed from her with which he installed machinery on land owned by her, but omitted such property from his schedules, denied without prejudice, pending a suit by creditors against the wife to recover the property.

In Bankruptcy. In the matter of George D. Bishop, bankrupt. On application for discharge. Denied without prejudice.

Bertha Rembaugh, of New York City, for objecting creditor.
Arington H. Carman, of Patchogue, N. Y., for bankrupt.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

CHATFIELD, District Judge. This bankrupt borrowed money from his wife, with which he erected ways for a small shipyard upon land belonging to the wife. He spent various moneys for a shop, machinery, and other apparatus, which were attached or used upon the same property. Some years later he found himself in financial difficulties, and after examination in supplementary proceedings, with the usual restraining order, he filed a petition in bankruptcy, with schedules of creditors, in which he listed his wife for the moneys which she had advanced to him at the time the plant was started. In the same bankruptcy schedules he omitted, and thereby surrendered to his wife or kept for himself as tools of trade, all the property which he had acquired. Thus, as against his creditors and with his wife's knowledge, he sought to repay her, and at the same time deliver to her and keep from his creditors the entire plant, both as to the parts attached to the real estate and those as to which no claim of title by the owner of the real estate could be made.

The bankrupt in making up his schedules consulted counsel as to whether he was bound to include these properties in his assets, and now seeks to avoid objection to his discharge by showing that this counsel advised him that he was not required to include any of these properties in his schedules of assets. If a man accused of murder should offer, as a defense of lack of intent, that an attorney had advised him in advance that the circumstances constituted no more than justifiable homicide, the situation would be analogous. This bankrupt was in difficulties and under supplementary examination, and could not transfer the properties to his wife. He therefore surrendered them to her and sought to free himself from the debts by going through bankruptcy. He went to the attorney and stated the facts in such a way as to obtain an opinion that the property did not belong to the bankrupt. He had already concealed his property, if it was available for his creditors, by abandoning his own claim thereto, and his sincerity may be viewed from the manner in which he continued in business and used the property as his own, until, as his wife testifies, she stepped in and apparently ousted him from the active management.

The rights of the creditors are being urged in a creditor's action against the wife; the attorneys for the creditor and the trustee correctly assuming that a turn-over proceeding against the bankrupt alone, or against his wife, for property not in his possession, might fall short of raising an issue which could be disposed of. Under these circumstances the application for discharge cannot be heard without creating difficulties in the maintenance of the action to recover the assets. The referee has reported that the discharge should be granted, inasmuch as the bankrupt presented the apparently false schedules after advising with counsel. The court cannot agree with the proposition. But the matter of discharge should not be disposed of until the bankrupt can be given an opportunity of determining the actual resting place of the title to the property in dispute, before he is called upon to explain his intent in apparently turning everything over to

his wife, and at the same time seeking to repay her in part for the purchase price of the things turned over.

The application for confirmation of the commissioner's report will be denied, without prejudice to any further proceedings.

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In re LIGHTSTONE.

(District Court, W. D. New York. June, 1918.)

BANKRUPTCY ⇐398(1)—HOMESTEAD EXEMPTION—NEW YORK STATUTE.

Filing of a claim to a homestead exemption by a bankrupt prior to his bankruptcy, under Code Civ. Proc. N. Y. § 1397, has effect only from the date of its registry, and is inoperative against debts contracted before such time.

In Bankruptcy. In the matter of Maurice Lightstone, bankrupt. On review of decision of referee. Order confirmed.

George V. Holton, of Rochester, N. Y., for bankrupt.
Plumb & Plumb, of Rochester, N. Y., for trustee.

HAZEL, District Judge. Four years prior to the bankruptcy the bankrupt acquired a house and lot in Rochester, and subsequently gave his son a power of attorney authorizing him to file a petition in bankruptcy and to file a homestead exemption claim under section 1397 of the Code of Civil Procedure of the state of New York. The homestead exemption claim was filed August 17, 1917, and the petition in bankruptcy August 29, 1917. Nearly all the debts of the creditors whose claims have been proved and allowed herein had been previously contracted and were owing at the time of registering the claim of homestead exemption. Indeed, before such time, and while insolvent, the bankrupt had endeavored to make a compromise of his debts with his creditors.

The question submitted for review is whether the notice designating the interest of the bankrupt in the house and lot as exempt was valid as against debts contracted before such designation. I think, as did the referee, that the intendment of section 1397 of the Code of Civil Procedure is that such exemption shall be invalid as to debts contracted before the designation. While a statute of this description is entitled to a liberal construction, with a view to comporting with "the beneficent spirit that prompted its enactment" (Smith v. Thompson [C. C. A. 8th Cir.] 32 Am. Bankr. Rep. 165, 213 Fed. 335, 129 C. C. A. 637), still the statute law of the state wherein the bankrupt resided and registered his designation is controlling.

The adjudications cited by the attorney for the bankrupt on the point that the bankrupt was entitled to the homestead exemption in question were interpretative of statutes of other states, differently phrased. The language of section 1397, "Debts contracted before the designation of the property," must be given interpretative effect, and it does not seem to me that liability for such debts is to be excluded

after the designation, while a judgment recovered for the debt would be included. The purpose of the statute no doubt was to give notice to creditors of the recording of the exemption claim, and this would be an idle ceremony if a debt or debts previously contracted were to be defeated by the designation. In Waples on Homestead and Exemptions, p. 290, is cited section 1397 of the Code of Civil Procedure of the state of New York, and the author construes such section as follows:

"The homestead continues liable after its designation by the filing of the deed or notice for a debt previously contracted, under a statute similar to the above cited"—citing Mutual Life Insurance Co. v. Newton, Court of Chancery, New Jersey, reported 15 Atl. 542.

And besides there are homestead exemption statutes of other states, worded similarly to section 1397, which have been construed by the courts as not granting exemption from debts contracted before the recording. See In re Furniss, 34 La. Ann. 1013; Linsey v. McGannon, 9 West Va. 154; Watkins v. Overby, 83 N. C. 165. Hence it is held herein that the homestead exemption in question, registered by or on behalf of the bankrupt, can have effect only from the time of the designation or date of register and that it was and is inoperative against debts contracted before such time.

The exceptions are overruled, and the report of the referee confirmed.

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## ÆTNA LIFE INS. CO. OF HARTFORD, CONN., v. RYAN.

(District Court, E. D. New York. August 24, 1918.)

APPEAL AND ERROR ⊂=461—SUPERSEDEAS—COST BOND.

A bond given by plaintiff in error in an action at law, conditioned for payment of "all costs and damages that may be awarded against it, if it shall fail to make its plea good," unless so specified in the approval, does not operate as a supersedeas.

At Law. Action by the Ætna Life Insurance Company of Hartford, Conn., against Catherine Ryan. On motion for further bond on proceedings in error. Granted.

James B. Henney, of New York City, for plaintiff in error.
Edward H. Daly, of New York City, for defendant in error.

CHATFIELD, District Judge. The defendant appellant has presented a bond, which has been approved, to secure "all costs and damages that may be awarded against it, if it shall fail to make its plea good." This bond was intended, not only as a bond for costs, but to act as a supersedeas, and no question was raised at the time as to its form. The approval of the bond does not specify that it is to act as a supersedeas, and under the authority of Orchard v. Hughes, 68 U. S. (1 Wall.) 73, 17 L. Ed. 560, it must be treated as a bond for costs only.

In admiralty or equity, the decree rendered in the appellate court carries with it the entry of a new judgment, and the language used in

this bond would undoubtedly bind the assured to pay the amount of the judgment, as well as any additional damages or costs which might be awarded. But at common law, where the appeal is by writ of error, the original judgment stands, unless reversed and a new trial ordered. Thus, as stated in Orchard v. Hughes, supra, a bond for costs and damages which may be awarded on appeal, is the usual form for the cost bond, as distinguished from that intended to be a supersedeas. Bonds using this language are sometimes approved as a supersedeas, in which case they would undoubtedly be construed to cover the judgment which had already been awarded on the cause of action.

The point has, in this case, been raised by the appellee, who requests that the giving of another bond be required. This is equivalent to a waiver of the requirement that such security be given within 60 days after the entry of judgment, and would estop the appellee from seeking to issue execution.

The motion should therefore be granted.

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## In re LANGFELDT.

(District Court, S. D. Florida. May, 1918.)

BANKRUPTCY ⊂=412—DISCHARGE—NOTICE TO CREDITORS OF APPLICATION.

The provision of Bankruptcy Act July 1, 1898, § 58a, requiring 30 days' notice to creditors of an application for discharge, is mandatory, and the notice jurisdictional.

In Bankruptcy. In the matter of F. E. Langfeldt, bankrupt. On motion by bankrupt to dismiss specifications of objection to discharge. Denied, and new notice of application ordered.

E. J. Binford, of Tampa, Fla., for bankrupt.

Shackleford & Schackleford, of Athens, Ga., for objecting creditors.

CALL, District Judge. On February 19, 1918, the bankrupt filed his petition to be discharged. On February 23 the clerk entered an order requiring notice to be published, and fixing the return day March 23, at 10 o'clock a. m., for the creditors to appear and show cause why the petition should not be granted. No appearance was filed on that day, but on March 25 specifications of objection were filed by the trustee and others. A motion was made by the bankrupt to dismiss such specifications, on the ground that no appearance had been entered on the return day, and because said specifications were filed after the return day without first appearing on the return day.

This motion is submitted to the court on briefs. No objection is made on the shortness of the notice to the creditors, and if all the creditors had joined in the specifications such defect would have been probably waived; but the requirement of section 58a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 561 [Comp. St.

1916, § 9642]) is positive, and as a discharge releases the bankrupt from liability for all debts, covered by such discharge, to be effective the requirement of that section should be strictly complied with. In this case the fact that 30 days' notice was not given is apparent upon the face of the proceedings, and an order of discharge would therefore be unauthorized and without the jurisdiction of the court to make it.

Unquestionably General Order 32 (89 Fed. xiii) requires the creditor to appear on the return day of the order to show cause and file his specifications of objection within 10 days thereafter. For cause shown the time for filing these may be extended. Attention is called to this in Re Grant (D. C. Pa.) 14 Am. Bankr. Rep. 398, 135 Fed. 889, and it is there decided that without appearance on the return day specifications cannot be filed. However that may be, I am satisfied that the court in this case ought not to make any order in this case, except an order fixing a return day and requiring the proper notice to creditors, pursuant to section 58a of the Bankruptcy Act.

Such order will be made.

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## WAINWRIGHT v. PENNSYLVANIA R. CO.

(District Court, E. D. Missouri, E. D. October 22, 1918.)

No. 4893.

1. WAR ⟸4—WAR POWERS OF CONGRESS—DELEGATION OF POWER TO EXECUTIVE—RAILROAD ADMINISTRATION ACT.
   Act March 21, 1918, providing for federal control of railroads during the war and authorizing the President to make regulations therefor, assuming that it authorizes the fixing by such regulations of the venue of actions in federal courts against railroad companies, is within the war powers of Congress, and constitutional.
2. WAR ⟸4—FEDERAL CONTROL OF RAILROADS—EXECUTIVE REGULATIONS.
   Amended regulation No. 18a, promulgated by the Director General of Railroads April 18, 1918, providing that "all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose," as applied to suits in the federal courts, is within the authority conferred on the President by Act March 21, 1918.
3. STATUTES ⟸205—CONSTRUCTION—RULE GOVERNING.
   Statutes may not be construed by selecting some part thereof and disregarding other parts, but the whole must be read together.

At Law. Action by Nellie Wainwright, administratrix, against the Pennsylvania Railroad Company. On demurrer to plea in abatement. Overruled.

The plaintiff on May 6, 1918, instituted this action to recover damages under the Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]) for the death of her husband, alleged to have resulted from injuries sustained on December 26, 1917, while in the service of the defendant, and while both were engaged in interstate commerce. The defendant filed a plea in abatement, alleging as causes: "(1) The Pennsylvania Railroad Company, defendant herein, is a common carrier now under control of

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the United States Railroad Administration. (2) The plaintiff herein, and the deceased, John Wainwright, resided, at the time of the accrual of the cause of action stated in the plaintiff's petition, in the city of Pittsburgh, state of Pennsylvania. (3) That the place of trial, to wit, city of St. Louis, state of Missouri, is far removed from the place where the plaintiff was injured and resided at the time of the accrual of this action, to wit, city of Pittsburgh, Pa.; that the trial of this suit in the city of St. Louis, Mo., will necessitate the summoning of men, to wit, Engineman N. Carlson, Fireman W. J. Corbet, Conductor W. Baker, and Brakeman J. Wainwright, now operating trains in points distant from the place of trial, and keep them for a considerable period of time from said work of operating trains, all of which will greatly prejudice the interests of the government in maintaining railroad traffic for war purposes. And the defendant further states that the above specifications of facts, enumerated above, constitute to all intents and purposes a case of abatement under General Order No. 26, promulgated by the United States Railroad Administration on May 23, 1918, and General Order No. 18–A promulgated by the United States Railroad Administration on May 18, 1918." To this plea the plaintiff demurred.

The general orders pleaded by the defendant were promulgated by the Director General of the United States Railroad Administration. General Order No. 18, made on April 9, 1918, reads: "Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such federal control; and whereas, it appears that suits against the carriers for personal injuries, freight, and damage claims are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs: It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided, or in the county or district where the cause of action arose."

On April 18, 1918, this general order was amended by General Order No. 18–A, as follows: "It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose."

As this action was instituted after the promulgation of General Orders Nos. 18 and 18–A, and no question of limitation can possibly arise, it is unnecessary to refer to or pass upon the effect of General Order No. 26, in disposing of these pleas. These general orders are claimed to have been made by authority vested in the President and the Director General designated by the President, by Appropriation Act Aug. 29, 1916, c. 418, 39 Stat. 645, and the act of Congress entitled "An act to provide for the operation and transportation systems while under federal control, for the just compensation of their owners, and for other purposes," approved March 21, 1918.

Brownrigg, Mason & Altman, of St. Louis, Mo., for plaintiff.

Fordyce, Holliday & White, of St. Louis, Mo., for defendant.

E. H. Seneff and D. P. Williams, both of Pittsburgh, Pa., amici curiæ.

TRIEBER, District Judge (after stating the facts as above). The demurrer to the plea raises two questions of law: (1) Assuming that the act of Congress authorizes the President and the agencies appointed by him to make these regulations, is the act warranted by the Constitution? (2) Does the act vest the power to make these regulations in the President or the Director General?

At the outset of this opinion it is proper to state that, as this action was originally instituted in a court of the United States, the question whether Congress may authorize the general orders in question to apply to the courts of the states is not involved, and therefore cannot be determined in this proceeding. What is stated in this opinion is necessarily intended to apply solely to actions instituted in the national courts. Whether, under the war power, Congress may enact laws affecting the maintenance of actions in the state courts, can only be determined when it properly comes before the court. To express an opinion on that question in the instant case would be clearly obiter, and the court, for this reason, limits this opinion to actions instituted in the national courts.

[1] *Has Congress the power to enact this legislation, assuming that it vests the power claimed on behalf of the defendant?*

That Congress possesses the power to enact legislation of this nature, under the Constitution, cannot be questioned at this day. There are several grounds upon which it must be sustained.

1. In McCulloch v. Maryland, 17 U. S. (4 Wheat.) 316, 421 (4 L. Ed. 579), Chief Justice Marshall delivering the opinion of the court, it was held as a proper canon of the interpretation of the powers of Congress under the national Constitution, among others:

"Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

This rule of construction has never been doubted or questioned by any subsequent decision, but has been uniformly followed, whenever it has been before the courts, and must therefore be accepted as elementary in the construction of the national Constitution. That there is nothing in the Constitution prohibiting Congress from determining the venue in civil actions is beyond question.

Article 1, § 8, cl. 11, of the Constitution, grants Congress the power to declare war, and clause 12 of that section empowers it to raise and support armies. That, by virtue of these provisions of the Constitution, Congress may use all means which are, in its opinion, appropriate to that end and not prohibited by some provision of the Constitution, has, under the rule established in McCulloch v. Maryland, been settled in Miller v. United States, 78 U. S. (11 Wall.) 268, 20 L. Ed. 135, and Stewart v. Kahn, 78 U. S. (11 Wall.) 493, 506, 507, 20 L. Ed. 176; reaffirmed in Mayfield v. Richards, 115 U. S. 137, 5 Sup. Ct. 1187, 29 L. Ed. 334. In Stewart v. Kahn it was held:

"The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the

Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."

The same principle was recognized in the Legal Tender Cases, 79 U. S. (12 Wall.) 457, 539 (20 L. Ed. 286), where it was held:

"Before we can hold the legal tender acts unconstitutional, we must be convinced they were not appropriate means, or means conducive to the execution of any or all of the powers of Congress, or of the government, not appropriate in any degree (for we are not judges of the degree of appropriateness), or we must hold that they were prohibited. This brings us to the inquiry whether they were, when enacted, appropriate instrumentalities for carrying into effect or executing any of the known powers of Congress, or of any department of the government. Plainly to this inquiry, a consideration of the time when they were enacted, and of the circumstances in which the government then stood, is important. It is not to be denied that acts may be adapted to the exercise of lawful power, and appropriate to it, in seasons of exigency, which would be inappropriate at other times."

See, also, the address of former Justice Hughes on the War Powers under the Constitution, 42 American Bar Association, 232.

Whether the exigencies existed when Congress enacted this statute was for that body to determine, and cannot be questioned by the courts, if there is any substantial ground therefor. McCulloch v. Maryland, supra; Lottery Cases, 188 U. S. 321, 355, 23 Sup. Ct. 321, 47 L. Ed. 492; McDermott v. Wisconsin, 228 U. S. 115, 128, 33 Sup. Ct. 431, 57 L. Ed. 754, 47 L. R. A. (N. S.) 984, Ann. Cas. 1915A, 39. That there was substantial ground for the enactment of the statute requires no argument. The conditions so graphically described in the Legal Tender Cases (79 U. S. [12 Wall.] 540, 20 L. Ed. 286) prevail now, and it will conduce to brevity to refer to what was there said, without quoting it in this opinion.

That the act was enacted under the war power is not only apparent from its context, but it is expressly declared in section 16 of the act "to be emergency legislation, enacted to meet conditions growing out of war," and section 14 provides that the federal control of railroads shall continue not exceeding one year and nine months after the ratification of the treaty of peace.

2. Another ground upon which the act must be sustained is that the right to maintain an action in any particular court is always subject to the legislative will. It is only when one is deprived of all rights to maintain an action for the redress of his wrongs that the statute would be obnoxious to the Fifth Amendment to the Constitution. Congress has uniformly exercised that power by providing in what courts suits may be maintained, and in no instance has such an act been held void. Among the many is Act March 3, 1873, c. 226, 17 Stat. 509, authorizing the Attorney General to institute suits against the Union Pacific Railroad Company, for certain acts, in any Circuit Court of the United States. The constitutionality of this act was sustained in United States v. Union Pacific R. R., 98 U. S. 569, 25 L. Ed. 143. The Carmack Amendment to the Interstate Commerce Act, approved June 29, 1906 (34 Stat. 595, c. 3591, § 7, pars. 11, 12 [Comp. St. 1916, §§ 8604a, 8604aa]), authorizes an action against the receiving carrier, re-

gardless of the fact that the loss or damage sued for was caused by a connecting carrier. Its constitutionality was sustained in Atlantic Coast Line v. Riverside Mills, 219 U. S. 186, 31 Sup. Ct. 164, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7. Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1916, § 6923), vested the exclusive jurisdiction of actions on bonds of contractors for the construction of public works in the courts of the district in which said contract was to be performed and executed. The validity of the act was sustained in United States v. Congress Construction Co., 222 U. S. 199, 203, 32 Sup. Ct. 44, 56 L. Ed. 163, Hopkins v. Ellington & Guy, 246 U. S. 655, 38 Sup. Ct. 423, 62 L. Ed. 924, and Ex parte Southwestern Surety Ins. Co., 247 U. S. 19, 38 Sup. Ct. 430, 62 L. Ed. 961. The Clayton Act, approved October 15, 1914 (38 Stat. 730, 737, c. 323, § 12 [Comp. St. 1916, § 8835k]), expressly authorizes an action by the government, not only in the district whereof the defendant corporation is an inhabitant, but in any district where it may be found or does business. Section 15 of that act (section 8835n) authorizes service of process on other parties than the offending corporation, who are properly joined, in any district where found. The validity of these provisions was sustained in Southern Photo Material Co. v. Eastman Kodak Co. (D. C.) 234 Fed. 955.

Every state of the Union has provided by statute the venue for civil actions in its courts. In some states actions may be brought only in the county where the defendant resides; in some, where the defendant resides or may be found. Some actions can only be maintained in the county in which the cause of action accrued; others, where the subject-matter of the action is situated; and in some states actions may be maintained in the county where either plaintiff or defendant resides. The various acts are referred to in 22 Encyc. of Pl. & Pr. 790 et seq. In United States v. Crawford (C. C.) 47 Fed. 561, 565, Judge Parker said:

"I have no doubt that Congress may provide for service of process out of the district, as this is a regulation of practice and subject to the legislative control."

This was cited with approval by Judge Morrow in United States v. American Lumber Co. (C. C.) 80 Fed. 309, and in Sidney L. Bauman, etc., Co. v. Hart, 192 Fed. 498, 113 C. C. A. 104.

3. Another ground upon which this provision of the act must be upheld is that the courts of the United States, inferior to the Supreme Court, are not established by the Constitution, but owe their existence and powers to Congress alone. That they possess no powers not granted by an act of Congress was determined as early as 1809 in Bank of United States v. Deveaux, 9 U. S. (5 Cranch) 61, 3 L. Ed. 38, and again in 1812 in United States v. Hudson, 11 U. S. (7 Cranch) 32, 3 L. Ed. 259, and uniformly adhered to ever since. A late case in which this ruling is reaffirmed is In re Wisner, 203 U. S. 449, 455, 27 Sup. Ct. 150, 51 L. Ed. 264. That Congress may increase or diminish their powers, or abolish them, is beyond question. It has done so a number of times. Judiciary Act March 3, 1875, c. 137, 18 Stat. 470, extended the jurisdiction of the Circuit Courts of the United States mate-

rially. Act March 3, 1887, c. 373, 24 Stat. 552, contracted it. The Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1087) increased it in some respects, and in others decreased it. By that act Congress abolished the Circuit Courts, and no one ever questioned the exercise of these powers by Congress. If Congress, by the act under consideration, has seen proper to authorize the contraction of the jurisdiction of the District Courts, by limiting the courts in which actions may be maintained, it has only exerted the power which has been exercised ever since the enactment of the first Judiciary Act, in 1789 (1 Stat. 73, c. 20), by the first Congress under the Constitution. Possessing this power, Congress may well determine in what courts actions may or may not be maintained.

The Constitution confers on the Supreme Court appellate jurisdiction, but "with such exceptions and under such regulations as Congress shall make." In Ex parte McCardle, 74 U. S. (7 Wall.) 506, 514, 19 L. Ed. 264, it was held that Congress could deprive that court of appellate jurisdiction, and the repeal of an Act of Congress granting appellate jurisdiction in certain causes deprived the court of the power to review judgments in such actions. This case has been followed as a correct interpretation of the powers of Congress in all cases involving this question decided since. Murphy v. Utter, 186 U. S. 95, 109, 22 Sup. Ct. 776, 46 L. Ed. 1070. In Dooley v. Pennsylvania R. R. Co. (D. C.) 250 Fed. 142, Judge Booth passed upon an act similar to this and sustained it.

The contention that the statute is void, because vesting administrative officers with legislative discretion or power, is without merit. Selective Draft Cases, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. —, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856. It is therefore clear that the act, if it authorizes these general orders, is within the power of Congress under the Constitution.

[2] *Does the act of Congress grant this power to the President?*

Counsel for plaintiff contend that it does not, relying upon that part of section 10 of the act, which reads:

"Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law."

In the opinion of the court all this quotation means is that any person having a cause of action shall not, by reason of this act or any regulation made thereunder, be deprived of the right to maintain it in a proper court, if, under the state, federal, or common law, he is entitled to a legal remedy. It does not mean, as claimed, that, having a cause of action against the carrier, he has the right to institute it in any forum in which he could have brought it before the passage of this act. To meet the exigencies existing during the war, Congress has granted to the President the power to say that one shall not maintain an action in a forum where the natural effect of selecting such forum will be, in the language of General Order No. 18:

"That men operating trains engaged in hauling war materials, troops, munitions, or supplies, are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week

or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs."

That the exercise of the right to maintain actions in a forum distant from the place where the witnesses reside will seriously interfere with the successful prosecution of the war cannot be open to doubt. How are the soldiers drafted under the Selective Draft Act to be transported from the interior to the seaports, if the operation of trains is to be interfered with in this manner? How are munitions, clothing, food, coal, and other supplies necessary to carry on the war, to be transported expeditiously, if the employés, without whom trains cannot be operated, are to be compelled to leave their employment to attend as witnesses at places hundreds of miles away from where their duties require them to be, whenever a person has, or imagines he has, a cause of action against the carrier, and for his convenience, or in some instances, perhaps, to prevent a proper defense, institutes the action in a court far distant from the district where the cause of action arose, and in a district other than that of the residence of the plaintiff at the time of the accrual of the cause of action? The fact that not only the plaintiff, but his witnesses, can more conveniently attend the court, if held at or near his home, or where the cause of action accrued, may well raise a doubt whether the selection of the foreign forum is always made in good faith. The amendment of General Order No. 18 by General Order No. 18-A was evidently intended to prevent a change of residence for the purpose of enabling a suit to be brought at a distance from where the plaintiff resided at the time of the accrual of the cause of action, as is so frequently done to enable one to maintain an action in a national court, instead of in the courts of the state of which the plaintiff and defendant were both citizens at the time of the accrual of the cause of action.

[3] But, aside from this, statutes may not be construed by selecting some part thereof and disregarding other parts. For a proper construction of a statute the whole of it must be read together, to ascertain the legislative intent. In the language of Mr. Chief Justice White in Van Dyke v. Cordova Copper Co., 234 U. S. 188, 191, 34 Sup. Ct. 884, 885, 58 L. Ed. 1273:

"We may not, in order to give effect to those words, virtually destroy the meaning of the entire context; that is, give them a significance which would be clearly repugnant to the statute, looked at as a whole, and destructive of its obvious intent."

The various provisions of an act should be read so that all may, if possible, have their due and conjoint effect without repugnancy or inconsistency. New Lamp Chimney Co. v. Ansonia Brass Co., 91 U. S. 656, 662, 23 L. Ed. 336; Aaron v. United States, 204 Fed. 943, 123 C. C. A. 265.

Applying this canon of construction to the act, and giving effect to every part of it, as is our duty, it is apparent at once how untenable this contention is. That part of section 10 applicable to the matter in controversy reads:

"Sec. 10. That carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

Another provision of the act is section 9:

"And the President, in addition to the powers conferred by this act, shall have and is hereby given such other and further powers necessary or appropriate to give effect to the powers herein and heretofor conferred."

There is nothing in the general orders under consideration which deprives the plaintiff of her right to maintain an action against the defendant, but for reasons of public necessity, in a time of war, these regulations were made, because in the opinion of the President and Director General, for good and sufficient reasons, they are necessary to prevent serious interference with the physical operation of railroads under the control of the government and employed in the prosecution of the war. The act and regulations may well be sustained upon the ground that "salus populi supreme lex est." "The welfare of the people is the paramount law."

The demurrer to the plea is overruled.

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In re SIMMONS et al.

(District Court, D. Massachusetts. July 30, 1918.)

No. 24658.

1. BANKRUPTCY ⟸143(12)—PROPERTY VESTING IN TRUSTEE—LIFE INSURANCE POLICY.

A trustee is entitled to the surrender value of an endowment insurance policy on the life of bankrupt, where it has a cash surrender value, either by its terms or by the concession and practice of the company.

2. INSURANCE ⟸239—LIFE INSURANCE—RIGHTS OF BENEFICIARY.

Under St. Mass. 1907, c. 576, § 73, providing that a life policy payable to a married woman shall inure to her separate use and that of her children, free from debts of the insured, her rights in a policy having a cash surrender value are subject to the right of the insured to surrender it.

In Bankruptcy. In the matter of Arthur E. Simmons and John J. Griffin, partners, bankrupts. On petition to review order of referee directing Arthur E. Simmons, one of the bankrupts, to turn over to the trustee a certain life insurance policy. Order affirmed.

Milton B. Warner and Warner & Barker, all of Pittsfield, Mass., for bankrupts.

Walter J. Donovan, of Adams, Mass., for trustee.

JOHNSON, Circuit Judge. Arthur E. Simmons, one of the bankrupts, at the time of the adjudication of bankruptcy, held an endowment policy for $1,000, issued by the Metropolitan Life Insurance Company on the 4th day of September, 1903, which provides that

the insurance company will pay to him at the expiration of 20 years the sum of $1,000, and in case he should die prior to the expiration of 20 years, while said policy is in force, the said company shall pay the above-mentioned sum to Martha A. Simmons, mother of the insured, if alive; otherwise, to the legal representatives of the insured.

[1] While there is no provision in the policy for a change of beneficiary, it appears by assignment dated November 16, 1912, which is attached to the policy, that Martha A. Simmons assigned all her interest in the said policy to the insured, and that upon the request of the insured, Minnie M. Simmons, his wife, was designated as contingent beneficiary in said policy, to whom the proceeds of the same were to be paid in the event of the death of the insured prior to the expiration of the endowment period, if living; otherwise, to his legal representatives. The insurance company, it would seem, assented to this change of beneficiary and recorded the assignment and change of beneficiary in its policy register.

The referee has found that this policy had a cash surrender value on February 19, 1917, the date of the adjudication, of $415.26, according to the computation of the insurance company, and has ordered the bankrupt, Arthur E. Simmons, to pay or cause to be paid to his trustee the amount of the cash surrender value of said policy at the date of adjudication in bankruptcy, or that he execute an assignment of such documents and papers as may be necessary to enable the trustee to collect from the insurance company the amount of the cash surrender value of said policy, and the District Court is asked to review his order.

Section 70a, cl. 5 (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9654]), contains the following provision:

"Provided, that when any bankrupt shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and continue to hold, own, and carry such policy free from the claims of the creditors, participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets."

While the policy does not contain any provision for a cash surrender value, other than a table of the different amounts which the insurance company would loan at the expiration of different times during the life of the policy, the referee has found that the policy did have at the adjudication a cash surrender value, and it is evident from his report that this was recognized by the insurance company, as the amount was computed by it.

It was held in Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, that the provision of the Bankruptcy Act relating to insurance policies is not confined to policies in which the cash surrender value is expressly stated, but applies also to policies which have a cash surrender value by the concession or practice of the company issuing the same.

Previous to this decision of the Supreme Court, it had been held in this circuit (In re Boardman [D. C.] 103 Fed. 783), by Low-

ell, District Judge, that it was immaterial whether the cash surrender value was stated in the policy or not; "if in the ordinary course of business the bankrupt can obtain cash from the company by a surrender of the policy, his creditors are entitled to the cash."

While the referee does not state that the insurance company admitted that the policy at the time of adjudication had a cash surrender value, he does find and report that this cash surrender value was computed by the company, and I think his finding and report should be accepted by the court.

[2] But it is contended that, even if the policy had a cash surrender value, it was exempt under chapter 576, § 73, of the Acts and Resolves of Massachusetts of 1907, which is as follows:

"Every policy of life insurance made payable to or for the benefit of a married woman, or after its issue assigned, transferred or in any way made payable to a married woman, * * * shall inure to her separate use and benefit, and for that of her children."

And it further provides that the "beneficiary * * * shall be entitled to its proceeds against the creditors and representatives of the person effecting the" insurance.

This statute has received a construction by the Supreme Court of Massachusetts in Bailey v. Wood, 202 Mass. 549, 89 N. E. 147, 25 L. R. A. (N. S.) 722, and it was there held that it applies to and includes an assignment by a husband to his wife of a paid-up endowment life insurance policy, even when such assignment was made when the assignor was deeply insolvent within the knowledge both of himself and his wife. It will be noted, however, that the policy assigned to the wife was a paid-up endowment life insurance policy, and the court held that the insured's life "constitutes no part of the assets of his estate, and nothing therefore is taken from his creditors by an insurance upon it in favor of his wife or the assignment to her of a policy of insurance already issued."

In Dame v. Blinn, 207 Mass. 159, 93 N. E. 601, it was held that:

"A general assignment for the benefit of creditors which conveys all property of the assignor legal and equitable except such as is exempt by statute from being taken on execution, and expressly includes 'all claims, debts, choses in action, owing to him, whether now or hereafter payable,' transfers to the assignee a right of the assignor to surrender a policy of life insurance and take the amount of the surrender value for his own benefit."

The policy in this case was an endowment policy payable to the insured at the expiration of the period stated in the policy, or if the insured should die before that time to children of the insured, if living, otherwise to the insured's executors, administrators, or assigns, with power to the insured to surrender the policy to the company at any time. The policy was therefore assignable by the insured, and it contained a statement of what the accepted surrender value or the amount to be paid by the company to the insured or his assignees on surrender of the policy would be at the end of the successive years of the proposed insurance. The court there held that the children's rights under the policy were made subject to the unrestricted right of the insured to surrender it; that "this was a valuable property

right, incident to his general right under the policy, such as would pass with an assignment of the latter."

While the policy in the case under consideration contains no power of surrender clause, nor any clause authorizing assignment of the policy, yet it is true that the insurance company had already recognized one assignment of the policy before adjudication, and in view of the fact that the referee has found that the policy did have a cash surrender value at that time, it is evident that the referee must have found that it was the practice of the insurance company to accord the right of surrender to the insured under such a policy.

In Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, the policies under consideration had a surrender value; but the bankrupt before adjudication had procured loans upon the policies to the extent of their full surrender value. The court there held that there was nothing of value under the policies to be assigned to the trustee, and "that in the present case the company had advanced upon the policies their full surrender value as stipulated in the policies, and that the only interest that could have passed to the trustees would have been the speculative right to the net proceeds of the policies, contingent upon the death of the bankrupt, and possibly dependent upon the payment of large annual premiums for 13 years." The court in its opinion states:

"Congress recognized also that many policies at the time of bankruptcy might have a very considerable present value which a bankrupt could realize by surrendering his policy to the company. We think it was this latter sum that the act intended to secure to creditors by requiring its payment to the trustee as a condition of keeping the policy alive."

The court there held that there was nothing of value under these policies to be assigned to the trustees, but expressly recognizes the right of the trustees to hold as part of the property of the bankrupt, or to have paid to him, as part of the property of the bankrupt, the cash surrender value of any insurance policy.

I agree with the referee that the policy in question had a surrender value which the company was willing to pay, and which makes its value available to the bankrupt estate at the date of adjudication.

The order of the referee is affirmed, and the petition for review is dismissed.

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UNITED STATES v. LEWIS et al.

(District Court, S. D. California, N. D. July 10, 1918.)

No. 118.

INDIANS ⇐38(2)—PROSECUTION—JURISDICTION—FEDERAL COURTS—"RESERVED FOR EXCLUSIVE USE OF UNITED STATES."

A homestead acquired by an Indian on public land in a state under the general homestead law is not land "reserved * * * for the exclusive use of the United States," within Criminal Code, § 272, subd. 3 (Comp. St. 1916, § 10445), and a federal court is without jurisdicton to try a criminal offense committed thereon.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Criminal prosecution by the United States against Sarah Lewis, Roy Lewis, and Louis Valencia. On demurrer to indictment. Demurrer sustained.

Lyle W. Rucker, Asst. U. S. Atty., of Los Angeles, Cal.

George G. Graham, of Fresno, Cal., and Edward Schary, for defendants.

TRIPPET, District Judge. The defendants have been indicted for murder. The case is before the court on a demurrer to the indictment. The defendants raise the question that the court has no jurisdiction to punish for the offense charged in the indictment. The jurisdictional facts charged in the indictment are as follows:

"That Sarah Lewis, an Indian woman, Roy Lewis, a minor Indian, both wards of the United States government, and Louis Valencia, * * * at, upon, and within the limits of an Indian homestead, formerly of the public domain of the United States, known as the Joe Dehy ranch, for which application was made on April 13, in the year of our Lord one thousand eight hundred and eighty-seven, by one Joe Dehy, a full-blood Piute Indian, and the father of Sarah Lewis and of Minnie Fuller, both Piute Indian women, and wards of the United States government, and for which a patent was granted May 5, in the year of our Lord one thousand eight hundred and ninety-three, which said patent contained a twenty-five year trust provision, as provided in the act of Congress of July 4, in the year of our Lord one thousand eight hundred and eighty-four, and amendments thereof, said Indian homestead entry being more particularly described as the west one-half (½) of the southeast one-quarter (¼), section nine (9), township ten (10) south, range thirty-four (34) east, in the county of Inyo, within the Northern division of the Southern district of California, which said Indian homestead entry was at all of the times herein mentioned within the exclusive jurisdiction of the United States and within the jurisdiction of this honorable court, with force and arms, in and upon Minnie Fuller, a full-blood Piute Indian woman," etc.

There are two sections of the Penal Code (Act March 4, 1909, c. 321) concerning the jurisdiction of the court to try criminal offenses, namely, section 272 and section 328 (35 Stat. 1142, 1151 [Comp. St. 1916, §§ 10445, 10502]). Sections 2145 and 2156 of the Revised Statutes (Comp. St. 1916, §§ 4148, 4159) need not be considered, because the lands here involved are not within the Indian country. Ex parte Tilden (D. C.) 218 Fed. 920. Section 328 is as follows:

"All Indians committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, assault with a dangerous weapon, arson, burglary, and larceny, within any territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases. And all such Indians committing any of the above-named crimes against the person or property of another Indian or other person within the boundaries of any state of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and be subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States: Provided, that any Indian who shall commit the offense of rape upon any female Indian within the limits of any Indian reservation shall be imprisoned at the discretion of the court."

The United States attorney concedes that the court has no jurisdiction by reason of this section. No concession was necessary, however, because it is so plain that the court would not have jurisdiction by reason of this section that it will not admit of discussion. The United States attorney relies upon Donnelly v. United States, 228 U. S. 243, 268, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710, United States v. Kagama, 118 U. S. 375, 6 Sup. Ct. 1109, 30 L. Ed. 228, and similar cases. These cases, however, deal with Indian reservations and are not in point here. But this section has an important bearing upon the interpretation to be given to section 272. In this respect, when Congress enacted section 328, it intended by that section to provide, so far as the Penal Code was concerned, for all cases concerning Indians that should be prosecuted in the federal court, and therefore the fact that some of the defendants are Indians in this case has no relation whatever to the jurisdiction of the court.

Section 272 of the Penal Code (Comp. St. 1916, § 10445), is as follows:

"The crimes and offenses defined in this chapter shall be punished as herein prescribed: * * *

"Third: *When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof,* or any place purchased or otherwise acquired by the United States by consent of the legislature of the state in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

The United States attorney contends that the court has jurisdiction by virtue of the first part of this paragraph; that is to say, he contends that the land, upon which this murder was committed, was land reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof.

The court cannot agree with this contention. The land, at the time of the settlement by the Indian upon it, was the public land of the United States, subject to homestead entry, and the Indian acquired the title to the land under an act of Congress, entitled "An act making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-five, and for other purposes," passed July 4, 1884 (23 U. S. Stat. at Large, 76, 96, c. 180, 3 Fed. Stat. Ann. [2d Ed.] 820 [Comp. St. 1916, § 4612]). The provision of this act, authorizing the issuance of this patent, is as follows:

"That such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been

made, or, in case of his decease, of his widow and heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever."

It seems to me perfectly plain that the land, upon which this murder was committed, was not reserved for the exclusive use of the United States, simply by reason of the fact that there is a trust provision in the patent. The United States held it in trust for the use of the Indian, and not for the use of the United States. The mere fact that the Indian is a ward of the government does not change the reasoning in the slightest. This precise question has never been directly passed upon by any court, but nevertheless we are not wholly without authority. In United States v. Kiya (D. C.) 126 Fed. 879 (see, also, Matter of Heff, 197 U. S. 488, 25 Sup. Ct. 506, 49 L. Ed. 848), Judge Amidon rendered an able opinion, which has a bearing upon the proposition under discussion. Congress, February 8, 1887 (24 Stat. 388, c. 119), passed an act entitled "An act to provide for the allotment of lands in severalty to Indians. * * *" 3 Fed. Stat. Ann. 830, § 6, amended May 8, 1906 (34 Stat. 182, c. 2348 [Comp. St. 1916, § 4203]). This act provided for the allotment of lands in Indian reservations in severalty to Indians. The statute provided for a patent to issue to the Indian, but having a clause reserving a trust in the government for the benefit of the Indian, the same as in the act of 1884. The act further provided that, after the expiration of 25 years a patent should issue to the Indian or his heirs under certain conditions. In the case at bar there does not seem to be any necessity for a second patent.

In the case just referred to Judge Amidon held that a crime committed upon land so allotted to an Indian was not within the jurisdiction of the United States District Court. This decision in itself could not have much weight here, but for the fact that, subsequent to said decision, Congress amended the act of February 8, 1887, and provided in such amendment that, during the time the lands were so held in trust by the government, crimes committed thereon should be within the jurisdiction of the United States court. If the trust clause in the act as originally enacted had given the United States court jurisdiction of crimes committed upon the land, then there was no necessity for Congress to amend the act. The amendment, therefore, amounts to a legislative interpretation that the trust provision in the allotment patent would not give the court jurisdiction. If the court, under the act alloting lands in severalty in Indian reservations, did not have jurisdiction by reason of the trust clause, a fortiori the court would not have jurisdiction under the statute by virtue of which the patent was granted in this case.

There is another phase of this matter that is entitled to consideration. In United States v. Bateman, 34 Fed. 86, the Circuit Court for the Northern District of California held that homicide committed within the Presidio military reservation was not an offense over which the courts of the United States had jurisdiction. In that case it is pointed out that, when California was admitted to the Union,

no reservation was made by the national government of jurisdiction over any property. And the federal court could only acquire jurisdiction to punish crime in any territory within the state by cession of the state. It is not necessary for me to go into this phase of the matter fully, but, in passing, I call attention to the statutes of California upon the subject. There are many acts of the Legislature of California ceding jurisdiction to the United States over certain specified territories, such as Indian reservations, military reservations, etc.; but there is none ceding jurisdiction to the United States over land such as is described in this indictment.

I am therefore of the opinion that this court has no jurisdiction, and the demurrer is sustained.

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MONTGOMERY v. CITY OF PHILADELPHIA et al.

(District Court, E. D. Pennsylvania. October 9, 1918.)

No. 5226.

1. ASSUMPSIT, ACTION OF ⊂⊃1, 10—PENNSYLVANIA PRACTICE—EQUITABLE DEFENSES—INTERPLEADER.

Under the Pennsylvania practice, an action in assumpsit is open to equitable defenses, and when the real issue is, not whether the defendant owes, or how much, but to whom the money owed rightfully belongs, the action is transformed from one in debt to an interpleader proceeding between the respective claimants.

2. INTERPLEADER ⊂⊃32—MONEY PAID INTO COURT BY DEFENDANT—RIGHT TO HAVE OWNERSHIP DETERMINED.

When a court has jurisdiction of the parties and of the subject-matter, and emphatically when that subject-matter is money paid into court for the express purpose of having its ownership determined therein, there is no legal procedure obstacle in the way of such determination.

3. BANKRUPTCY ⊂⊃172—PROPERTY PASSING TO TRUSTEE—MONEY ASSIGNED BY BANKRUPT.

An assignment by a contractor for city work of all money to become due under the contract to the surety on his bond, which on his default completed the work at a loss, *held* to entitle the surety, as against the contractor's trustee in bankruptcy, to sums earned before default, but reserved by the city, although the city was not notified of the assignment.

At Law. Action by Kingsley Montgomery, trustee in bankruptcy of Cloud, Stiles & Work, a corporation, against the City of Philadelphia and the Maryland Casualty Company, intervening defendant. Judgment for Maryland Casualty Company.

Joseph H. Hinkson, of Chester, Pa., for plaintiff.

John P. Connelly, of Philadelphia, Pa., for defendant city of Philadelphia.

Maurice W. Sloan, of Philadelphia, Pa., for defendant Maryland Casualty Co.

DICKINSON, District Judge. The crucial point of the question involved in this case may be best presented by an outline statement of the fact situation:

Cloud, Stiles & Work, a contracting corporation, entered into a contract with the city of Philadelphia to do certain construction work for

the city. The Maryland Casualty Company became the surety of the contractor. The city reserved the right to withhold a certain percentage of the earned payments (otherwise payable to the contractor) until the completion of the contract. These moneys then became payable as part of the final payment.

As part of the inducement to the surety to become such, the contractor made what is conceded to have been (between the parties) a valid assignment of all moneys which became payable under the contract by the city, including this reserve. The assignment became operative in the event of a default by the contractor upon its contract. This assignment was duly executed and delivered, but no notice thereof was given to the city, nor was there other delivery than of the assignment. The contractor proceeded with the work until May 1, 1916. It then defaulted, and the city thereupon regularly declared, and notified the surety of, the default, and called upon the latter to complete the work. This the surety did at a cost in excess of all payments under the contract, including the sum which had been held back from the contractor by the city by virtue of the right given to it by the contract. The figures expressive of the sum so reserved are $8,215.67.

The contractor, subsequently to the default, went into bankruptcy. The date is agreed to be August 1, 1916. The plaintiff, as trustee in bankruptcy, brought this action against the city. The latter, admitting its possession of the fund and having no interest in the controversy over the ownership of it, asked and was given leave to pay the money into court. These further proceedings are in effect an interpleader to determine to whom the money belongs, and the question is presented through and by a case stated.

The plaintiff advances the claim of the bankrupt estate from two positions. One is in effect that the question of to whom this money belongs is a question for the determination of the court in bankruptcy, and because of this the fund should be taken in charge by the trustee. The underlying principle upon which the trustee relies must be accepted, but the acceptance of the conclusion involves a begging of the real question. The right to the money determines the question before us, but the question is, not the right to the money, but the right of the plaintiff to recover in this action.

It is fairly presented by a statement of the defense as really made. It is that the defendant owes the plaintiff nothing, because the debt, although admitted to be due, is due, not to the plaintiff, but to another. If this defense is made out, the plaintiff cannot recover. Ordinarily, it is true, a defendant has no concern with the ownership of the debt which he owes, if the plaintiff has a right of action in the sense of being the legal plaintiff. If he owes the money, and owes it to the plaintiff, he cannot escape judgment by setting up that the ownership of the fruits of the action has passed to a third party. His only legal defense is that he does not owe the plaintiff. Herein lies the distinction between the legal and an equitable, or, as the Pennsylvania practice has it, a use, plaintiff. It may be, however, that the circumstances are such as to give the defendant a real interest in the question of to

whom payment should be made, and that he has a claim upon the protection of the court against the danger of being compelled to pay the debt twice.

[1] The statutes of Pennsylvania supply a weapon of defense, although a somewhat unwieldy one, to such defendants. Moreover, it is one of the merits of the Pennsylvania system of practice that its machinery, aside from that provided by statute, is mobile and flexible. An action in assumpsit, although an action at law, is regarded as an equitable action, or proceeding open to equitable defenses. When the real issue is, not whether a defendant owes, or how much he owes, but to whom he owes, in the sense, not of in whom is the legal right of action, but to whom does the money to be recovered rightfully belong, the action is transformed from an action in debt against the defendant to an interpleader proceeding between the respective claimants to the money, to determine its ownership.

[2] This fitly describes the present proceeding. When a court has jurisdiction of the parties and of the subject-matter, and emphatically when that subject-matter is money which has been paid into the court for the express purpose of having its ownership determined, there would seem to be no legal procedure obstacle in the way of such ownership being determined.

Aside from all other considerations, the common sense of the situation would command that the real question be finally, so far as concerns that court, determined. This is particularly true when the court which may pronounce judgment and the court to which the question would be referred are one and the same, although sitting in the one case as a court of equity and in the other as a bankruptcy court.

[3] This brings us to the other standing ground of the plaintiff, which is that the Maryland Casualty Company has no valid title to this fund as against a trustee in bankruptcy, having, as he does, the status of an execution creditor. The argument proceeds upon the thought that the law of Pennsylvania has accepted the principle ingrafted upon the common law by the statute of Elizabeth that possession is the badge of ownership of personal property. In the application of this principle the law of Pennsylvania is guided by the more direct, simple, and sturdier spirit of the common law, and does not follow the more subtle doctrines of the civil law in countenancing secret transfers and liens inconsistent with the ownership indicated by possession. It therefore places under the ban of its condemnation all transfers unaccompanied with a change of possession.

The modification of the doctrine is recognized to the extent that such transfers are good as against the grantor and persons claiming title through him, and that no further change of possession is required than that called for by the nature of the thing transferred, but that such transfers are not valid against execution creditors, unless there has been a change of possession or its equivalent. The principle, it is asserted, applies to choses in action as well as to things tangible. When a chose in action, in the form, for instance, of a claim of debt, is assigned, it is reasonably possible to have the assign-

ment accompanied, not only by a delivery of the written assignment, if there be one, but also by notice to the debtor. Without the latter, therefore, an assignment of a chose in action is void as against an execution creditor. The line of foreign attachment and other attachment cases, in each of which the title of the assignee has been upheld, is distinguished from the case of a trustee in bankruptcy in this: That the plaintiff in an attachment proceeding stands in the shoes of and makes his claim through the grantor, and that the title of such trustee is that of an execution creditor.

As against this view there are two things to be said. In the first place, the fund here was in a very substantial, although somewhat technical, sense, earned by the surety, and not by the bankrupt. The latter had no claim whatever to the money until the contract was completed, although it is true that the money represents work done by the bankrupt. The contract was completed by the surety and the reserve money thus saved. There is, because of this, great force in the equitable consideration that the salvor should not be at a loss.

In the second place, and as a finality, the question sought to be raised has been set at rest by the case of Hawley Down-Draft Furnace Co., 238 Fed. 122, 151 C. C. A. 198. In that case there was a secret assignment of choses in action in the form of book accounts. Not only was no notice given to those who owed the accounts, but the assignor collected them as if still the owner. It was, it is true, agreed between the grantee and grantor that in making collections the grantor acted as the agent of the grantee; but this relationship was in no way disclosed to others. A receiver was appointed by a state court, who collected the outstanding accounts. Bankruptcy proceedings followed, and the receiver paid over the fund to the trustee in bankruptcy. The assignee made claim to the moneys under his assignment, and his title was upheld against that of the trustee.

This ruling is decisive of the question of ownership. The conclusion reached is based upon the finding that by the assignment of this reserved fund title thereto was in the Maryland Casualty Company. We, in consequence, answer questions (a) and (b) submitted for our decision, but see no occasion to answer question (c).

These answers are as follows: (a) No. (b) Yes.

## UNITED STATES v. BORDONARO et al.

(District Court, W. D. New York. October 15, 1918.)

BRIBERY ⊂=1(2)—"OFFICER OF UNITED STATES" —MEMBERS OF DRAFT BOARD.
A member of a local draft board is an "officer of the United States" or a person acting on behalf of the United States in an official function, within the meaning of Criminal Code, § 39 (Comp. St. 1916, § 10203), making it an offense to give or offer a bribe to any such officer, or person.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, United States Officer.]

Criminal prosecution by the United States against Charles Bordonaro and John Marino. On demurrer to indictment. Overruled.

Stephen T. Lockwood, of Buffalo, N. Y., for the United States.
Henry Donnelly, of Olean, N. Y., for defendants.

HAZEL, District Judge. [1] The demurrer, jointly interposed by defendants, challenges the validity of the indictment mainly on the ground that one Murrin, chairman of the local exemption board, division 1, of Olean, to whom $500 was given by defendants to reclassify John Marino, by removing him from class 1, A to class 5, F, as a resident alien, was not an officer of the United States; the contention being that he was in fact an officer of the state of New York under the Selective Draft Act (Act May 18, 1917, c. 15, 40 Stat. 76) and the rules and regulations promulgated for carrying it out, and hence that there was no infraction of section 39 of the Criminal Code of the United States. Act March 4, 1909, c. 221, 35 Stat. 1096 (Comp. St. 1916, § 10203). This contention, however, seems to me to be untenable.

The members of local boards appointed for carrying out the provisions of the Selective Draft Act are appointed by the President, and it is entirely immaterial that the appointments are made upon the recommendations of the Governors of the various states in which the appointees perform their duties. The act in terms authorizes and empowers the President to designate local boards upon the recommendations of the Governors of the states, and, furthermore, to utilize the services of officers and agents of the several states in the execution of the act. Indeed, the act substantially provides that any and all persons designated and appointed under the rules and regulations prescribed by the President, regardless of whether they are appointed by the Governor, or any officer of any state, are required to perform their duties as ordered and directed by the President. Under the act, the President was specifically authorized to establish and create exemption boards, such boards to be appointed by him and to consist of three or more members, the boards to have power to determine questions of exemption under the act. Such provisions, in my judgment, support the view of the government that a member of a draft board is an officer of the United States, under article 2, § 2, of the Consti-

tution, and, in any event, under the Selective Draft Act is required to perform an official duty for the United States, and is therefore a person acting in an official function within the meaning of section 39 of the Criminal Code.

Another point sustaining this view is that failure to perform any duty required of a member of a local board is a misdemeanor and subjects him to punishment in the District Court of the United States having jurisdiction of the offense. He was selected, not merely to perform a ministerial duty, or a duty in a particular case, or as an expert or assistant, nor for his special knowledge, as was the case in Auffmordt v. Hedden, 137 U. S. 327, 11 Sup. Ct. 103, 34 L. Ed. 674, cited by counsel for defendants, but, on the contrary, he was to perform a quasi-judicial function requiring conference with his associate members and the exercise of judgment and discretion in the proper discharge of his duties. It is true that the duration of his office was not stated at the time of his appointment, nor the emolument he was to receive, though reference to the latter is made in the rules; nevertheless his duties were such as fall either to an officer of the United States or to "any person acting for or on behalf of the United States in any official function." Section 39, Criminal Code. In either case the indictment sufficiently apprises the defendants of the character of the charge against them.

The precedents cited by counsel for defendants to sustain his point are to my mind clearly inapplicable to the present situation. In no sense are the members of local boards employés or agents of the states or counties. While their duty, true enough, is to assist in raising the state's quota of men for the United States army, and their decisions result from co-operation and concurrence of the members of the board, still Congress, in enacting the Selective Draft Act, did not contemplate that they were to be employés and agents of the state. Of course, as pointed out, the members of the boards act unitedly, and no individual member has the right to determine for the board any question of classification; but it was plainly a commission of the offense in question to give money to any person acting for, or on behalf of, the United States in any official function with an intent to influence his decision or action on any question which might at any time be pending, or which might be brought before him in his official capacity.

It is questioned whether there was a matter pending before the board. Upon this phase we must look to the indictment, which alleges that a matter was pending and about to come before the board, and that defendants offered money to Murrin in his official capacity to induce him to vote on it a certain way. The trial will no doubt indicate whether or not there was a basis for the performance of an official act by Murrin. It is not thought that section 39 of the Criminal Code is limited to a question or matter pending before Murrin individually, as distinguished from a question or matter pending before the local board. It is essentially necessary in this case for the government to show that the defendants committed an act to influence official action on the part of Murrin, or to influence him in the per-

formance of any duty that he was required to perform by authority of his appointment to office. United States v. Ingham (D. C.) 97 Fed. 935. See, also, United States v. Haas (C. C.) 163 Fed. 908. The evidential facts, true enough, may show that there was no intention to influence official action, but as to this no comment is required.

The demurrer is overruled.

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CITIZENS' TRUST & SAVINGS BANK v. HOBBS.

(District Court, S. D. California, S. D. October 11, 1918.)

No. 647.

REMOVAL OF CAUSES ⟸79(6)—TIME FOR FILING PETITION—EXTENSION OF TIME TO PLEAD.

Under Code Civ. Proc. Cal. § 585, subd. 1, requiring defendant to answer within the time specified in the summons, "or such further time as may have been granted," an extension may be granted by stipulation of counsel, and at any time within such extension defendant may file a petition for removal.

At Law. Action by the Citizens' Trust & Savings Bank against John H. Hobbs. On motion to remand to state court. Denied.

W. E. Lady, Hunsaker & Britt, and Le Roy M. Edwards, all of Los Angeles, Cal., for plaintiff.

J. R. Whittemore and C. O. Whittemore, both of Los Angeles, Cal., for defendant.

TRIPPET, District Judge. This action is before the court on a motion to remand. Summons was served upon the defendant in Los Angeles county, Cal. According to the notice in the summons, the defendant was required to answer within 10 days from the date of service. Within that time the plaintiff and defendant entered into a stipulation in writing, extending the time for the defendant to answer. Within the time specified in the stipulation, the defendant filed a petition to remove the cause to this court. The question presented to the court is whether or not the petition for removal was filed "at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead."

There are three provisions of the Code of Civil Procedure of California that bear upon this question:

Section 407:

"The summons * * * must contain: * * *

"2. A direction that the defendant appear and answer the complaint within ten days, if the summons is served within the county in which the action is brought; within thirty days, if served elsewhere.

"3. A notice that, unless the defendant so appears and answers, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint."

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Section 585:

"Judgment may be had, if the defendant fails to answer the complaint, as follows:

"1. In an action arising upon contract for the recovery of money or damages only, if * * * no answer has been filed with the clerk of the court within the time specified in the summons or such further time as may have been granted, the clerk, upon application of the plaintiff, must enter the default of the defendant. * * *"

Section 283:

"An attorney and counselor shall have authority:

"1. To bind his client in any of the steps of an action or proceeding by his agreement filed with the clerk, or entered upon the minutes of the court, and not otherwise."

These provisions of the Code must be construed together, so as to give effect to each phrase therein. It is perfectly plain that the phrase of paragraph 1 of section 585, to wit, "Such further time as may have been granted," is a provision of law of the state of California, which provides for the time of the defendant to answer. Section 585 does not limit the right to grant extensions of time to answer to orders of the court. The granting of the extension of time, as provided by section 585, may be done by stipulation of the attorneys. A stipulation made by the attorneys extending the time to answer would, of course, be enforced by the courts, and undoubtedly has been on many occasions. These provisions of the Code are the requirements of the law of the state of California, which determine the time for the defendant to answer.

The rules of the court were introduced in evidence at the hearing. Under these rules the defendant had a right to answer or file his petition for removal at the time it was filed. The law of California established the right of the defendant to have filed his answer at the time he filed his petition so clearly "that he may run that readeth it." The opinion in Tevis v. Palatine Ins. Co. (C. C.) 149 Fed. 560, is in point, and there is no reason why that opinion should not be followed.

The motion to remand will be denied.

## FOSTER et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3157.

1. INDICTMENT AND INFORMATION ⟸59—RIGHT OF DEFENDANTS TO BE INFORMED OF NATURE OF ACCUSATION.
   Defendants, charged with crime, have a constitutional right to be informed of the nature and cause of the accusation against them.
2. INDICTMENT AND INFORMATION ⟸110(4)—SUFFICIENCY—LANGUAGE OF STATUTE.
   An indictment charging that defendants, in violation of the Espionage Act, conveyed false reports, with intent to interfere with the success of the military and naval forces of the United States, etc., but which did not specify the reports, or to whom they were made, but merely followed the language of the statute, *held* insufficient; the statute itself being general.
3. INDICTMENT AND INFORMATION ⟸121(1)—BILL OF PARTICULARS.
   A bill of particulars may be ordered by the court, in its discretion, in cases where the indictment, while so expressed as to be good on demurrer, does not furnish defendant with all information he is entitled to have before being compelled to go to trial.
4. INDICTMENT AND INFORMATION ⟸121(4)—BILL OF PARTICULARS.
   A bill of particulars, not having been made by a grand jury on oath, cannot cure the failure of the indictment to sufficiently inform defendant of the charge against him, for it is no part of the record, and is not subject to demurrer.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Leonard Foster and others were convicted of violating the Espionage Act (Act June 15, 1917, c. 30, 40 Stat. 217), and they bring error. Reversed and remanded, with instructions to sustain demurrer to indictment.

The plaintiffs in error were civilian employés for a contractor who was doing work at the Camp Lewis cantonment. They were indictment in six counts, three of which charged offenses committed on November 10, 1917, and the others charged offenses committed on November 13, 1917. The first count charges that on November 10, 1917, at Camp Lewis, Wash., when the United States was at war with Germany, the accused "did willfully, knowingly, unlawfully, and feloniously make and convey false reports and false statements with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America." The second count charged, in the language of the statute, that the accused "did willfully, knowingly, unlawfully, and feloniously cause and attempt to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States, to the injury of the service of the United States"; and the third count charged that they "did unlawfully, willfully, knowingly, and feloniously obstruct the recruiting and enlistment service of the United States, to the injury of the service of the United States." The fourth, fifth, and sixth counts were framed as were the first, second, and third.

A demurrer was interposed to the indictment, and to each count thereof, on the ground that no offense or crime was charged therein against the laws of

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the United States. The demurrer was overruled, but the court directed that a bill of particulars be furnished. The order was complied with, and a bill of particulars was furnished, stating that the seven defendants were singled out as leaders spreading propaganda against the United States, that they were searched, and I. W. W. cards and papers were taken from their persons; that they carried on I. W. W. activities, working toward the spreading of dissatisfaction among the soldiers and laborers whom they got to listen to their arguments. Then followed the specification of statements made by the defendant Hodges on November 10th to a named person, and statements made by the defendants Foster and Hodges on November 13th in the sleeping quarters occupied by the defendan' at Camp Lewis. There was no mention made in the bill of particulars of the activities of the other defendants, except that it was alleged that one of them, who was not named, made certain disloyal and hostile statements as to the government, and another passed around I. W. W. literature. No exception was taken to the bill of particulars as insufficient, and the cause went to trial without further objection. But objection was made to the introduction of evidence against the defendants not named in the bill of particulars, to the overruling of which an exception was allowed.

By the verdict of the jury all of the plaintiffs in error were found guilty as charged in the first count; Phelan and Hodges were found guilty as charged in the second, third, fifth, and sixth counts; and Phelan, Hodges, and Foster were found guilty as charged in the fourth count.

H. E. Foster, of Seattle, Wash., for plaintiffs in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., and Robert C. Saunders, U. S. Atty., of Seattle, Wash., for the United States.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] We are of the opinion that the indictment is fatally defective and that the demurrer should have been sustained. The plaintiffs in error had the constitutional right to be informed of the nature and cause of the accusation against them. To furnish them with that information it was necessary to set forth in the indictment the particular facts and circumstances which rendered them guilty and to make specific that which the statute states in general. A statutory offense may be so defined that the indictment will sufficiently charge the violation thereof if it follows the language of the statute, but this is so only in cases where the statute apprises the offender from the mere adoption of the statutory terms of the precise nature of the offense for which he is to be tried. Here the statute is very general in its terms, and the indictment merely charges in the language of the statute. Thus in the first count it goes no further than to allege that the accused did willfully, knowingly, unlawfully, and feloniously make and convey false reports and false statements, with intent to interfere with the operation and success of the military and naval forces of the United States, and to promote the success of its enemies. It conveyed no information to the accused of what the reports were, wherein they were false, nor to whom they were made. It is as bare of information as to the nature of their offense as would have been an indictment charging that at a designated time and place they "committed larceny."

In United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819, it was said:

"Where the offense is purely statutory, having no relation to the common law, it is, 'as a general rule, sufficient in the indictment to charge the defendant with acts coming fully within the statutory description, in the substantial words of the statute, without any further expansion of the matter.' 1 Bish. Crim. Proc. § 611, and authorities there cited. But to this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment, with reasonable certainty, of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense. An indictment not so framed is defective, although it may follow the language of the statute."

That rule was reaffirmed in substance in United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135, and in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, where the court said:

"The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent, and these must be set forth in the indictment with reasonable particularity of time, place, and circumstances."

That doctrine was applied in Keck v. United States, 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505, and in Armour Packing Co. v. United States, 209 U. S. 58, 83, 28 Sup. Ct. 428, 52 L. Ed. 681, where the court said:

"And it is true it is not always sufficient to charge statutory offenses in the language of the statutes, and, where the offense includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms, but it must state the particulars."

This court, in Peters v. United States, 94 Fed. 127, 36 C. C. A. 105, said:

"Every indictment should charge the crime, which is alleged to have been committed, with precision and certainty, and every ingredient thereof should be accurately and clearly stated; but where the offense is purely statutory, and the words of the statute fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished, it is sufficient to charge the defendant in the indictment with the acts coming fully within the statutory description, in the substantial words of the statute. * * * The true test of the sufficiency of an indictment is not whether it might possibly have been made more certain, but whether it contains every element of the offense intended to be charged, and sufficiently apprised the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction."

Of similar import are Ackley v. United States, 200 Fed. 217, 118 C. C. A. 403; Martin v. United States, 168 Fed. 198, 93 C. C. A. 484; Knauer v. United States, 237 Fed. 8, 150 C. C. A. 210; United States v. Bopp (D. C.) 230 Fed. 723.

[3, 4] The bill of particulars could not avail to cure the defect of the indictment. A bill of particulars may be ordered by the court in

its discretion in cases where the indictment, while so expressed as to be good on demurrer, still does not furnish the defendant all the information he is entitled to have before being compelled to go to trial. It does not constitute a part of the record, and it is not subject to demurrer. Commonwealth v. Davis, 11 Pick. (Mass.) 432. Not having been made by a grand jury on oath, it cannot cure the omission of material averments from an indictment, and it cannot "give life to what was dead when it left the grand jury." Commonwealth v. Baltimore & O. R. R. Co., 223 Pa. 23, 72 Atl. 278, 132 Am. St. Rep. 723; Floren v. United States, 186 Fed. 961, 108 C. C. A. 577; United States v. Bayaud (C. C.) 16 Fed. 376. In United States v. Tubbs (D. C.) 94 Fed. 356, Judge Carland said:

"It is because the indictment is good as against a general demurrer that the defendant is compelled to resort to a motion for a bill of particulars. If it is bad, he has his remedy by demurrer or motion in arrest."

The judgment is reversed, and the cause is remanded, with instructions to sustain the demurrer.

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TREAT et al. v. ELLIS.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3082.

JUDGMENT ⇐586(2)—RES JUDICATA—ISSUES NOT DETERMINED.

Decree in a suit for specific performance of a contract for mining property, which relief was denied, *held* not a bar to a second suit for the same relief, but based on a different contract.

Appeal from the District Court of the United States for the Third Division of the Territory of Alaska; Fred M. Brown, Judge.

Suit in equity by George C. Treat and others against H. E. Ellis. Decree for defendant, and complainants appeal. Reversed and remanded, with directions.

In May, 1915, Treat and the others, appellants here, began suit against Ellis, appellee here, for specific performance of a contract made July 9, 1908. Upon issues framed the District Court adjudged Treat to be the owner of and entitled to the immediate possession of an undivided one-tenth interest to certain mining property, and that Smith and Archibald, to whom Smith had transferred a one-half interest, were each the owner of and entitled to the immediate possession of an undivided one-twentieth interest, and required the appellant therein to convey said interests to the respective appellees in that case. Ellis appealed, and it was held by this court that the lower court erred in treating the contract involved as one to convey an interest in real estate, and not one to transfer personal property. It was also decided that, under the allegations of the bill and the prayer for such other and further relief as might be just and equitable, Treat and the other appellees were not entitled to a decree for the specific performance of the contract which they pleaded. Full report of the case will be found in Ellis v. Treat, 236 Fed. 120, 149 C. C. A. 330.

Thereafter, in February, 1917, Treat and Smith and Archibald, appellants herein, commenced the present action to enforce the specific performance of

a contract to convey an undivided one-fifth interest in the mining claims described in the former action. The appellee herein, Ellis, among other defenses, set up res judicata. Appellants herein replied, putting in issue all of the new matter set forth in the answer, except the records of the former suit and the identity of the parties in the two causes. Ellis moved to dismiss the action, on the ground that the plea of res judicata was not fully denied by the reply. The lower court sustained the motion, on the ground that the plea of res judicata was well taken, and dismissed the suit. Treat and Smith and Archibald appeal.

Lyons & Orton, of Seattle, Wash., Donohoe & Diamond, of Valdez, Alaska, and Smith, Chester, Brown & Worthington, of Seattle, Wash., for appellants.

L. V. Ray, of Seward, Alaska, for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). Adherence to the decision in Ellis v. Treat, supra, makes the determination of the present suit comparatively simple. In the former suit plaintiff sought to enforce a contract concerning personal property; whereas, by this suit plaintiffs seek to enforce a contract concerning real estate. The opinion of the court in the former suit was that the allegations of the complaint failed to show that Ellis, the appellant therein, ever promised or agreed to convey to the appellees therein, Treat and Smith, any interest in the mining claims, but did agree to convey to a corporation thereafter to be formed eight mining claims, in consideration of all the stock of the corporation, and thereafter to transfer to Treat and Smith a certain per cent. of the stock. Specific performance was denied.

The remaining question considered was "whether, under the allegations of the bill and the prayer for such other and further relief as may be just and equitable, the appellees are entitled to a decree for the specific performance of the contract which they pleaded"; and it was held that such relief should be denied for these reasons: That the contract as pleaded was too indefinite and uncertain; that the appellees, Treat and others, had never performed the covenants which were to be kept, and offered no sufficient reason for nonperformance; and that the contract, even if specific, called for participation by others not parties to the contract or suit.

The present case is as if there never had been an issue tried and adjudicated as to the rights of the parties to a conveyance of an interest in the mining property described in the contract. Now, however, the plaintiffs herein have made averments which fairly state such a cause of action, and we think that the District Court erred in ruling that the judgment in the former case operated as conclusively settling the matter.

The principle which controls is the familiar one, elaborately discussed in Cromwell v. Sac County, 94 U. S. 351, 24 L. Ed. 195, that, where the second action between the same parties is upon a different demand, the judgment in the former suit operates as an estoppel only as to those matters which were in issue, or those controverted

points upon the decision of which the finding was rendered. The Supreme Court also said:

"In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

See McNamara v. Home Land & Cattle Co., 121 Fed. 797, 58 C. C. A. 245; Miller v. Margerie, 170 Fed. 710, 96 C. C. A. 30.

The decree is reversed, and the cause is remanded, with directions to proceed in accordance with the views herein expressed.

Reversed.

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## THE MALCOLM BAXTER, JR.

(District Court, S. D. New York. October 15, 1918.)

No. 62-260.

1. SHIPPING ⟸51—CHARTER—DEFAULT OF VESSEL.
Where the owner of a chartered vessel is willing to perform the charter, nothing short of certainty that he cannot perform can impose upon him a default on the ground of impossibility.

2. SHIPPING ⟸39—CHARTER—CONSTRUCTION OF CHARTER PARTY.
Provision of a charter party for a vessel to carry a cargo to Holland in war time that it should be consigned to the Netherlands Overseas Trust, without whose permit the vessel could not pass the British patrols, *held* in effect one requiring charterer to obtain such permit.

In Admiralty. Suit against the schooner Malcolm Baxter, Jr., for breach of charter. Decree for respondent.

This is a suit in rem in the admiralty against the schooner Malcolm Baxter, Jr., to recover freight prepaid under the terms of a charter party entered into between the parties on January 23, 1917. The claimant was the owner of the schooner, and the libelant the owner of a cargo of corn oil meal which they wished to ship to Holland. The charter party provided that the schooner should carry the cargo to Rotterdam and that the libelant should pay $38 a ton; "full freight to be prepaid in New York when vessel loaded, without discount, and earned retained and irrevocable vessel and/or cargo lost or not lost." Later it provided: "Cargo to be consigned to the Netherlands Overseas Trust of the Netherlands government. Any detention of the vessel by Great Britain or her allies to count as lay days against charterers, if detained longer than forty-eight hours." It contained no exceptions in favor of the ship.

A permit had been issued by the Netherlands Overseas Trust on November 14, 1916, to a Dutch firm, "The Widow Cleyndert," the real consignee, under which, however, the cargo was to be shipped "by one of the shipping companies affiliated by the Netherlands Overseas Trust," and which did not, therefore, cover the Baxter. On January 26, 1917, recognizing the insufficiency of this permit, the Widow Cleyndert applied to the Netherlands Overseas Trust for another to allow the cargo to be shipped on the Baxter, upon which no action was definitely taken until April 4th, when the Trust withdrew its original permit unless the cargo went forward by steamer. The British government had meanwhile decided to pass no sailing vessels with contraband, which the cargo was. Between January 26th and shortly before April

4th, this question had been in some doubt, and it does not certainly appear whether or not any sailing vessels had passed the blockade.

Meanwhile the loading was completed early in February, and the libelant made independent efforts to secure the necessary permit through the Widow Cleyndert, but, as has appeared, without success. As the lay days had long since expired, and as there appeared to be no prospect of the schooner's getting through the blockade, on March 29th, the libelant denounced the charter party and discharged the schooner early in April, under an agreement between the parties not necessary to detail.

The second article of the libel contained the following allegations explanatory of the practice which obtained in the forwarding of Dutch cargoes and in view of which the charter party was drawn:

"That the allies, having enforced by this means an effectual supervision over all merchandise entering Holland by sea, entered into an agreement with the Netherlands government by which all merchandise whatever should be consigned to the Netherlands Overseas Trust Company, hereinafter called the Trust. The Trust, as libelant is informed and believes, is a corporation in the nature of a Chamber of Commerce for the kingdom of the Netherlands, acting under the control of the Dutch government, to which all goods destined for Holland by sea are required to be consigned; the real interest in the merchandise being retained by the merchants dealing therein. Before the goods can be consigned to the Trust, the permission of the Trust has, by agreement between the Trust and the British government, first to be obtained, and the permission so obtained constitutes a permit recognized by the Allied patrol vessels and men of war, and requires the captains of the Allied patrol vessels and men of war to permit the cargo to proceed to the Dutch port to which they are consigned; that in the absence of such permission the British government treats such cargoes as contraband, and seizes and confiscates the same, and refuses to permit the vessel to proceed to her Dutch destination."

The libelant's position rests upon the theory that the schooner was in default, in that it had appeared that the voyage was impossible, and that it was idle to require of the claimant performance which would not only have been frustrated, but would have involved the parties in heavy loss.

A. Leo Everett, of New York City, for libelant.
Clarence Bishop Smith, of New York City, for claimant.

LEARNED HAND, District Judge (after stating the facts as above). [1] There is no absolute certainty that the claimant would have failed in performance. That he was willing to try must be assumed, and if he is to be treated as in default it can only be upon the hypothesis that the Baxter could by no possibility have escaped the blockade. That her chances were very slight is true enough, but the conclusion in some part must rest in supposition, for perhaps some schooners did slip through, and she might have been one. When, as here, the obligor remains willing, nothing short of certainty can impose upon him a default on the score of impossibility. Hence the case really fails at the outset.

[2] Passing this point, and assuming that the case is to be judged as though the Baxter had been restrained in her voyage by princes or peoples, the case is still with the claimant. I shall assume, without deciding, that the absence of any exception put the owners in default, though the voyage were frustrated by the restraint of princes; still, viewing the charter party as a whole, it seems to me clear that in accepting any such risk the owners provided for their safety by the clause written into the charter party that the cargo should be consigned to the Netherlands Overseas Trust. This the libelant answers

by saying that the words mean no more than that the bill of lading should be in favor of the Trust, just as in an ordinary consignment. The libel itself contains allegations which refute that interpretation. The situation was this: No cargoes could go forward to Holland without the consent of the Trust, which was the only agency trusted by Great Britain to distribute supplies to the Dutch. The Trust was not the true consignee in the usual sense at all; all it did was to insure to Great Britain's satisfaction that the cargoes should not leave Holland. As a part of the system the preliminary consent of the Trust was necessary. With such a consent the ship could pass the British cordon; without it, it would be stopped, if detected.

There was, therefore, no conceivable reason for a clause, certainly intended to expedite the ship, which went no further than to provide for a consignment to the Netherlands Overseas Trust in the usual sense. Such a provision would not have helped the ship; rather it would have excited suspicion, and promoted delays and eventual discharge in a British port, if, upon being overhauled by a cruiser, the bill of lading had shown the consignment of a cargo to whose entry the Trust had not consented. It is clear, therefore, that the provision must be read in the light of the surrounding facts, all set forth in the second article of the libel, showing that the permit of the Trust was considered as a condition to a consignment of the cargo.

An analysis of the succeeding clause, also written into the charter party, makes this conclusion stronger. It is provided that for any detention over 48 hours by Great Britain or her allies the charterer shall pay demurrage. Now, if it were intended that the cargo might be consigned to the Netherlands Overseas Trust without its consent, this imposed upon the charterer a prohibitive risk. Such a consignment would not have protected the ship, but, on the other hand, would have stopped the voyage altogether. It was hardly intended that the charterer must go on indefinitely paying demurrage, yet it is hard to see how demurrage could stop, at least before the ship was discharged. What was intended was that she should be protected by a consignment fortified by a permit, which would shorten detention and insure the completion of the voyage. It is therefore unreasonable to suppose that, with such a provision in the charter party for demurrage, either party meant to attempt a venture, dependent upon the ability of a sailing vessel to escape the British cordon, and to impose upon the charterer a vague and extremely onerous liability, if she did not.

Hence from every view it seems to me clear that the consignment presupposed a preliminary permit, and this the libelant never procured. Performance of that covenant was a condition precedent to performance by the owners, who were not obliged to carry any cargo other than that described. Thus they are not in default, and the rule in The Gracie D. Chambers, 253 Fed. 182, — C. C. A. — applies. Indeed, since the default was the cause of the frustration of the voyage, it is not necessary to invoke the rule in that case, for, if the charterer defaults in his covenants, he is in no event in a position to recover.

The libelant's argument does not impress me, based upon the improbability of such a contract. I see no reason to suppose that it

anticipated any difficulty in getting the permit. The "Widow Cleyndert" had already got the permit of November 14, 1916, and it must have seemed an easy thing to secure the slight change necessary. Unhappily the general situation had also changed, and performance had become impossible. That, under the hard rule which the charterer itself invokes, would not excuse performance. Even if it would, the case would then stand with each party excused by impossibility of performance, in which event the rule in The Gracie D. Chambers would again apply.

From the best possible aspect, therefore, that case controls, and the libel must be dismissed, with costs.

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## THE ADRIATIC.

(District Court, E. D. Pennsylvania. October 9, 1918.)

No. 46.

SHIPPING ⊂=51—VIOLATION OF CHARTER—"CONTROL OF PRINCES."

Under the clause in a charter party excepting "control of princes," a foreign ship is released from the charter by the actual exercise of such control through requisition by her home government, and a court of this country cannot question the legality of its exercise.

In Admiralty. Suits by H. Baars & Co., a corporation, against the British steamship Adriatic and against W. H. Cockerline & Co., owners of the Adriatic. Sur trial hearing on libel, answer, and proofs. Decree for respondent.

The ship was chartered to libelant; the charter party containing the following provisions:

"20. The act of God, * * * arrests and restraints of princes, rulers, and people, * * * excepted."

"28. If vessel be requisitioned by the British admiralty, this charter is to be null and void."

The suit was for breach of such charter. On hearing of the case the British embassy appeared by counsel, who, as amici curiæ, filed the following suggestions:

(1) That the British steamship Adriatic was duly requisitioned by the British admiralty, which is an integral part of the government of the United Kingdom of Great Britain and Ireland, by a notice dated the 8th day of November, 1915, served on her owners, W. H. Cockerline & Co., at Hull, England, on or about that date. Pursuant to such requisition the British consul general at Philadelphia, Pa., by order of the admiralty, gave instructions to the master of the Adriatic, on November 23, 1915, as to the subsequent movements of the vessel. The period of the requisition was indefinite, and after it became operative as aforesaid the steamship Adriatic was continuously in the service of the British government until her loss at sea on or about October 31, 1916, and during that period she was operated solely under the orders and directions of the British admiralty.

(2) That the steamship Adriatic was of British registry, and belonged to subjects of Great Britain, and the requisition of said steamship was a governmental action, by the government of Great Britain, and should not be inquired into by this court.

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(3) That by reason of the said requisition the steamship Adriatic was, at the time of the service of the process of this court in these causes, a vessel in the service of the British admiralty and under its direction and control, and as such was not subject to arrest or detention by process of this court.

(4) That this court should decline to adjudicate these cases, on the ground that they involve the relations between the British government and the owners of a British steamship, and call for a determination by this court of the effect of governmental acts of the British government, and are, in effect, an attempt on the part of the libelants to hold the respondent liable for such acts.

(5) That this court should decline to adjudicate upon any rights or claims of the libelants as charterers of a British steamship against the said steamship or her owner, in so far as such rights or claims arise out of the requisition of the said steamship by the British government.

John C. Avery, of Pensacola, Fla., and Willard M. Harris, of Philadelphia, Pa., for libelant.

Kirlin, Woolsey & Hickox, of New York City, and Biddle, Paul & Jayne, of Philadelphia, Pa. (John M. Woolsey, of New York City, and Howard H. Yocum, of Philadelphia, Pa., of counsel), for respondent.

Frederic R. Coudert and Howard Thayer Kingsbury, both of New York City, amici curiæ.

DICKINSON, District Judge. This cause, as argued, presents many interesting features and advances many questions for discussion. We see no need, however, to discuss the case in other than its main features. As thus viewed the case is this:

The respondent, as is frankly admitted, entered into a charter party, the contractual obligation of which was that the ship should render service to the libelant. The contract, however, contained the usual provision in the event of the interference expressed in the phrase "control of princes." The assertion of this control forbade performance and is given to excuse the default. The ship was requisitioned by the sovereign to whom her master and owners owed allegiance. The fact is not in dispute that there was the practical assertion of such authority over the movements of the vessel. A question is sought to be raised of the legality of the authority exercised in the respect of whether it extended to vessels outside the "home waters" of the sovereign. This question is set at rest by two considerations. One is that foreign law is a fact to be established by evidence, and that the authority asserted existed under the foreign law has been established, not only by the weight of the evidence, but by the only evidence in the cause. The other is that—

"No court [of one jurisdiction] will undertake to determine whether the conduct of duly appointed officers of [a foreign power] is within the scope of their delegated authority viewed as a question of the foreign municipal law. Either the conduct of the officials is authorized, in which case it has the only warrant of law possible, or it is unauthorized, in which case it rests upon the foreign power first to repudiate it, and so to open the question of the effect of acts thereupon conceded to have been without warrant of law." The Florence H. (D. C.) 248 Fed. 1017.

In the instant case the authority prompting the act of respondent is not only not repudiated, but the act is avowed to be in pursuance of the command of the sovereign, and the respondent supported in what was done, and full responsibility for the act is assumed by the sover-

eign. The embassy, representing the sovereign, appears by counsel to present this state of the facts to the court.

The rule followed in like cases prevails in this, that the court should decline to adjudicate any claim of right advanced by the libelant which grows out of the requisitioning of the respondent vessel by the government to which its master and owners owe the duty of obedience.

A formal decree to carry this ruling into effect may be submitted.

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CHICAGO, M. & ST. P. RY. CO. v. DRAINAGE DIST. NO. 8 OF SHELBY COUNTY, IOWA, et al.

(District Court, S. D. Iowa, W. D. August 31, 1916. Supplemental Opinion, March 6, 1917.)

No. 4013.

1. CONSTITUTIONAL LAW ⊂=284(2)—"DUE PROCESS OF LAW"—TAXATION.
Taxation, general or special, is a legislative function, and it is not necessary to "due process of law" that the matter of assessment and levy shall ever come before a court, but it is sufficient that at some stage in the proceedings the parties affected shall have an opportunity to be heard.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

2. REMOVAL OF CAUSES ⊂=23—SUPPLEMENTAL OPINION—RIGHT OF REMOVAL—"SUIT"—TRANSPOSITION OF PARTIES.
Under a state statute establishing drainage districts, authorizing them to construct drains and assess the cost on property benefited, and giving the property owner a right of appeal from the assessment to the district court, such an appeal is a "suit," in which the appellant is defendant, within the meaning of the Removal Act (Comp. St. 1916, § 1010).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Suit.]

3. REMOVAL OF CAUSES ⊂=3—RIGHT OF REMOVAL—DESIGNATION OF PARTIES IN STATE COURT.
A state statute cannot deprive a party of the right of removal by designating him as plaintiff in a particular class of suits where he is essentially defendant.

In Equity. Suit by the Chicago, Milwaukee & St. Paul Railway Company against Drainage District No. 8 of Shelby County, Iowa, the Board of Supervisors of Shelby County, and Hans Broderson, George E. Miller, and N. H. Johnson, members of said Board, acting as and for Drainage District No. 8. On motion to remand to state court. Denied.

J. N. Hughes, of Cedar Rapids, Iowa, for plaintiff.

Cullison & Cullison and E. S. White, all of Harlan, Iowa, for defendants.

WADE, District Judge. This case was transferred to this court from the district court of Iowa in and for Shelby county, upon petition of the plaintiff. It has been submitted upon motion to remand. I

can repeat with emphasis the language of Judge Van Valkenburgh in Drainage District No. 19 v. C., M. & St. Paul Ry. Co. (D. C.) 198 Fed. 253, in which he says:

"As stated at the outset, this question is attended by difficulties. It is a perplexing one, and we must concede that it is not entirely free from doubt, feeling, as we must, that it is highly desirable that matters of this nature should, so far as possible, be dealt with in the courts of the state especially designated and more conveniently adapted to handle such proceedings."

Many cases involving questions related to the questions at issue in this case have been decided by the federal courts and the Supreme Court of the United States, and yet the very question involved in this case has never been before any court so far as I have ascertained.

The question before Judge Van Valkenburgh in the Drainage District Case, supra, comes nearer to this case than any other I have found, and yet there is a marked distinction, which distinction I feel is decisive in this case. In the Drainage District Case, it is said:

"In its petition for removal the defendant alleges that benefits amounting to $617.50 have been illegally, wrongfully, and improperly assessed against it, and that the drainage district proposes to construct a ditch along and across the right of way and roadbed of petitioner, to its damage in the sum of $17,490."

In his opinion in this case Judge Van Valkenburgh quotes from In re Jarnecke Ditch (C. C.) 69 Fed. 161, as follows:

"Whether a removal could be had, if the sole issue presented by the remonstrants was the amount of the assessments, it is not necessary to determine."

In the case at bar the only question involved is the assessment for alleged benefits. Neither before the board of supervisors, nor in this court, is there any question raised as to the jurisdiction of the board, or the regularity of the proceedings up to the time of the appraisement and assessment. In this proceeding there can be no question tried or determined as to the establishment of the drainage district, or the necessity therefor; it is simply and solely a question of the amount of taxes for special benefits which the plaintiff is required by the assessing body to contribute to the public improvement, and it is a question as to what tribunal shall determine such amount under the peculiar provisions of the statutes of the state of Iowa. Did this question involve any question of damages to the property, or any question of eminent domain, I would have no hesitation in holding that this court had jurisdiction.

Another case which considers the questions involved, is County of Upshur v. Rich, 135 U. S. 467, 10 Sup. Ct. 651, 34 L. Ed. 196, where the defendants complained of taxes levied upon their land, and filed a petition with the county court, asking that the same be reduced, and thereupon filed a petition to remove the case to the United States court, which was sustained by the Circuit Court, which ruling was reversed by the Supreme Court of the United States. It is true that the Supreme Court says in that case:

"Even an appeal from an assessment, if referred to a court and jury, or merely to a court, to be proceeded in according to judicial methods, may become a suit, within the act of Congress."

And yet I am not convinced that this proceeding comes within this language of the court. Kansas City v. Hennegan (C. C.) 152 Fed. 249, referred to by counsel, involved the question of condemnation of property for public purposes, and not the question of taxation.

[1] Taxation, whether general or special, is a legislative function, and the power of the county in this case to levy taxes upon the plaintiff's property was derived from the Legislature. It is well settled that the Legislature may prescribe the mode by which taxes shall be levied and the amount determined. It may fix the tribunal, or designate the body of men who shall act in making appraisement and assessment. It is not necessary to "due process of law" that the matter shall ever come before a court. All that is necessary is that at some stage in the proceedings the parties affected shall have an opportunity to be heard. In the recent case of St. Louis & Kansas City Land Co. et al. v. Kansas City, 241 U. S. 419, 36 Sup. Ct. 647, 60 L. Ed. 1072, the Supreme Court of the United States says:

"Where assessments are made by a political subdivision, a taxing board, or court, according to special benefits, the property owner is entitled to be heard as to the amount of his assessment and upon all questions properly entering into that determination. 'If the Legislature,' as has frequently been stated, 'provides for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.' Spencer v. Merchant, 125 U. S. 345, 355, 356 [8 Sup. Ct. 921, 31 L. Ed. 763]; Paulson v. Portland, 149 U. S. 30, 41 [13 Sup. Ct. 750, 37 L. Ed. 637]; Bauman v. Ross, 167 U. S. 548, 590 [17 Sup. Ct. 966, 42 L. Ed. 270]; Goodrich v. Detroit [184 U. S. 432, 22 Sup. Ct. 397, 46 L. Ed. 627], supra. What is meant by his 'proportion of the tax' is the amount which he should be required to pay, or with which his land should be charged. As was said in Fallbrook Irrigation District v. Bradley, 164 U. S. 175 [17 Sup. Ct. 56, 41 L. Ed. 369], when it is found that the land of an owner has been duly included within a benefit district, 'the right which he thereafter has is to a hearing upon the question of what is termed the apportionment of the tax; i. e., the amount of the tax which he is to pay.' See, also, French v. Barber Asphalt Paving Co., 181 U. S. 324, 341 [21 Sup. Ct. 625, 45 L. Ed. 879]. It is a very different thing to say that an owner may demand as a constitutional privilege, not simply an inquiry as to the amount of the assessment with which his own property should rightly be charged in the light of all relevant facts, but that he should not be assessed at all, unless the assessments of other owners, who have paid without question and are not complaining, shall be reopened and redetermined. The Fourteenth Amendment affords no basis for a demand of that sort."

In Hagar v. Reclamation Dist., 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, it is said:

"Undoubtedly, where life and liberty are involved, due process requires that there be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard; so, also, where title or possession of property is involved. But, where the taking of property is in the enforcement of a tax, the proceeding is necessarily less formal, and whether notice to him is at all necessary may depend upon the character of the tax, and the manner in which its amount is determinable. The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments. As stated by Mr. Justice Bradley, in his concurring opinion in Davidson v. New Orleans [96 U. S. 97, 24 L. Ed. 616]: 'In judging what is "due process of law," respect must be had to the cause and object of the taking, whether under the taxing

power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be "due process of law," but if found to be arbitrary, oppressive, and unjust, it may be declared to be not "due process of law."'"

The court also says:

"But where a tax is levied on property, not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers, in estimating the value, act judicially; and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law. In some states, instead of a board of revision or equalization, the assessment may be revised by proceedings in the courts and be there corrected, if erroneous, or set aside, if invalid, or objections to the validity or amount of the assessment may be taken when the attempt is made to enforce it. In such cases all the opportunity is given to the taxpayer to be heard respecting the assessment, which can be deemed essential to render the proceedings due process of law."

In Kelly v. Pittsburgh, 104 U. S. 78, 26 L. Ed. 658, it is said:

"Taxes have not, as a general rule, in this country since its independence, nor in England before that time, been collected by regular judicial proceedings in a court of justice. The necessities of government, the nature of the duty to be performed, and the customary usages of the people have established a different procedure, which, in regard to that matter, is and always has been due process of law."

Now, with these established legal principles before it, the Legislature of Iowa devised a plan for establishing drainage districts, and collecting taxes to pay for their construction. It provided for the establishment of the district, as a separate proceeding, to be first completed; then it provided for the appraisement and the assessment; then it provided for a hearing by any one dissatisfied with the assessment. It could have provided for this hearing before the board of supervisors, and, with proper notice and opportunity for hearing, it could have been made final, and would be due process of law; but the Legislature selected another tribunal, the district court of the state of Iowa, and it conferred certain powers upon the district court which it did not previously possess. It made of the district court an assessing tribunal, to the extent, at least, that the court would have to hear testimony and consider the benefits to all the land in the district, in order to determine whether or not one tract of land was assessed more than its share of the benefits.

This is a proceeding unknown to either the common law or to the courts of chancery. The Legislature directed that it should be tried by the court as "an action in equity"; but the Legislature of Iowa has no power to prescribe forms of action for the courts of the United States. In the recent case of McLaughlin v. St. Louis Southwestern Railway Co., 232 Fed. 579, 146 C. C. A. 537, it is said:

"Counsel then argue that the provision of the Constitution and laws of Arkansas, above cited, can be invoked for the purpose of conferring jurisdic-

tion in equity upon the United States District Court, sitting in Arkansas, to entertain the present action. The result of such a contention, if it may be maintained, is to hold that the people of Arkansas, in framing a Constitution, and the General Assembly thereof, in the enactment of laws, may enlarge or limit the jurisdiction of the federal court sitting in equity."

It is further said:

"The Code of Iowa enacts that 'an action to determine and quiet the title to real property may be brought by any one having or claiming an interest therein, whether in or out of possession of the same, against any person claiming title thereto, though not in possession,' * * * implying that the action may be brought against one in possession of the property. And such has been the construction of the provision by the courts of that state. Lewis v. Soule, 52 Iowa, 11 [2 N. W. 400]; Lees v. Wetmore, 58 Iowa, 170 [12 N. W. 238]. If that be its meaning, an action like the present can be maintained in the courts of that state, where equitable and legal remedies are enforced by the same system of procedure and by the same tribunals. It thus enlarges the powers of a court of equity, as exercised in the state courts; but the law of that state cannot control the proceedings in the federal courts, so as to do away with the force of the law of Congress declaring that 'suits in equity shall not be sustained in either of the courts of the United States, in any case where a plain, adequate and complete remedy may be had at law,' or the constitutional right of parties in actions at law to a trial by a jury. The state, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States, and such we understand to be the effect of the decision in Clark v. Smith, 13 Pet. 195 [10 L. Ed. 123], and In re Broderick's Will, 21 Wall. 503 [22 L. Ed. 599]."

The court further states:

"We have thus far assumed that the Constitution and laws of Arkansas, as above cited, conferred jurisdiction upon the state courts of Arkansas to enjoin the collection of taxes in cases like the one at bar; that is, where the gist of the action is an assault upon an erroneous assessment of property for taxation. We refuse to assent to the proposition that, if they do, they can be made available for the purpose of conferring jurisdiction upon the United States District Court for Arkansas in a case like the present one."

The language above quoted, "The state, it is true, may create new rights and prescribe the remedies for enforcing them, and, if those remedies are substantially consistent with the ordinary modes of proceeding in equity, there is no reason why they should not be enforced in the courts of the United States," is significant; but the remedy provided for by this appeal is not "substantially consistent with the ordinary modes of proceeding in equity." It is a proceeding never heard of in a court of equity, and in which a court of equity would have no jurisdiction, except as conferred by the statutes of the state of Iowa. It seems to be clear that the Legislature simply designated the district court as a medium of final determination of the amount of taxes to be assessed, and that as to any property located in the state the procedure fixed by the statute must be followed.

It is needless to review the numerous cases defining what constitutes a "suit," within the meaning of the Removal Act (Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [Comp. Stat. 1916, § 1010]). Some of the definitions would clearly include this proceeding, but they must be considered with reference to the particular controversy before the

court. It must be conceded, I think, that, if this proceeding is subject to removal, every proceeding involving the taxation of property, either general or special, is also removable. I see no difference, in the principles involved, between the drainage legislation and the legislation permitting special assessments for sewers and paving, and I cannot bring myself to believe that this court has jurisdiction of all these proceedings. The Supreme Court of the United States in the Hagar Case, quoted above, says:

"The necessity of revenue for the support of the government does not admit of the delay attendant upon proceedings in a court of justice, and they are not required for the enforcement of taxes or assessments."

And I feel that, where the Legislature has provided that property owners may have a right to appeal to the district court of the state, public policy requires that the trial should be had in the local tribunal, convenient to the field of inquiry.

Much is said in some of the cases about the necessity of a broad construction of the statute, to enable nonresidents to avoid the effect of local prejudice; but I cannot assume that there is any more danger of local prejudice in taxation of this kind than there is in the assessment of general taxes for state, county, and city purposes, to which nonresidents must assent, without opportunity for hearing in the courts of the United States.

While I am not without doubt in this ruling, the doubt is not sufficiently strong to justify me in retaining jurisdiction of this case, and the motion to remand will be sustained.

## Supplemental Opinion.

Since filing the original opinion herein, I have had before me, and have decided, the case of In the Matter of the Appeal of the Assessment of the Mississippi River Power Company, 241 Fed. 194, in the Eastern division of this district. This case involved all the questions involved in the case at bar, except the single question as to whether the Chicago, Milwaukee & St. Paul Railway Company, being designated by the Iowa statute as the "plaintiff," can for the purpose of this motion to remand be considered a "defendant." It is true that the statutes involved in the two cases differ, but in essentials, in the controversies before the court, they are the same, and my opinion in the foregoing case, in conflict with my opinion previously filed in this case, is conclusive herein.

[2] Now, upon further consideration and deeper study of the remaining question, as to whether the railway company can be considered as defendant in this proceeding within the meaning of the Removal Act, I am convinced that it can and must be so considered. This conclusion has been forced upon me, not by any specific words of the statutes involved, but rather by the reason and spirit of the law as construed by the highest courts. The Removal Act is founded in a purpose and is based upon the recognition of a right. The spirit of all our legislation providing for trials in court is that the parties shall be entitled to a trial in their own community, or as nearly in their own community as is practicable. Human experience, and a knowl-

edge of human nature, compels us to give recognition to the fact that, under certain circumstances and conditions, there are cases—sometimes, on account of the parties; at other times, on account of the questions involved—in which a resident party, with a case tried in his own community, has some advantage over the nonresident or the party who is a stranger in the community.

This statement in no manner reflects upon courts or juries; it simply gives recognition to the fact that tribunals, whether courts or juries, are merely human, and that sometimes—rarely, it is true, but sometimes—human judgment and will are unconsciously influenced. But I think a stronger reason for granting the right of removal exists in the supreme importance of not only giving a man a fair trial in a tribunal unbiased and unaffected by local interest, prejudice, or parties, but in having every man feel that he has had a fair trial before a tribunal unbiased and unaffected by anything except the merits of the case. Therefore it was that Congress, in its effort to provide fair and just tribunals, and in its effort to maintain confidence in such tribunals, and in the results of trials, provided that, in cases involving substantial amounts, a citizen of one state should, when his rights were brought before the court in another state, have the privilege of transferring the subject-matter of litigation into the courts of the United States for trial.

The law covers all "suits," and this is a "suit," as heretofore determined by me in the case above referred to. In the opinion in that case I have held that the Legislature of Iowa, in its generous treatment of persons whose property may be assessed for any purpose, provided that such person should, before the question as to whether his property was assessable at all, and, if so, for what amount, have the right to a trial in a judicial tribunal, which trial is a "suit."

[3] In the authorities quoted it will be found that the Supreme Court of the United States has specifically held that, once this right is given, the Legislature cannot by any process or procedure, or by any designation of parties or proceedings, affect the "right" conferred by Congress (not by the Legislature) to have the cause removed to the proper court for trial. The Legislature had the power to confer the "right" to a trial, and, having conferred that right, it had no power to limit any citizen upon whom the right was conferred to any specific tribunal to try out the issues. It could not do it directly; it could not do it indirectly. It could not bar the right of removal by saying that the railway company in this case should be called the plaintiff, nor could it confer the right to removal by saying that it should be designated as "defendant."

Now, stripped of forms and methods of procedure, the railway company in this case is the owner of property subject to taxation. The question as to whether it is subject to taxation is, under the issues in this case, as I understand them, settled; but the question as to the amount of taxes the property should bear, is in issue—a question of law and fact. It does not make any difference where the burden of proof is; the thing that is transpiring in the court where the trial is held is an inquiry into the amount the railway company

must pay to the other party to the suit, or through the other party to the suit, for certain purposes; and ultimately, whichever form it may assume, the result of the judgment in this case is to fix a liability which the railway company must pay.

In Hudson River Railway v. Day (D. C.) 54 Fed. 545, the court says: "He may be plaintiff in appeal, but he is defendant in the cause." And the court points out that at the beginning the railroad company "was the actor," just as in this case the county in the beginning "was the actor." It is further pointed out that it (the railway company, there; the county here) "originated the initiatory steps which led to the award which is now on appeal from the judgment of a lower tribunal. It invoked the execution of the law, as against the landowner, and it was, and is, in fact the plaintiff."

In Mason City & Ft. Dodge Railway v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 633, the Supreme Court of the United States says:

"And it is obvious that the word 'defendant,' as there used, is directed toward more important matters than the burden of proof or the right to open and close. It is quite conceivable that a state enactment might reverse the names which, for the purpose of removal, this court might think the proper ones to be applied. In condemnation proceedings the words 'plaintiff' and 'defendant' can be used only in an uncommon and liberal sense. The plaintiff complains of nothing. The defendant denies no past or threatened wrong. Both parties are actors; one to acquire title, and the other to get as large pay as he can."

Here both parties are "actors"—the one party exercising its power and duty to make a public improvement, and to compel the other party to pay its share of the cost of such public improvement; the other party insisting that it shall pay only a portion charged against it.

I have looked carefully, and find that the courts have given little consideration to the question here involved. But it is my judgment that, when Congress limited the right of removal to the "defendant," it based such limitation upon the theory that a party, resident or nonresident, who voluntarily appeared in a state court when he had a choice of jurisdictions, should not be permitted to ask for a transfer of his case out of that court, and if the railway company in this case, being a nonresident, could have gone directly into the United States court, as it could in any ordinary action against a resident of Iowa, then, of course, it would be estopped from asking removal herein, because it had voluntarily chosen its forum; but the right conferred by the Legislature gave it no such power. It proceeded in the only way authorized by the Legislature. There was no "suit" possible until it had perfected its appeal, but instantly the appeal was perfected, there was a "suit," and in the spirit of the law, I believe that it ought to have, and I believe that it has, the right to remove the case for trial.

If the Legislature of Iowa had enacted that, after the determination by the board of supervisors of the amount of the tax, any property owner would have the right, by proceeding in a court of competent jurisdiction, to have the proceedings reviewed in an action in equity, the railway company certainly could have brought its proceeding in this court. The Legislature in effect did grant the property

owners this very thing—a trial de novo in an equity proceeding in a court of competent jurisdiction. It could not, by designating the procedure for getting into court an "appeal," destroy the right which Congress gave to the plaintiff, a nonresident of the state, to have its case tried in the United States court. In any event, under the authorities cited in my opinion in the Keokuk Case (D. C.) 241 Fed. 194, if there is any doubt, the motion to remand should be denied, because the other party has the right of appeal, and the railway company has not; and I am a firm believer in putting a case, if possible, in shape where the parties may have the final judgment of the higher courts.

Now, this overrules my previous opinion in this case. Order will be entered accordingly.

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## COLUMBUS RY., POWER & LIGHT CO. v. CITY OF COLUMBUS, OHIO, et al.

(District Court, S. D. Ohio, E. D. September 20, 1918.)

No. 104.

1. MUNICIPAL CORPORATIONS ⟸680, 681(7)—STATUTORY POWERS—CONTRACTS WITH STREET RAILROADS.
Gen. Code Ohio, §§ 3768–3777, 9101–9139, as construed by both state and federal courts, confer on municipal corporations full power to enter into contracts for the maintenance and operation of street railway lines.

2. CARRIERS ⟸12(9)—CHARGES—FRANCHISE—REGULATION.
A municipal ordinance, passed under statutory authority, granting a franchise for a stated term to a street railroad company, and fixing a rate of fare to endure during that term, when accepted by the company, creates a contract mutually binding and unalterable during the term, except by consent of both parties.

3. CARRIERS ⟸1—POWER TO REGULATE—REGULATION—STREET RAILWAY FARES—CONTRACTS RESPECTING RATES.
The Legislature of a state may, unless restrained by the state Constitution, contract away its power to regulate the rates of fare of a street railroad company, either by an enactment of its own, or by delegating to the municipality the power to do so.

4. CONSTITUTIONAL LAW ⟸278(7)—CONTRACTS—STREET RAILWAY FRANCHISE.
The courts cannot relieve a street railroad company from performance of a valid franchise contract by which it agreed to operate its road at a fixed rate of fare, on the ground that because of changed conditions such operation would be at a loss, and the company would be deprived of its property without due process of law.

5. COURTS ⟸280—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
When no real or colorable, but only a fraudulent and fictitious, federal question is stated, the jurisdiction of a federal court does not attach for any purpose, and it is duty of court of its motion to refrain from exercising jurisdiction.

6. COURTS ⟸282(1)—JURISDICTION OF FEDERAL COURTS—FEDERAL QUESTION.
Even when a threatened act may be an impairment of a contract or a deprivation of property without due process of law, still, if the only means threatened to be used are resort to the courts or legal proceedings, a case is not stated within the jurisdiction of a federal court as involving a constitutional question.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Equity. Suit by the Columbus Railway, Power & Light Company against the City of Columbus, Ohio, George J. Karb, Mayor, and others. On motion by complainant for preliminary injunction, and by defendants to dismiss. Injunction denied, and bill dismissed.

Henderson & Burr, of Columbus, Ohio, for plaintiff.
Henry L. Scarlett, City Atty., of Columbus, Ohio, for defendants.

WESTENHAVER, District Judge. This cause has been heard and submitted on complainant's application for a preliminary injunction, based on its verified bill and affidavits, and on defendants' motion to dismiss for want of jurisdiction, and because a valid cause of action in equity is not stated. These respective motions have been elaborately argued, both orally and by briefs. Due consideration has been given to the many authorities cited and the several contentions made, but this opinion will deal only with such as seem to me vital and controlling.

The complainant is a corporation organized under the laws of the state of Ohio. The defendant, the city of Columbus, is a municipal corporation of the state of Ohio, and the other defendants are its mayor, members of its council, and other city officials. Complainant owns and operates a system of street railways within the city of Columbus, and is engaged in manufacturing and selling heat, light, and power to the inhabitants of the city and to industrial plants therein and adjacent thereto.

Complainant's street railway lines have been constructed, maintained, and operated by virtue of certain grants or franchises. These are embodied in two ordinances duly enacted by the proper authority of the city of Columbus. The principal franchise, called the "blanket franchise," is Ordinance No. 17801, passed February 4, 1901; and the other, called the "Central Market franchise," is Ordinance No. 17802, passed January 21, 1901. In addition, complainant claims to own a perpetual franchise on certain streets; but the provisions thereof are not material to any question now to be decided. Both franchises are for terms of 25 years and will not expire, by their terms, earlier than the year 1926. They require the grantee to carry passengers for a single cash fare of 5 cents and to sell tickets in packages of 8 for 25 cents, and to give universal free transfers upon the payment of a 5-cent fare or the presentation of one of these tickets.

Complainant's bill alleges, and the supporting affidavits clearly show, that the cost of operating these street railway lines has greatly increased during the present war, owing to the rise in price of coal, materials, supplies, and labor. As a result of this increased cost, the net earnings from the operation of the street railway line for the year ending June 30, 1918, after deducting taxes, operating expenses, and a proper charge for depreciation, were only $301,987. These earnings are insufficient by the sum of $31,000 to pay interest on outstanding bonds, and are sufficient to allow a net return of only 4½ per cent. on the actual value of the capital invested in the street railway system. The value of this property, it is alleged, is $12,000,000, and the par value of the bonds issued and outstanding is $7,225,000.

In June, 1918, complainant's street railway employés demanded an increase in wages, and, in order to avoid a strike, the controversy between the complainant and its employés was submitted to the National War Labor Board for decision. This board, on July 31, 1918, made an award granting to the employés an average increase of 50 per cent. in the rate of wages hitherto being paid. Complainant abided by this decision and granted the increase thus awarded. The amount of this increase, it is estimated, will be for the ensuing year $560,000, and as a result thereof it is estimated that the gross earnings will fall short of paying operating expenses, taxes, and a proper allowance for depreciation by approximately $250,000. This leaves no net income, either to pay interest on outstanding bonds or dividends on capital actually invested.

Complainant alleges that these facts were twice brought to the attention of the city council of defendant, and request made for permission to increase the rate of fare above that fixed by these franchise grants, so as to permit the earning of a reasonable return on the invested capital. This request being either denied or ignored, complainant on August 20, 1918, filed with defendants a communication in writing, stating that it would henceforth discontinue the selling of 8 tickets for 25 cents and the giving of universal transfers, and that it surrendered, relinquished, and canceled its two franchises; that it would no longer operate cars thereunder; that it would thereafter consider itself a tenant by sufferance only on the streets, and would withdraw therefrom whenever notified so to do by the city, but that until so notified, and in order not to deprive the traveling public of service, it would continue to operate its lines, not under these franchises, or either of them, but at a rate of fare to be fixed by itself. It thereupon fixed the rate at 5 cents for cash fare and made a charge of 1 cent for each transfer to be issued, discontinuing the sale of 8 tickets for a quarter and free transfers. This rate thus established has been in force since August 20, 1918.

On the same day as this communication in writing was filed, the bill herein was also filed. This bill, as well as the amended bill filed September 3, 1918, states that the defendants threaten, and will, unless restrained, attempt to force complainant, to continue to operate these street railway lines in accordance with the terms of these two franchise grants. The nature of the threats made and the means to which it is expected the city will resort to enforce its threats are not stated or shown.

Complainant's bill also alleges and shows that, in addition to its street railway business, it is engaged in manufacturing and selling electricity for heat, light, and power. The capital invested therein, the earnings thereof, and the franchise rights are not disclosed. The city of Columbus and its suburbs, it is alleged, contain a population of more than 250,000; that it is a large industrial manufacturing center, in which are situated shops, factories, and plants; that many of these persons and plants are employed in the making of various kinds of munitions and war materials necessary to the prosecution of the war; that within the territory served by complainant's

street railway lines, and by its heat, light, and power, is located a military barracks, in which are quartered more than 100,000 recruits per annum. All these, it is said, are dependent upon the street railway service, and on the heat, light, and power furnished by complainant. The discontinuance or impairment of this service would cause great harm to the government of the United States, to the people of the city of Columbus, and to all persons dependent thereon.

Complainant's amended bill alleges, and the supporting affidavits show, that it has in progress a plan to enlarge its heat, light, and power business, and that it is necessary to buy and install new equipment for this purpose, and that, in order so to do, it is necessary to raise new capital, which it is unable to do because of the low rates of fare fixed for street railway service.

Such in substance and in brief is the case made upon which the jurisdiction of this court is invoked and a preliminary injunction is asked. Complainant urges that any action of the city or its officials compelling the continuance of street railway service on the terms of these franchises at less than cost, or at a loss, is depriving it of its property without due process of law, in violation of the due process clause of the Fourteenth Amendment. This position is supported by two lines of argument. One is that the fare provisions of these franchises amount only to a legislative fixing of a rate of fare for transportation service, and cannot be enforced when conditions have so changed that this rate of fare does not yield a fair return on the capital actually invested. Another is that, even if these franchises were mutually binding contracts when entered into, they are no longer enforceable because of the conditions produced by a state of war. From these positions it is argued that complainant has the right to treat these franchise contracts as terminated, and having, by its communication in writing to the city, so declared, it becomes and is thereafter a tenant by sufferance only in the streets, subject to ejection at will by the city, but that, while the city refrains from so ejecting it and permits street railway service to be given, complainant has the right to insist upon a rate of fare which will yield a fair return on the capital actually invested, and that any effort of the city to compel service on terms which will deprive it of this fair return is depriving complainant of its property without due process of law. It is, of course, insisted that the 5-cent straight fare, with a charge of 1 cent for transfer, is the rate necessary to yield that fair return on the capital actually invested, and is therefore a reasonable rate.

Defendants urge that the averments of the bill do not present a real and colorable, but only a fictitious and fraudulent, federal question, under the due process of law clause of the Fourteenth Amendment, and that, therefore, inasmuch as there is no diversity of citizenship, this bill should be dismissed for want of jurisdiction, and, further, that the bill does not state a valid cause of action in equity, such as entitles complainant to any relief.

[1] The primary and controlling question, in my opinion, depends on the nature of the relation created between the complainant and the city by these franchise grants. This relation is settled beyond con-

troversy by numerous decisions of the Supreme Court of Ohio and of the Supreme Court of the United States. The statute law of Ohio in force when these ordinances were passed were sections 2501, 2502, 2504, 2505, 2505b, 3443, 3443—12, Bates' Annotated Statutes of Ohio. They are copied in full in the margin in Cleveland v. Cleveland City Ry. Co., 194 U. S. 531–534, 24 Sup. Ct. 756, 48 L. Ed. 1102. These sections, slightly different only in phraseology, are now sections 3768 to 3777 and 9101 to 9139 of the Ohio General Code. Cases construing these sections, and defining the rights and burdens created by franchise ordinances, such as are now under consideration, are the following: Railway Co. v. Village of Carthage, 36 Ohio St. 631, 634; City of Columbus v. Street R. R. Co., 45 Ohio St. 98, 12 N. E. 651; Interurban Co. v. Cincinnati, 93 Ohio St. 109, 112 N. E. 186; Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102; Cleveland v. Cleveland Electric Ry. Co., 201 U. S. 529, 26 Sup. Ct. 513, 50 L. Ed. 854; Cleveland Electric Railway Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399.

[2] The holding of all these cases is uniform. Of them the leading one is Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102. The law as settled by these cases is that the Legislature has by these sections delegated to municipal corporations full power and authority to enter into contracts for the maintenance and operation of street railway lines; that whatever the city in fact does pursuant thereto is the act of the state and is mutually binding upon the parties. Franchise grants for fixed terms not exceeding 25 years, and for a fixed rate of fare to continue during the term of such grants, may lawfully be made by the city under this legislative delegation of power. If the city passes an ordinance purporting to grant a franchise for a fixed term, with a rate of fare to endure during that term, and this ordinance is accepted, expressly or impliedly, a contract is engendered mutually binding and unalterable, except by the consent of both parties, during the term thereof.

In Cleveland v. Cleveland City Railway Co., 194 U. S. 517, 24 Sup. Ct. 756, 48 L. Ed. 1102, all these rules are fully stated and upheld. The question there was whether or not the ordinances under consideration had in fact created a contract at a fixed rate of fare for a definite term, thereby extinguishing a right reserved to the city in earlier ordinances of increasing or diminishing the rate of fare. Mr. Justice White, delivering the opinion, says (194 U. S. 536, 24 Sup. Ct. 763, 48 L. Ed. 1102):

"In reason, the conclusion that contracts were engendered would seem to result from the fact that the provisions as to rates of fare were fixed in ordinances for a stated time, and no reservation was made of a right to alter; that by those ordinances existing rights of the corporation were surrendered, benefits were conferred upon the public, and obligations were imposed upon the corporations to continue those benefits during the stipulated time. When, in addition, we consider the specific reference to limitations of time which the ordinances contained, and the fact that a written acceptance by the corporations of the ordinances was required, we can see no escape from the conclusion that the ordinances were intended to be agreements binding upon both parties definitely fixing the rates of fare which might be thereafter charged. Taking all the circumstances above referred to into

account, the case before us clearly falls within the rule as to the binding character of agreements respecting rates applied in Detroit v. Detroit Citizens' Street Railway Company, 184 U. S. 368 [22 Sup. Ct. 410, 46 L. Ed. 592], and approvingly referred to in Knoxville Water Co. v. Knoxville, 189 U. S. 434, 437 [23 Sup. Ct. 531, 47 L. Ed. 887]."

The other cases are equally in point, and, inasmuch as no conflict exists therein, a review of them is unnecessary. Numerous cases illustrating and applying the same rule are contained in the United States Supreme Court Reports arising under municipal ordinances of other states. A citation of them is for the same reasons superfluous.

[3] Complainant's further contention that the fare provision of these franchises is only a legislative regulation of the charge for service is also shown by these authorities to be untenable. There are cited, in support of this contention, Milwaukee Electric Railway Co. v. Wisconsin Railroad Commission, 238 U. S. 174, 35 Sup. Ct. 820, 59 L. Ed. 1254, and other kindred cases. These cases establish a different principle and belong to a different class. The right to regulate the charges for a public service is, as shown by these cases, a governmental function, and a municipality has not the power by contract to deprive a state of that power, unless expressly authorized so to do. In determining whether or not a state, through its agent, a municipality, has authorized and permitted this governmental power to be contracted away, all doubts will be resolved in favor of the public and against the alleged surrender of power. No question is made but that the Legislature of a state may, unless restrained by state Constitution, contract away this power, either by an enactment of its own or by delegating to the municipality power so to do. The Milwaukee Case only holds that, applying these principles, it did not clearly and unmistakably appear that the state had contracted away this function of the government, or had delegated to the municipality the power to contract it away.

The cases already cited show that as regards Ohio the state has delegated to municipalities full power to make a binding contract fixing for a definite term the rate to be charged for this service, and has thereby disabled the municipality, if not itself, from altering or changing that rate during the fixed term. The law of Ohio is, as was said by Mr. Justice White, of the same kind as that of Michigan and Indiana. See City Railway Co. v. Citizens' Street Railroad Co., 166 U. S. 557, 17 Sup. Ct. 653, 41 L. Ed. 1114; Detroit v. Detroit Citizens' Street Railway Co., 184 U. S. 368, 22 Sup. Ct. 410, 46 L. Ed. 592.

No question is made but that the franchise grants now being considered did by their terms purport to create a binding contract as to the rate of fare for a term of 25 years. It follows from this settled law that a contract has been engendered, mutually binding upon the city and upon the owner of these franchises, that this contract requires the owner during the entire term of 25 years to furnish street railway service at the rates of fare therein provided, and that neither the complainant nor the city during this term has the right to change or alter that rate without the consent of the other.

The impairment of contract and the due process of law clauses of the Constitution have often been invoked to prevent cities from im-

pairing franchise grants, or forcing a reduction in the contract rate, and the courts have uniformly, despite all criticism, sustained and upheld them, and, in so doing, have vindicated the law. It is equally the duty of the courts to uphold these contracts and vindicate the law when it is the grantee therein, and not the city, which is seeking to change the terms thereof without the consent of the other party. It is of primary importance that contracts should be upheld by the courts, for the right to contract and the binding obligation of contracts once made lie at the foundation of all public and municipal law.

This proposition is really controlling of all questions argued, but a brief consideration of some other questions should, perhaps, also be made.

[4] One proposition strongly urged is that a steam or street railway cannot be compelled by injunction or mandamus to operate all or a part of its system at a loss, and that any effort so to do is depriving it of its property without due process of law. In its final analysis, this proposition means that courts will not enforce a valid and binding contract, if so to do will inflict loss upon one of the contracting parties. Manifestly the proposition, when thus baldly stated, will not be contended for. Obviously, then, the cases cited in which courts have refused to grant an injunction or a mandamus to compel the operation of all or a part of an unprofitable steam or street railway system turns upon different facts from those here present.

Briefly, and without reviewing at length the many cases cited, the law on this proposition, as I understand it, may be summed up as follows: If a railway company is under a statutory or a contract duty to maintain and operate a line, it will be compelled by injunction or mandamus so to do, even though the further operation should be at a loss. It is only when there is no valid or binding obligation to continue operation that the company may, at its discretion, abandon an unprofitable line or branch. If there is a binding obligation to maintain and operate a part of a system, it is questionable whether that part or branch can ever be abandoned, unless the losses inflicted by its continued operation are such as will wreck the entire system. On the other hand, if the operation of a railway line cannot be continued, owing to insolvency, a court will not by mandamus or otherwise try to compel its further operation; and this is particularly true, if its continued operation will perform no useful public service. This refusal of the courts to interfere does not proceed on the view that the company had a right to abandon the operation of an unprofitable system, or of an unprofitable branch. If there is a statutory or contract duty to maintain and operate, this obligation still remains in law, just as a debtor's obligation to pay his debts remains after he has become insolvent; but a court will not attempt to compel by mandamus or otherwise that which is manifestly futile and impossible, for a court has no means of providing capital to operate an insolvent railway company, or to continue its operation after it has become insolvent. This, it seems to me, is all that can be claimed for the statement found in some cases that a court will not compel a continued operation at a loss of a railway line or branch.

The true rule, with its limitations and exceptions, is, in my opinion, fully stated in Southern Railroad Co. v. Hatchett, 174 Ky. 463, 192 S. W. 694, L. R. A. 1917D, 1105, note L. R. A. 1915A, 549. Illustrating and supporting these statements and conclusions are the following: Northern Pacific Railroad Co. v. Washington Territory, 142 U. S. 493, 12 Sup. Ct. 283, 35 L. Ed. 1092; Interurban Co. v. Cincinnati, 93 Ohio St. 109, 112 N. E. 186; State ex rel. v. Black Diamond Co., 97 Ohio St. 24, 119 N. E. 195; Fort Loramie v. Gress (Ohio C. C. A., not reported); State ex rel. v. Bridgeton & M. T. Co., 62 N. J. Law, 592, 43 Atl. 715, 45 L. R. A. 837; State ex rel. v. Spokane Street Railway Co., 19 Wash. 518, 53 Pac. 719, 41 L. R. A. 515, 67 Am. St. Rep. 739; City of Potwin Place v. Topeka R. R. Co., 51 Kan. 609, 33 Pac. 309, 37 Am. St. Rep. 312; Paige v. Schenectady R. R. Co., 178 N. Y. 102, 70 N. E. 213.

These conditions are not present in this case. The complainant does not allege insolvency, or make any showing of inability to perform the terms of its contract. Its showing merely is that operation for the year ending June 30, 1918, yielded only 4½ per cent. net return on capital actually invested, after deducting operating expenses, taxes, and a reasonable allowance for depreciation, and that operation during the year ending June 30, 1919, at the increased wage schedule, will result in a loss of $250,000 on operation alone.

These statements, it will be noted, apply only to the street railway part of complainant's business. Furthermore, this is not an application by the city for a mandamus, or a mandatory injunction, to compel continued operation under present conditions, nor a suit to compel specific performance of a harsh and unconscionable bargain. Complainant here is seeking an injunction to protect it in a manifest and plain violation of its contract. Consequently the rules of law under which courts have refused to compel the operation of an unprofitable railway branch, or the performance of an unconscionable contract, have no pertinency.

Complainant further contends and urges that it has the right to end these franchise contracts because of new conditions, not foreseen when they were entered into; that is to say, the war and the increased cost of operation due to the war. In support of this proposition are cited the following: The Kronprinzessin Cecilie, 244 U. S. 12, 37 Sup. Ct. 490, 61 L. Ed. 960; Krell v. Henry, [1903] 2 K. B. 740; Metropolitan Water Board v. Dick, Kerr & Co., Appeal Cases, H. of L. 119, [1917] 2 K. B. 1; Liston et al. v. Owners of Steamship Carpathian, [1915] 2 K. B. 42, 112 Law Times Reports, 994.

In my opinion, neither the facts of these cases nor the rules of law announced therein have any application to this situation. The Kronprinzessin Cecilie involves no question, except whether its owners were excused on July 31, 1914, from continuing its journey to Bremerhaven, Germany, in view of the prospects of war and seizure. It was contended that, inasmuch as war had not been declared, and that perhaps the journey might have been completed without seizure, the contract of the vessel's owner to carry gold and deliver it in Europe might still have been possible of performance. It was not denied that actual

seizure as a result of war would have discharged the contract, because making it impossible of performance, and the court held that the imminence of such seizure was so apparent that due prudence justified the master of the vessel in returning to the United States.

In Krell v. Henry the parties had made a lease of windows overlooking the Pall Mall for June 26 and 27, 1902, when the King's coronation procession was to take place. Owing to illness, the coronation procession was postponed. It was held that, notwithstanding the lease did not refer to the specific use for which the premises were being hired, namely, to view the coronation procession, and did not provide for ending the contract if for any reason it did not take place, the parties had made the lease in view of the expected coronation procession, and that the unforeseen and unprovided-for contingency of its unavoidable postponement excused the lessee from payment. This case is of that class which holds that a destruction of the subject-matter of a contract, or of a basis mutually assumed by the parties when entering into it, puts an end to the respective obligations.

In Metropolitan Water Board v. Dick, Kerr & Co. a contractor had agreed to construct a part of a water system within six years, and, after beginning work thereon, his equipment and the site upon which he was to do the construction work was seized by the military authorities of Great Britain for war purposes. Obviously here was a vis major, rendering impossible the further performance of the contract into which the parties had entered. It was impossible to proceed further.

No such conditions are here present. The performance of these franchise contracts has not been made illegal nor rendered impossible by any superior power. War conditions, it is true, have made the performance of them more burdensome and expensive, so far as the facts now presented tend to show. The war has in a different degree, perhaps, affected the performance of many, if not the larger part, of outstanding and unexecuted contracts between citizens of the United States; yet it would be a strong proposition to say that all such contracts are thereby rendered void, or voidable, at the option of the losing party.

The increased cost to complainant of performing its franchise contracts differs only in degree and quality from that due to other economic causes prevailing since they were made. If the war or economic changes had decreased the price of coal, materials, supplies, and labor, it would not be urged upon any one that the city would have the right to declare null and void these contracts, or the fare provisions therein, and establish a new rate in accordance with new conditions; and if the city should take such a position, it would be met, and justly, with an injunction on the ground that such action impairs the obligation of a valid and binding contract.

In order to make applicable the principles of law urged in this connection, it would be necessary to show that war or military authority had directly interfered in such a manner as to make these contracts illegal or impossible of performance. Nothing less than the equivalent of actual seizure by military authority, or a direct and

forcible intervention, such as prevents further performance, would bring the case within the operation of these rules.

Complainant also invokes the rule announced in the majority opinion in Denver Union Water Co. v. Denver, 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649, decided by the United States Supreme Court March 4, 1918. That case, in my opinion, has no application. There the Denver Union Water Company had constructed and operated its plant under a franchise expiring in 1910, and thereafter, during a certain period, it remained a tenant by sufferance, with the right on its part to discontinue service and remove its pipes and hydrants from the streets, and with the right and power of the city at any time to compel the removal thereof. Later an ordinance was passed to regulate the terms and conditions, including charges, upon which the water company should continue to perform its public service. It was not held that the owner of a water system with an expired franchise, the property of which is subject to ejection at the will of the city, has a right to complain under the due process of law clause because the terms and conditions under which service is rendered in that situation does not yield a fair return on the capital invested. It was held that the so-called regulating ordinance granted a new franchise of indefinite duration, terminable either by the city or the company at such time and under such circumstances as may be consistent with the duty that was owing by both to the inhabitants of Denver, and while this new franchise of indefinite duration remained undetermined by the city, the water company was entitled to enjoin the rate fixed for service because not yielding a fair return on the capital actually invested. This, it was said, deprived the company of its property without due process of law. If the regulating ordinance had not been construed as granting a new franchise of indefinite duration, but had merely been one forbidding a charge higher than a certain rate during such time as the water company saw fit to leave its pipes and hydrants in the streets and perform service, the fair implication is, both from the majority and minority opinions and other cases previously decided, that no relief would have been accorded. See, also, Cleveland Electric Railway Co. v. Cleveland, 204 U. S. 116, 27 Sup. Ct. 202, 51 L. Ed. 399; Detroit United Railway v. Detroit, 229 U. S. 39, 33 Sup. Ct. 697, 57 L. Ed. 1056; Denver v. Denver Union Water Co., 229 U. S. 123, 33 Sup. Ct. 657, 57 L. Ed. 1101.

Complainant's franchise contracts, as already said, have not expired. It is not a tenant of the streets under a franchise contract of indefinite duration, much less a tenant merely by sufferance. It has not the right to remove its tracks at will, or to refuse to operate a street railway line. I am of opinion that the bill should be dismissed, because it does not state facts constituting a valid cause of action in equity.

[5] I am also of opinion that on the facts stated this court has no jurisdiction. There being no diversity of citizenship, jurisdiction is invoked only because of the due process of law clause of the Fourteenth Amendment. The facts stated in the bill show a valid and binding contract, from the force and effect of which complainant is

seeking to escape. No threatened action of the city authorities is complained of, except that it may endeavor to enforce compliance by complainant with its contract. No charge is made that other than legal methods will be adopted for that purpose, and, in the absence of a statement clearly showing a threatened resort to illegal means, a court must assume that the city officials will proceed in conformity to law.

[6] The law is well settled, as contended for by complainant, that if the facts stated make a real and colorable federal question, jurisdiction properly attaches, and will not be ousted, even if on the hearing the claim thus made is held to be without merit in law, or without foundation in fact. On the other hand, when no real and colorable, but only a fraudulent and fictitious, federal question is stated, the jurisdiction of the court does not attach for any purpose, and it is the duty of a federal court of its motion to refrain from such an unwarranted exercise of jurisdiction. And even when the threatened act may be an impairment of a contract, or a deprivation of property without due process of law, still if the only means threatened to be used are resort to the courts or to legal proceedings, a case is not stated within the jurisdiction of a federal court. Such seems to me to be the present case. For authority see the following: Penn Mutual Life Insurance Co. v. Austin, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626; St. Paul Gaslight Co. v. St. Paul, 181 U. S. 143, 21 Sup. Ct. 575, 45 L. Ed. 788; Defiance Water Co. v. Defiance, 191 U. S. 184, 24 Sup. Ct. 63, 48 L. Ed. 140; Barney v. New York, 193 U. S. 437, 24 Sup. Ct. 502, 48 L. Ed. 737; Des Moines v. Des Moines, etc., Railway Co., 214 U. S. 179, 29 Sup. Ct. 553, 53 L. Ed. 958.

The application for a preliminary injunction will be denied. The motion to dismiss will be granted, both for want of jurisdiction and because no valid cause of action in equity is stated.

This opinion should perhaps be ended here, but the importance of the interests at stake moves me to make some further observations, in the hope that the apparently strained relations between the complainant and defendants may be ameliorated. It cannot be denied, on the showing made, that the present war has greatly increased the cost of street railway operation. The award of the National War Labor Board in the wage controversy cannot be regarded otherwise than binding on the company, and the increase of wages granted by the company pursuant thereto cannot, in any fair sense, be considered as its voluntary act. It is also undoubtedly true, on the showing made, that complainant cannot, under existing conditions finance any improvements required to meet new demands for heat, light, and power, or for increased street railway facilities, and its failure so to do must injure the interests of the defendant and its inhabitants as much as it injures the complainant.

Prolonged operation under these conditions would seem to be a manifest impossibility, and must result in impairing the street railway service and grievously harming the people and business of the city. These considerations do not, for the reasons already stated, present any ground upon which a court can grant relief, for it has power only to declare the law and apply it. A sound public policy

forbids usurpation by the courts of governmental power lodged in other departments of the government. No power inheres in a court, either to make contracts for parties, or to absolve them from the effect of their contracts, provided the parties are competent in law to contract, and no fraud intervenes in the making thereof.

In view of these well-recognized limitations of the court's power, I can only suggest that the present emergency, likely as it is to become much graver in the near future, calls urgently for some kind of accommodation or temporary compromise between the parties. No intimation is made that blame attaches to either, much less that one more than the other is at fault, for it is undoubtedly true that the present situation is due to the rapid and unexpected evolution of uncontrollable events; but some kind of a modus vivendi fair to both, and to endure at least for the period of the war, should be agreed to, in order that loss to both may be prevented, and the public mind may not be distracted by a street railway war, when engrossed in the problems of a foreign war. If something is not done, no gift of prophecy is required to foresee that the recommendation of the National War Labor Board will be acted upon, namely, that the President of the United States, as Commander in Chief of its armed forces, by virtue of the powers inherent in his office and conferred by Congress, will seize and operate the street railway at rates yet to be fixed. Such a shifting of duty and of responsibility would not be creditable to the people of a self-governing city, nor to the business management of an efficient public service corporation.

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## In re MYERSON.

(District Court, E. D. Pennsylvania. November 13, 1918.)

No. 5602.

1. BANKRUPTCY ⟸136(2)—TURN-OVER PROCEEDINGS—CONTEMPT—DISTINCTION.

   While a fact which has once been judicially determined may not be again litigated between the parties, a bankrupt against whom a turn-over order has been entered may purge himself of contempt for failure to comply therewith by showing his present inability, etc.

2. BANKRUPTCY ⟸136(2)—FAILURE TO DELIVER PROPERTY—CONTEMPT PROCEEDINGS.

   A mere denial, by formal answer to motion for attachment for contempt, of the original concealment found against the bankrupt in the turn-over proceedings, and inability to deliver, will not stay attachment.

In Bankruptcy. In the matter of Myer Myerson, individually and as surviving partner of the firm of Strat & Myerson. Sur motion for attachment. Motion granted.

Alfred T. Steinmetz, of Philadelphia, Pa., for trustee.

Joseph L. Kun, of Philadelphia, Pa., for bankrupt.

DICKINSON, District Judge. [1] There is ground for surprised comment that there should be any difficulty in grasping the distinction

which has been so clearly pointed out between turn-over proceedings and contempt proceedings. We are given a summarized statement of the doctrine of the previously adjudged cases in Frederick v. Silverman, 250 Fed. 75, —— C. C. A. ——. A mere surface glance over the situation presented might suggest a seeming conflict between the two doctrines which are thus distinguished. A fact which has been judicially found becomes a fact which, in the very nature of things, cannot come again into controversy between the same parties to have the same question of fact again determined, and yet, in the effort to convince the court that the bankrupt cannot comply with the order made in the turn-over proceedings, the fact there found may be sought to be again brought into controversy.

Perhaps it may be of aid in grasping the thought of the real distinction if we view the question from something of the same point of view from which we would view it, were the respondent seeking to purge himself of a contempt. This order was made. It was made to be obeyed. If, however, compliance is beyond the power of the respondent, no court will imprison or otherwise punish a man for not doing what he cannot do. In order to bring out clearly the grounds of the distinction, if the respondent frankly admitted the original concealment, but gave a clear explanation of his present inability to comply with the order, a case for indictment and trial by a jury might be presented, but no judge could impose punishment without a usurpation of power. If, however, the respondent was found to be contumaciously refusing compliance with the order, the court must enforce obedience.

[2] It is a mistake to assume that a mere denial, by formal answer to the motion for attachment, of the original concealment found against the bankrupt in the turning over proceedings, and a consequent inability to deliver up the property to the trustee will stay the issuance of the attachment. It will not. There is in this a practical policy of the law to be served, which has been pointed out in the Epstein Case, 206 Fed. 568.

Let the attachment issue.

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## SANDERS v. SOUTHERN TRACTION CO. OF ILLINOIS et al.

(District Court, E. D. Illinois. August 29, 1918.)

No. 927.

1. RAILROADS ⟸171(7)—LIENS—PRIORITY—MORTGAGES.
Under Railroad Lien Law Ill. § 1, declaring that persons who furnish to railroad company materials for construction, etc., shall be entitled to be paid for the same as part of the current expenses, and shall have a lien as against all mortgages which shall accrue after delivery, the lien of contractors constructing railroad is prior to a previously recorded mortgage given to secure bonds of the railroad corporation.

2. RAILROADS ⟸171(3)—LIENS—PRIORITY.
Liens against railroads for current expenses are preferred over a prior recorded mortgage.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. RAILROADS ⟸171(2)—LIENS—RECORDATION.

A recorded mortgage does not become a lien on property mortgaged until the money or consideration has been actually received by the mortgagor; so the mere recording of a mortgage given by a railroad company to secure bonds did not create a lien superior to contractors' mechanics' liens.

In Equity. Suit by Jared Y. Sanders against the Southern Traction Company of Illinois and others. On exceptions to the master's report. Decree in favor of priority of mechanic's lien claimant.

John C. Slade and Joseph W. Moses, both of Chicago, Ill., for trustee Union Trust & Savings Bank of East St. Louis, Ill.

Rice, Lowes & O'Neil, of Chicago, Ill. (Francis M. Lowes, of Chicago, Ill., and Dan McGlynn, of East St. Louis, Ill., of counsel), for defendant Lorimer & Gallagher Co.

ENGLISH, District Judge. The report of the master in chancery having been filed and numerous exceptions taken thereto, August 5, 1918, was set for the date on which arguments were had before court upon questions raised by the exceptors.

At the date of argument it was determined and agreed by counsel that, certain principal questions involved being first determined, other and minor questions would be materially simplified, if not fully determined.

One of the principal and perhaps the most important of all the questions raised by the exceptors is that of "priority" as between the mortgage lien held by the trustee to secure bonds issued by the railroad company and that of the mechanic's lien claimed by the construction company (Lorimer & Gallagher), which presents the single question of priority as between a prior mortgage lien and mechanic's lien.

In the argument and discussion, which lasted five days, this was the main question touched upon. Other questions were incidentally mentioned, some of which were argued at considerable length, but most, if not all, related to the one main question.

I do not deem it necessary at this time, neither do I think counsel expect the court, to consider and pass upon issues other than the one of priority as between the mortgage upon the railroad in question and mechanic's lien filed by the company which constructed and built the railroad.

The mortgage in question was executed, recorded, and delivered at a date prior to the contract entered into, upon which the mechanic's lien is based, and ordinarily is what would be termed a prior lien.

The mechanic's lien in question is authorized by the statute of the state of Illinois, the terms of which attempt to fix the status of mechanics' liens and their priority as to all other liens on railroad against which the mechanics' liens are filed.

[1, 2] This being a lien fixed, determined, defined, and allowed by the statute of the state of Illinois, such statute must necessarily largely determine the question at issue.

The railroad lien act of Illinois (Hurd's Rev. St. 1917, c. 82, § 7), which is relied on by counsel for mechanics' liens claimants, is as follows:

"Section 1. Be it enacted by the people of the state of Illinois, represented in the General Assembly, that all persons who may have furnished, or who shall hereafter furnish to any railroad corporation now existing, or hereafter to be organized under the laws of this state, any fuel, ties, materials, supplies, or any other article or thing necessary for the construction, maintenance, operation or repair of such roads, by contract with said corporation, or who shall have done and performed, or shall hereafter do and perform any work or labor for such construction, maintenance, operation or repair by like contract, shall be entitled to be paid for the same as part of the current expenses of said road; and in order to secure the same, shall have a lien upon all of the property, real, personal and mixed, of said railroad corporation as against such railroad, and as against all mortgages or other liens which shall accrue after the commencement of the delivery of said articles, or the commencement of said work or labor."

Following this section is a provision of the statute which applies to the subcontractor, but for the purpose of this discussion the lien claimant in this case is regarded as the original contractor. Therefore only that portion of the statute above quoted applies.

A solution of the question here involved depends almost wholly upon the interpretation given statute above quoted. Some authorities cited are quite helpful, and much argument made by counsel is quite illuminating upon some uncertainties which heretofore existed in the mind of the court as to meanings to be given to certain language and words in the said statute.

At the time this statute was enacted it was then (and is now) not an uncommon practice for railroad corporations, before any considerable amount of property had been secured, and before any work had been done, to issue bonds for the purpose of securing money with which to build or construct its railroad. The framers of this law, evidently having in mind this practice of railroad corporations, drafted and enacted the railroad mechanic's lien statute as above quoted. Too, the legislative body must have had in mind the rule of law that a mortgage did not attach to or convey property not owned by mortgagor at the time of its execution and delivery.

By the use of the word "accrue" the Legislature evidently intended that same should be construed to mean that the mortgage did not accrue—that is, become attached to any of the property—until such property was actually owned by or came into the possession of the railroad company. The Legislature must have understood and intended that none of the road built by the construction company became the property or into possession of the railroad company until built, constructed, created, and put into the possession of the railroad company by the construction company. The Legislature must have further understood and intended that, when such constructed road so came into the possession of the railroad company, then, and not until then, did its mortgage attach and become a lien. Therefore, when such railroad so constructed came into the possession of the railroad company, it came charged with the statutory rights of its builder and creator in the form of a mechanic's lien, which was an incumbrance prior to the time the mortgage lien accrued, attached, or became effective.

A mechanic's lien against a railroad shall be paid "as part of the current expenses of said road," and according to decisions of the Supreme Court of Illinois liens against railroads for current expenses are liens preferred as against a prior recorded mortgage. The expense of construction is to be paid for upon the same basis as that of current expenses, therefore the logical conclusion is that a lien for construction work must be preferred over a prior recorded mortgage to secure bonds of the corporation.

[3] A recorded mortgage does not become a lien on property mortgaged until the money or consideration therefor has been actually realized or received by the mortgagor. In the case at bar nothing was received by way of consideration until the railroad was built or constructed. The mere recording of the mortgage did not of itself create a lien, and no lien in fact existed or could exist until the railroad or some part thereof was built, or until some material was furnished; and when such road, or some part thereof, was built, or when some material was furnished, the mechanic's lien had already attached before the mortgage in fact became a lien thereon.

The Illinois Railroad Lien Law employs the following language:

"And in order to secure the same, shall have a lien upon all of the property, real, personal and mixed, * * * as against all * * * other liens which shall accrue after the commencement of the delivery of said articles. * * *"

Counsel in behalf of the construction company, in construing this provision, cites the case of Brooks v. Railroad Co., 101 U. S. 443, 25 L. Ed. 1057, which construes a lien statute of Iowa (Code 1873, § 2139) that provides in substance that:

"A mechanic has, for labor done or things furnished, a lien on the entire land upon which the building * * * was made, which has been held to include railroads, and it shall be preferred to all other liens * * * which shall be attached to or upon such building * * * made subsequently to the commencement of said building. * * *"

Counsel for mortgagee urges that there is quite a distinction between the two lien statutes. I am unable to agree with such contention, but, on the contrary, I am clearly of the opinion that there is a striking similarity between them, so much so that, without other reasons, I would feel impelled to hold in case at bar, as the Supreme Court did in that case, that the mechanic has a lien superior to the prior recorded mortgage, and that such lien extends to the entire length of the railroad in question.

It is therefore the opinion of the court that mechanic's lien in this case is entitled to priority in payment over the mortgage held by the trustee to secure payment of the bonds issued by the railroad company.

## NETHERWOOD v. RAYMER.

(District Court, W. D. Wisconsin. April 30, 1918.)

1. CONTRACTS ⟸26—ACCEPTANCE—DEPOSIT OF ACCEPTANCE IN MAILS.
When an offer is made by letter sent by mail, the deposit of a letter of acceptance by the person to whom the offer is made, properly addressed, completes the contract, though it is never received by the one making the offer.

2. CONTRACTS ⟸2—EXECUTION—WHAT LAW GOVERNS.
The execution of a contract must be determined by the laws of the place where the contract is made.

3. CONTRACTS ⟸144—CONSTRUCTION—WHAT LAW GOVERNS.
The construction of a contract must be determined by the laws of the place where the contract is made.

4. SALES ⟸22(4)—PROPOSAL—ACCEPTANCE.
Where an offer to sell is made by mail, no contract results if the acceptance is coupled with any condition which varies or adds to the offer to sell.

5. CONTRACTS ⟸28(2)—ACCEPTANCE OF OFFER—CONSTRUCTION.
Where one to whom an offer by mail was made used the mails as a medium for acceptance, extrinsic evidence is admissible to clear up question whether the letter of acceptance intended to impose a new condition, or merely a suggestion as to the consummation of the contract.

6. SALES ⟸22(4)—ACCEPTANCE—VARIANCE.
Where defendant, who held plaintiff's notes, given in payment for corporate stock, which was deposited as collateral offered to sell at a discount, *held*, that there was no variance between the offer and acceptance, because the acceptance did not include interest.

At Law. Action by Harry C. Netherwood against George W. Raymer. Judgment for plaintiff.

On July 1, 1911, the defendant sold to the plaintiff 23 shares of the capital stock of the Democrat Printing Company. The purchase price was $65,000, of which $5,000 was paid in cash, and 10 notes for $6,000 each, payable at the Capital City Bank of Madison, Wis., on or before 10 years from date, were given for the balance. The 23 shares of stock were pledged as collateral to the notes, and the collateral contract contained an insecurity clause, whereby the defendant, at any time when he deemed the debt insecure, could sell the stock. At the time of the negotiations between the parties, which make the subject-matter of this case, all interest had been paid when due, and $2,000 on the principal.

Early in 1914 the defendant became disturbed over the affairs of the Democrat Printing Company. In reply to defendant's letter, the plaintiff wrote, that the affairs of the company were in good shape, but telling him further that, if he felt that his security was in danger, plaintiff would have no trouble in negotiating a new loan or making a sale of the stock in order to take care of his indebtedness.

On March 14, 1914, defendant wrote to the plaintiff as follows:

"Positively confidential.

"965 N. Y. Avenue, Pasadena, Cal., March 14, 1914.

"Dear Mr. Netherwood: My letter to you of Feby. 20th remains unanswered, although several others sent out in the same mail have been. I will now offer you three propositions. These are simply for you, and for no one else, not even for that trouble maker, Doc. Bryant. I think you must know by this time that you must shake him. He will ruin you if you don't do it. You must certainly see that he will wreck any business or any person with which he is connected. I fully understand the difficulty that confronts you in dis-

posing of Bryant, but hope you can find a way out. The first proposition may be the most troublesome, because it goes right to the end sought without frills. The second and third I think you may act upon. The second I earnestly hope you can carry out. It saves you $5,800, the equal of two years' interest on all your debt. This I will give to close out all my relations with the company. However, the third proposition is the easy one for you, and you can simply say that under the circumstances you feel that you cannot meet your indebtedness and you simply throw up your hands. Mr. Netherwood, I am so fully advised that it is beyond question that affairs cannot run but a little longer as now. There must be the change mentioned in my first proposition, to prevent a peaceful or forceful reorganization of the company. That would air some things like the monthly meeting of directors and their pay. All are in the office and already being paid large salaries. You must know that every dollar of stock not owned or controlled by you and Bryant will insist on a reorganization other than that of Doc. Bryant.

"First. You to agree to letting Bryant and Osborne out and that your pay may be fixed at $5,400, as formerly. This you can do if you will, and it will benefit you more than any one else. You know Bryant is absorbing $3,600 a year of the earnings of the company, and his services are worth nothing, besides being a pernicious and constant meddler and trouble maker. You stand by him, and he will wreck both of you; but he will not be permitted to wreck the Democrat Printing Company. *He must go out.* The salary of Osborne, fixed by Bryant, is fully three times what any service he can render is worth.

"Second. You stated in a former letter to me that you knew that you would have no trouble in negotiating a new loan or a sale of the stock for more than the amount of the unpaid notes. If you can and will, I will agree to discount for cash all the notes in the sum of $5,800, or 10 per cent.; that is, I will accept $52,200 for the $58,000 of unpaid notes. I will be more than glad to do this, but have little faith that you can, for I very much fear that the stock has been depreciated still more by Bryant's management, and I am sure it will be still more if Bryant is much longer kept in the office in any capacity whatever.

"Third. You to resell to me for your notes all the stock bought of me. I will surrender to you all your unpaid notes for the stock, and will be only too glad to sell it again at any time for $52,200 cash. While this is the easy way out of an unfortunate combination for you, it is the hardest one for me. The man Bryant will wreck any business that he has any connection with.

"Finally, I am constrained to question one or two matters in your last letter to me. I feel that you have not fully analyzed the situation. You speak of not sacrificing what you have in the company. You have paid $7,000. As I understand it, all of this was from earnings of the company, as well as all the interest you have paid out, and in addition a salary of $2,400 a year, which is $500 a year more than you were getting when I sold you my stock. Now, just what actual interest could you in fact claim? This I leave to you. Also you state that your notes are not due until 1921. Am I to understand that you can, if you choose, defer payment on all of these notes until 1921, if you find it convenient to do so. If I thought that was so, I would present you with all of them now.

"Mr. Netherwood, I am not blaming you for Bryant's mismanagement of affairs, because I know full well the bad combination you have gone into and the puzzle you have on your hands to get out of it. But you must get out or sink in the wreck that impends now in the affairs of the company. With the load you are carrying you cannot hope to pay dividends, and discontent is rampant among the outside stockholders, and that man Bryant has no more sense than to believe he can do anything he pleases with the property of others, simply because he with your assent permits him to do it, and he has no more honesty than to believe that is right. You cannot afford to longer keep such company. If you buy my stock outright, that lets me out. If you resell the stock to me, that frees you from the deal you have been in, and you are saved endless trouble and financial loss. I am anxious only to get difficulties straightened out there, and I assure you I am by no means alone in

this. Don't plunge deeper into trouble, but get out, and do it now; and it cannot be done, except by the methods, or some one of them, offered, or of some one that will accomplish the result.

"Hoping that you will see the situation and act for your own good, and that will be for the good of all interests concerned, with best wishes, I am,

"Very truly yours, Geo. Raymer.

"Please let me have an early reply. R."

That letter reached Madison, Wis., on March 21, 1914, and on the same day the plaintiff wrote to the defendant as follows:

"Madison, Wisconsin, March 21, 1914.

"Mr. George Raymer, 965 New York Ave., Pasadena, Cal.—My Dear Mr. Raymer: I am to-day in receipt of your letter of March 14th. Since I received your letter of Feb. 13th, I have been very much disturbed about the matter. In view of the fact that you evidently feel yourself insecure, I beg to advise you that, if you will execute to Mr. Hobbins power of attorney in the form herewith inclosed and forward the same to Mr. Hobbins, with full authority and power to assign the notes in the bank to which my stock is collateral security, making the assignment in blank, but without recourse against you, my indebtedness to you on these notes will be fully taken care of.

"I want you to understand that I am not putting up this money, but that the notes are being sold by you without recourse to a third party, who takes them off your hands; the understanding being that the notes are to be turned over upon the payment of $52,200 to Mr. Hobbins, or a discount of 10 per cent. from the face of the notes and interest. Power of attorney is herewith inclosed. This is in accordance with your favor of the 14th, and gives you your money, so that you need not have any further worry as far as you are concerned about the matter. Please write to me when you forward this power of attorney to Mr. Hobbins, so that you get your money without any delay. With best regards to you and yours, I am

"Very truly yours, H. C. Netherwood."

Before the defendant received the plaintiff's letter of March 21st, Brandenberg, another stockholder in the Printing Company, went to California and saw the defendant at Pasadena on March 20, 1914. Defendant then offered to sell Brandenberg the Netherwood notes for $52,200. Brandenberg accepted the offer, and told the defendant that he would return to Madison, Wis., and place the money to purchase the Netherwood notes to defendant's credit in the Capital City Bank.

On March 26, 1914, not having heard from his letter of the 21st, plaintiff telegraphed the defendant as follows:

"Madison, Wis., March 26, 1914.

"George Raymer, 965 New York Ave., Pasadena, California:

"Please wire me whether you have received my letter of Saturday last and when you will forward power of attorney to Mr. Hobbins period. Also wire him that you are forwarding power of attorney to him at my request.

"Harry Netherwood."

On the same day defendant sent the following telegram to the plaintiff:

"Pasadena, Calif., March 26, 1914.

"H. S. Netherwood, Madison, Wisc.:

"Letter and telegram just received. Notes not owned by me.

"Geo. Raymer."

Brandenberg completed his purchase of the notes at the Capital City Bank of Madison, Wis., and immediately foreclosed on the collateral, which was sold on March 28, 1914, for more than enough to pay the balance due on the notes. At this sale the plaintiff was compelled to pay $58,000 in order to protect his security. At the time of the sale to Brandenberg, plaintiff had the money ready in Madison, Wis., to consummate the defendant's offer made in his letter of March 14, 1914.

Plaintiff contends that his letter of March 21, 1914, posted on that day and addressed to the defendant at his California home, was an acceptance of the

offer contained in the defendant's letter of March 14th, and that a contract between the parties resulted.

Defendant claims that the plaintiff's letter of March 21st was not an acceptance of any offer made by the defendant; that it changed material terms of the defendant's offer, and amounted to, at the most, a counter proposition, which was never accepted by the defendant.

Sanborn & Blake, of Madison, Wis., for plaintiff.

Jones & Schubring, of Madison, Wis., for defendant.

CARPENTER, District Judge (after stating the facts as above). [1] The determination of this case depends entirely upon the construction to be given to the defendant's letter of March 14, 1914, and the plaintiff's reply, posted at Madison, Wis., on March 21, 1914, the date when he received the defendant's letter. If there was a contract made, it was consummated by the mailing of the letter by plaintiff at Madison, Wis., properly addressed to the defendant at Pasadena, Cal.

"For it is well settled, in England and this country, that when a proposal for a contract is made by letter, sent by mail, the deposit of a letter of acceptance in the post office by the person to whom the proposal is made, addressed to the person making it, at the proper place, completes the contract, even though the latter never receives the letter accepting his offer." Washburn v. Fletcher, 42 Wis. 152, 166.

[2, 3] The execution of the contract and its construction must be determined by the laws of the place where the contract, if any, was made. McFarlane v. Wadhams (C. C.) 165 Fed. 987; Liverpool, etc., v. Insurance Co., 129 U. S. 397, 458, 9 Sup. Ct. 469, 32 L. Ed. 788; Berget-Crittenden Co. v. Railway Co., 159 Wis. 256, 261, 150 N. W. 496.

[4] The law of the state of Wisconsin with reference to offers and acceptances by mail is well summarized in Curtis L. & L. Co. v. Interior L. Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068:

"The vendee in his letter of acceptance may not attach any condition to such acceptance, even to the extent of undertaking to dictate the place where payment shall be made. If his attempted acceptance is coupled with any condition that varies or adds to the offer to sell, it is not an acceptance, but is in reality a counter proposition. N. W. Iron Co. v. Meade, supra [21 Wis. 474, 94 Am. Dec. 557]; Baker v. Holt, supra [56 Wis. 100, 14 N. W. 8]. Where the letter of acceptance contains a mere suggestion or request that payment be made at a particular place, but such a request is not a condition attached to the acceptance, it does not amount to an attempt to vary the terms of the offer to sell, and will not defeat an action for specific performance. Matteson v. Scofield, 27 Wis. 671; Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887. Applying these principles of law to the errors under consideration, the case does not present any unusual difficulties."

The Wisconsin cases cited by counsel for the defendant are Baker v. Holt, 56 Wis. 100, 14 N. W. 8, N. W. Iron Co. v. Meade, 21 Wis. 474, 94 Am. Dec. 557, Clark v. Burr, 85 Wis. 649, 55 N. W. 401, and Russell v. Falls Mfg. Co., 106 Wis. 329, 82 N. W. 134.

In the first two of these cases the letter of acceptance changed the place of payment from the vendor's domicile to a different place many miles away. In the Clark Case it asked for a deduction of nearly one-half the purchase price, and in the Russell Case there were three material modifications.

Other Wisconsin cases, in which, under somewhat similar conditions, the letter of acceptance has been held to contain a mere suggestion, and not a variation in the terms, are the following: Matteson v. Scofield, 27 Wis. 671; Sherley v. Peehl, 84 Wis. 46, 54 N. W. 267; Kreutzer v. Lynch, 122 Wis. 474, 100 N. W. 887; Curtis L. & L. Co. v. Interior L. & L. Co., 137 Wis. 341, 118 N. W. 853, 129 Am. St. Rep. 1068.

[5] In the Kreutzer Case, numerous Wisconsin decisions were referred to in the opinion, and we find this summary:

"Each of the letters so considered was marked by some slight differentiation from that in the present case; but these varying views of court at least serve to establish that such a letter is not necessarily clear or certain in its significance, but may contain a measure of ambiguity. In both Matteson v. Scofield and Baker v. Holt it is held that such ambiguity might be resolved by extrinsic facts surrounding the transaction and by the conduct of the parties. In the present case there was evidence of conversation between the parties which might have served as an invitation to Mr. Kreutzer to suggest a method of closing the transaction by mail—the defendant Lynch having suggested to him that that might be done. Again, correspondence between and conduct of the parties after the sending of the letter of June 17th was offered as significant upon the meaning of this letter and the understanding of it by Mr. Lynch. Upon this evidence the trial court has found that the request for transmission of the deed and abstract to a bank at Wausau was intended by Mr. Kreutzer and was understood by the defendants simply as a suggestion and request, and not as a condition of acceptance. There being extrinsic evidence admissible upon this subject, with no clear and overwhelming preponderance to the contrary, the finding of the court must conclude us on this question."

Defendant charges that the letter of acceptance contained an important variation, in that it required the defendant to appoint an attorney or agent of the plaintiff's own choosing to receive the money and to close the transaction. The agent named was J. W. Hobbins, cashier of the Capital City Bank of Madison, Wis. The original notes were payable at the bank, and plaintiff paid his interest there and part of the principal as it fell due.

Under the rule laid down in the Kreutzer Case, extrinsic evidence is admissible to clear up the question whether or not the letter in question contained a condition or merely a suggestion. The facts surrounding the transaction and the conduct of the parties make it clear that Netherwood's letter contains simply a suggestion, and not a condition. All of the notes were "on or before," and could have been paid by Netherwood at any time, had he desired to go to the Capital City Bank and deposit the money. The record shows that J. W. Hobbins was the president and cashier of this particular bank; that the notes were in the possession of the bank, and all payments of interest, and the two payments of principal on these notes had been made to Hobbins at the bank; that he was the active managing officer of the Capital City Bank, and when payments were made of principal or interest he personally indorsed them on the notes in the presence of Netherwood. The indorsements show that those payments ran over a period of years; the first being August 5, 1911, and the last March 7, 1914. Hobbins was not connected in any way with the Democrat Printing Company, or in any way with the stockholders

of the company. The Democrat Company carried their account at the Capital City Bank, and the defendant Raymer had a checking account at the same bank; it being his working bank account, so far as he had one in Wisconsin. He also had one in California. The notes in question, when they were foreclosed on by Brandenberg, were sold at the Capital City Bank, and the transaction the defendant had with Brandenberg was also consummated through the Capital City Bank. The cash which the plaintiff had raised to consummate the purchase from the defendant was in the Capital City Bank, and he was ready, able, and willing to carry out his part of the contract.

It is plain that the plaintiff in his letter of acceptance named J. W. Hobbins simply as a suggestion, for the purpose of aiding in the immediate winding up of the transaction. It appears from the record that all parties in interest had the utmost confidence in Hobbins; that he personally had taken charge of all the dealings with regard to these notes from the time of their execution, and he naturally was the one man at the bank who would have closed the transaction, had the name of the bank been inserted in the power of attorney, instead of his name. Raymer had been dissatisfied for some time with the conduct of affairs in the publishing company, and was extremely anxious to get his money, or the major part of it. He had manifested anxiety for some time, and had committed himself on this point in writing. His letter containing the offer of sale shows that his anxiety was acute, and this anxiety the plaintiff was trying to relieve, when he wrote back, on the same day that he received the offer, accepting it and suggesting Mr. Hobbins, "so that you get your money without any delay."

The importunity on the part of the aged defendant to close out this transaction and to get as much of his money as possible at the earliest date was further evidenced by the manner in which he accepted Bandenberg's offer immediately on its presentation March 20th. This was before he had heard from Netherwood. He states:

"After a few minutes of conversation, Mr. Brandenberg said he had come out to see if I would sell him Netherwood's notes. I quickly answered that I would."

The reasons for the defendant's anxiety are clearly shown in his communication. Raymer, when he received the plaintiff's letter of March 21st, would have understood that his proposition was accepted, and that only the details of consummating the agreement remained to be disposed of. The suggestion of Hobbins seems to me to be an attempt on the part of the plaintiff to save time, so that he could comply with the very evident desire of the defendant to get his $52,200 at once.

It should be particularly noticed that the failure of the defendant to carry out his contract with Netherwood was not due to any claim on his part that he had any objection to executing the power of attorney to Mr. Hobbins. Without waiting for an answer to his offer, without leaving enough time in which an answer could possibly be received, and before his offer was received, he sold these notes to Brandenberg on exactly the same terms as contemplated in his offer

to Netherwood. The Brandenberg transaction would have been carried out under Netherwood's letter of acceptance, with the exception that the indorsement, "Without recourse, George W. Raymer," was put on the Netherwood notes at the Capital City Bank under a general power of attorney held by Jones & Schubring, instead of the specific power of attorney to J. W. Hobbins inclosed in Netherwood's acceptance.

Under all the circumstances, I am of the opinion that the naming of Hobbins as the attorney in fact was in expedition of the sale rather than a condition of acceptance or counter offer.

I am not impressed with the argument that the three propositions were for Netherwood's sole benefit, and that no one else could be interested with him in the transaction, because Raymer's letter refers to a statement of the plaintiff that he would have no trouble "negotiating a new loan or sale of the stock for more than the unpaid notes."

[6] It is also charged that there is a variance in that the acceptance did not comprehend $52,200 principal and also the interest to date of sale. I fail to see that interest was a part of the defendant's offer. In addition to the above extract Raymer also stated:

"I will agree to surrender all your notes for a surrender of the stock, and I would gladly sell it again at once for the sum of $52,200 cash."

The interest was paid up to a very recent date, and the amount then outstanding was so small in proportion to the total amount involved that I do not believe the question of interest was considered by the defendant. It evidently was not mentioned by him as a part of his offer.

The other objections raised by the defendant do not have any particular significance in this situation.

An order will be entered, finding the issues in favor of the plaintiff, and assessing his damages at the sum of $5,800 and interest thereon from March 28, 1914.

Judgment will be entered on the finding; exceptions being preserved by the defendant.

## UNITED STATES v. COLGATE & CO.

(District Court, E. D. Virginia. October 29, 1918.)

1. MONOPOLIES ⟸17(2)—COMBINATION IN RESTRAINT OF TRADE—ANTI-TRUST ACT.

A manufacturer of products shipped in interstate trade is not subject to criminal prosecution, under Sherman Anti-Trust Act July 2, 1890 (Comp. St. 1916, § 8820 et seq.), for entering into a combination in restraint of such trade, because he agrees with his customers upon prices, claimed by them to be fair and reasonable, at which the products may be resold, and declines to sell to those who will not so agree.

2. MONOPOLIES ⟸31—ANTI-TRUST ACT—INDICTMENT FOR ILLEGAL COMBINATION.

An indictment against a manufacturer alone, charging a combination in restraint of trade in violation of Sherman Anti-Trust Act July 2, 1890 (Comp. St. 1916, § 8820 et seq.), which averred only that defendant required its customers, to whom it sold its products, individually and not collectively, to sell at established prices, not alleged to be unreasonable, and refused to sell to customers who would not so agree, which did not charge that defendant had or attempted to acquire a monopoly, that it retained any control over the purchasers, or the goods after their sale, or any interest therein, or the right to control the disposition of the same, or that there was any combination or agreement between the customers themselves, *held* not to charge an offense.

3. MONOPOLIES ⟸31—INDICTMENT—COMBINATION IN RESTRAINT OF TRADE.

An indictment for combination in restraint of trade, which charged generally that defendant, a manufacturer, entered into agreements with customers to whom it sold its products to maintain prices, but which did not join such customers, nor aver that their names were unknown, nor set out any particular transaction, *held* too general and insufficient for want of certainty.

Criminal prosecution by the United States against Colgate & Co., a corporation. On demurrer to indictment. Demurrer sustained.

G. Carroll Todd, Asst. Atty. Gen., and Henry S. Mitchell, Sp. Asst. Atty. Gen., Richard H. Mann, U. S. Atty., of Petersburg, Va., and Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va.

Charles E. Hughes, of New York City, Harry K. Wolcott and Menalcus Lankford, both of Norfolk, Va., and Charles Wesley Dunn and Mason Trowbridge, both of New York City, for defendant.

WADDILL, District Judge. The indictment in this case charges in a single count that the defendant is a corporation organized and existing under the laws of the state of New Jersey, and having its general offices, factories, and salesrooms at Jersey City, in said state, and there engaged in producing laundry soaps, toilet soaps, and other toilet articles, and selling and shipping such products to wholesale and retail dealers in the Eastern district of Virginia, and throughout the United States; that during the period of three years immediately preceding the return of this indictment, to wit, on the 18th day of December, 1917, it did knowingly and unlawfully create and engage in a combination with the aforesaid wholesale and retail dealers within said Eastern district of Virginia, and throughout the United States, to procure adherence on the part of said wholesale and retail dealers in

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the products of the defendant, in selling such products sold to them as aforesaid, to resale prices fixed by the defendant, and to prevent such dealers from reselling at lower prices such products sold to them as aforesaid, thus to suppress competition amongst such wholesale dealers, and among such retail dealers, and that prices were thereby maintained and enhanced to the consuming public, in violation of the act of Congress entitled "An act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, commonly known as the Sherman Anti-Trust Act (26 Stat. 209, c. 647 [Comp. St. 1916, § 8820 et seq.]).

The demurrer presents for the consideration of the court two questions: (1) Whether the indictment charges a criminal offense under the act referred to; and (2) if so, are the averments of the indictment made with the accuracy, definiteness, and sufficiency that the law requires in setting forth a criminal charge, in order that the defendant may be advised of just what offense he is charged with.

[1] Considering the first proposition, the government insists that, while the indictment does not descend into all the particulars of the alleged crime, it does specify the means by which the combination was formed and carried out, sufficiently to show the offense charged, namely: (1) Distributing telegrams, lists, etc., of uniform resale prices; (2) urging the dealers to adhere to those prices; (3) informing them that defendant would refuse to sell to those who did not so adhere; (4) requesting them to inform it of sales at other prices; (5) discovering and investigating sales of that character; (6) placing the names of dealers who made such sales on "suspended lists"; (7) requesting those dealers to give assurances and promises to adhere in future to the indicated prices; (8) refusing to sell to those dealers until they gave such assurances and promises; (9) selling to such dealers upon their giving such assurances and promises; (10) requesting such assurances and promises from new dealers when opening accounts; and (11) freely selling to those dealers who observed the indicated prices.

Defendant's counsel urge that many of the acts alleged are immaterial, and that when the charge is analyzed, so far as the manufacturer's conduct is concerned, it amounts only to this:

> That "a manufacturer who simply declines to sell to dealers who fail to charge fair and reasonable resale prices, indicated by the manufacturer, which are of vital importance to the industry and trade, is subject to criminal prosecution as a violator of the Sherman Act, in case it appears that dealers generally resell at such fair and reasonable prices."

The government contends that the offense charged does not consist in refusing to sell to price cutters, but in forming an unlawful combination to procure adherence to universal resale prices, and that the essential difference in law between the proposition that it is unlawful for a manufacturer to combine with dealers in its product, for the purpose of maintaining resale prices fixed by him, and that of the refusal of a manufacturer to sell to dealers who fail to observe resale prices indicated by him, is at once apparent.

Considering the case from the government's standpoint, namely, that

of a combination on the part of the defendant with its retail customers to procure adherence to its uniform resale prices, the omissions from the indictment, as applicable to the charge of combination and conspiracy in restraint of trade, at once become apparent. No suggestion is made that the conduct complained of was a monopoly, or was an attempt to monopolize the trade in toilet and laundry soaps, and other articles referred to; that the defendant was in a position to effect such purpose; that its business bore any appreciable proportion to the general extent of the business in question; or that the defendant was under any special duty or obligation to the public, not applicable to all citizens alike in other private businesses, to manufacture its products. There is no charge that the defendant acted in what it did in concert with other manufacturers of soaps, or with other than its own customers separately, or that the prices sought to be maintained were other than fair; nor was any request made, or assurance given, that customers who gave the assurance would in turn require like assurance from persons to whom they sold, or that buyers giving the assurance would also stipulate to buy only from the defendant, or sell only to customers selected by it; and no charge is made that any contract was entered into by and on the part of the defendant, and any of its retail customers, in restraint of interstate trade and commerce —the averment being, in effect, that it knowingly and unlawfully created and engaged in a combination with certain of its wholesale and retail customers, to procure adherence on their part, in the sale of its products sold to them, to resale prices fixed by the defendant, and that, in connection therewith, such wholesale and retail customers gave assurances and promises, which resulted in the enhancement and maintenance of such prices, and in the suppression of competition by wholesale dealers and retail dealers, and by the latter to the consuming public.

It will be observed that the indictment is solely against the defendant manufacturer, and not against either a wholesaler or retailer with whom it is alleged the combination was made. No citation of authority is furnished the court of any criminal case involving the state of facts charged here, nor in support of the indictment against only one person to the unlawful combination. The government cites numerous cases to sustain their view of the case, among them the following: Addyston Pipe & Steel Co. v. United States, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136; Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086; Dr. Miles Medicine Co. v. Park & Sons, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; United States v. American Tobacco Co., 221 U. S. 106, 181, 31 Sup. Ct. 632, 55 L. Ed. 663; Bauer v. O'Donnell, 229 U. S. 1, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150; Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788; Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955; Thomsen v Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322; Boston Store of Chicago v. American Graphophone Co., 246 U. S. 8, 38 Sup. Ct.

257, 62 L. Ed. 551, Ann. Cas. 1918C, 447; United States v. Addyston Pipe Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122; Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, 253, 92 C. C. A. 315; United States v. Kellogg Corn Flake Co. (D. C.) 222 Fed. 725, Ann. Cas. 1916A, 78; United States v. U. S. Steel Corporation (D. C.) 223 Fed. 55; Frey & Sons v. Welch Grape Juice Co., 240 Fed. 114, 117, 153 C. C. A. 150.

These are all civil cases, in one form or another, involving the effect of acts alleged to be violative of the laws of commerce and trade, and mainly growing out of breaches of contracts alleged to have been unlawfully entered into, either under patent or copyright laws arising in connection with unfair competition, or because of alleged violation of contracts entered into between litigants in respect to their rights, or what they conceived to be their rights, in matters of trade relations, the subject of interstate commerce. No review of these several cases will be attempted; they are referred to generally in the case, relied on by the government, of Boston Store of Chicago v. American Graphophone Co. et al., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447, and to that decision and the review of the cases by the Supreme Court reference is specially made, as it is believed, while bearing on the general subject under consideration, they do not, because of their own peculiar facts, materially affect this case.

In the view taken by the court, the indictment here fairly presents the question of whether a manufacturer of products shipped in interstate trade is subject to criminal prosecution under the Sherman Act, for entering into a combination in restraint of such trade and commerce, because he agrees with his wholesale and retail customers, upon prices claimed by them to be fair and reasonable, at which the same may be resold, and declines to sell his products to those who will not thus stipulate as to prices. This, at the threshold, presents for the determination of the court how far one may control and dispose of his own property; that is to say, whether there is any limitation thereon, if he proceeds in respect thereto in a lawful and bona fide manner. That he may not do so fraudulently, collusively, and in unlawful combination with others, may be conceded. Eastern States Lumber Association v. United States, 234 U. S. 600, 614, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or to sell at a named sum to a customer, with the understanding that such customer will resell only at an agreed price between them, and, should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline further to deal with such person.

Authorities to sustain this view might be cited almost without number, and only some of the federal decisions bearing strictly thereon will be mentioned. In an early decision construing the Sherman Act, rendered long before the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730) was passed, and which latter act is not involved here (Transatlantic Missouri R. R. Case, 166 U. S. 326, 17 Sup. Ct. 551, 41 L.

Ed. 1007), Mr. Justice Peckham, in distinguishing between a public carrier or calling and a business like the one here involved, said:

"The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases; he may charge different prices for the same article to different individuals; he may charge as much as he can get for the article in which he deals, whether the price be reasonable or unreasonable; he may make such discrimination in his business as he chooses; and he may cease to do any business whenever his choice lies in that direction."

In Northern Securities Co. v. United States, 193 U. S. 361, 24 Sup. Ct. 466, 48 L. Ed. 679, Mr. Justice Brewer, speaking for the court, said:

"Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

In Standard Oil Co. v. United States, 221 U. S. 56, 31 Sup. Ct. 514, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, Chief Justice White, speaking for the court said:

"From the review just made it clearly results that outside of the restrictions resulting from the want of power in an individual to voluntarily and unreasonably restrain his right to carry on his trade or business, and outside of the want of right to restrain the free course of trade by contracts or acts which implied a wrongful purpose, freedom to contract, and to abstain from contracting, and to exercise every reasonable right incident thereto, became the rule in the English law."

In United States v. American Tobacco Co., 221 U. S. 180, 31 Sup. Ct. 648, 55 L. Ed. 663, the Chief Justice, speaking for the court, said:

"Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required, in order to give effect to the remedial purposes which the act under consideration contemplates and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us."

In Dueber Watch Case Co. v. Howard Watch, etc., Co., 66 Fed. 646, 14 C. C. A. 22 (C. C. A. 2d Circuit), the court said:

"An individual manufacturer or trader may surely buy from or sell to whom he pleases, and may equally refuse to buy from or to sell to any one with whom he thinks it will promote his business interests to refuse to trade."

In Union Pacific Coal Co. v. United States, 173 Fed. 739, 97 C. C. A. 580 (C. C. A. 8th Circuit), the court said:

"There was no law which required the coal company to sell its coal to Sharp on the terms which he prescribed, or to sell it to him at all. It had the undoubted right to refuse to sell its coal at any price. It had the right to fix the prices and the terms on which it would sell it, to select its customers, to sell to some and to refuse to sell to others, to sell to some at one price and on one set of terms, and to sell to others at another price and on a different set of terms. There is nothing in the act of July 2, 1890, which deprived the coal company of any of these common rights of the owners and venders of merchandise, and, if it did not combine with some other person or persons so to do, its refusal to sell its coal to Sharp, unless he would withdraw his

advertisement of a reduction in his retail price of it, was not the violation of the Sherman Anti-Trust Act charged in the indictment."

The case of Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co. (D. C.) 224 Fed. 566, on appeal 227 Fed. 46, 141 C. C. A. 594 (C. C. A. 2d Circuit), will be found to contain a comprehensive and able discussion of the right of manufacturers to sell their wares or not, to fix retail prices, or to decline dealing with any particular retailer. To these cases, and the authorities therein cited, and especially to the able discussion by Judge Hough on pages 572–575 of the first report (224 Fed. 566, supra), attention is especially drawn.

[2] The pregnant fact should never be lost sight of that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferentially, others declined so to do. No suggestion is made that the defendant, the manufacturer, attempted to reserve or retain any interest in the goods sold, or to restrain the vendee in his right to barter and sell the same without restriction. The retailer, after buying, could, if he chose, give away his purchase, or sell it at any price he saw fit, or not sell it at all; his course in these respects being affected only by the fact that he might by his action incur the displeasure of the manufacturer, who could refuse to make further sales to him, as he had the undoubted right to do. There is no charge that the retailers themselves entered into any combination or agreement with each other, or that the defendant acted other than with his customers individually. It cannot be said that the defendant has no interest in the prices at which its goods shall be sold. On the contrary, it had a vital interest, in so far as cutting the same would tend to demoralize the trade, and might have been more injuriously affected by the result of this disorganization than the public would be benefited by a temporary reduction in the prices of its products. The sale of the defendant's particular soaps cannot be said to be a necessity, or that the same bears a large proportion to the entire manufacture of soaps of the kind and grade involved. The successful prosecution of the defendant's business, and the continued use of its soap by the public, depend upon its ability to find and maintain a market for its output. Price cutting would almost inevitably result in reducing the defendant's business in a given community to only those engaged in that practice, and deprive it of the patronage of the great body of wholesalers and retailers engaged in what they believed to be a fair and legitimate conduct of their business. It by no means follows that, in the end, the public would be benefited, as the price cutter could easily raise prices after the demoralization caused by his conduct had been brought about, and profit individually by so doing. What the public is interested in is that only reasonable and fair prices shall be charged for what it buys, and it is not claimed that the defendant's manner of conducting its business has otherwise resulted.

The indictment should set forth such a state of facts as to make it clear that a manufacturer, engaged in what was believed to be the lawful conduct of its business, has violated some known law, before it is haled into court to answer the charge of the commission of a crime. In the instant case, the court's conclusion is that the averments of the indictment, when carefully considered, and read in the light of the defendant's inalienable right to deal lawfully with his own property, the handling, trading in, and disposing of which is made the subject of this indictment, fail to charge any offense, either in restraint of trade and commerce, under the Sherman Act, or any other law of the United States.

[3] Second. This brings us to the consideration of the form of the indictment. Ordinarily, this would be deemed immaterial, the indictment failing to charge a criminal offense, as held by the court; but it will be perhaps better, if the case is to be reviewed by the appellate court, to have the sufficiency of the indictment also determined.

The indictment, it will be observed, is only against a manufacturer alleged to be in combination with wholesale and retail dealers, and not against the wholesale and retail dealers referred to. It is not averred that the names of the latter were unknown to the grand jury, and no reason is given why they were not made parties defendant. Assuming, but without deciding, that it is permissible to indict only one party in an unlawful combination, it does not seem to the court that the alleged offense with which the defendant is charged is stated and set forth with that degree of accuracy and certainty required in criminal pleading. The facts in no particular combination, against any one set of wholesalers or retailers alleged to have been in combination with the defendant, are given, but merely that assurances and promises were made by the wholesale and retail dealers doing business with the defendant throughout the United States, and the Eastern district of Virginia, that its products would not be resold at retail other than at prices fixed by the defendant. This language is too general, and the defendant has the right at least to be informed of some one particular infraction of the law that it is claimed it has committed. It would be impossible to intelligently prepare a defense or answer to this indictment, as it involves the defendant's dealings with its wholesale and retail customers throughout the territory named, covering a period of three years. This is too indefinite, and there ought to be no difficulty, if such conditions exist, as set forth in the indictment, to name some specific instance of the alleged combination, and state the same in detail.

The demurrer will be sustained, and the indictment quashed.

HAWKINS v. DANNENBERG CO. et al.

In re WARLICK BROS. CO.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1918.)

No. 3215.

1. CHATTEL MORTGAGES ⊂=196 — WITHHOLDING FROM RECORD — VALIDITY AGAINST CREDITOR.
An unrecorded mortgage on a stock of goods is subject to be vacated as a fraud on subsequent creditors, if withheld from record by agreement or understanding between its parties, so as not to affect mortgagor's credit.

2. APPEAL AND ERROR ⊂=1177(6)—REMAND FOR NEW TRIAL—MISAPPREHENSION OF FACT.
It fairly appearing from trial court's opinion that the conflicting evidence, on the question of an unrecorded mortgage on stock of goods being in fraud of subsequent creditors, was not duly considered, because of misapprehension that mortgagee had agreed to sell mortgagor all the goods it needed, and so did not contemplate that mortgagor would seek credit elsewhere, there will be a reversal and remand for new trial.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by Robert T. Hawkins, trustee of the Warlick Brothers Company, bankrupt, against the Dannenberg Company and others. From an adverse decree, complainant appeals. Reversed, and remanded for new trial.

See, also, 234 Fed. 752.

Max F. Goldstein, of Atlanta, Ga. (Ellis, Webb & Ellis, of Americus, Ga., and Little, Powell, Smith & Goldstein, of Atlanta, Ga., on the brief), for appellant.

Orville A. Park and Edward P. Johnston, both of Macon, Ga. (Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This was a bill in equity filed by the appellant, as trustee of Warlick Bros. Company, a bankrupt, praying that a mortgage made in January, 1914, by the bankrupt, to the defendant the Dannenberg Company, be adjudged fraudulent and void as to creditors of the bankrupt. The mortgage was not recorded until July 18, 1914, a few days prior to the filing of the involuntary petition under which the bankruptcy was adjudged. The bill contained averments to the effect that the mortgage was fraudulently withheld from record, with the understanding that the mortgagor would buy merchandise from others who, in ignorance of the existence of the mortgage, might extend credit for goods sold.

The following statement made in the opinion rendered by the District Judge indicates what was relied on to support the conclusion that the mortgage was not withheld from record to give the mortgagor a fictitious credit:

"The Dannenberg Company, who are wholesalers, agreed that they would sell Warlick all the goods he needed. It follows that they did not contemplate that he would seek credit elsewhere. Nor was the mortgage withheld from record to impart to Warlick a fictitious credit, to the injury of those subsequently having dealings with him. Warlick had just failed, and a mortgage for a large amount was already of record against him. It follows that no creditors could have been deceived by the failure to record the subsequent mortgage of the Dannenberg Company."

The quoted statement manifests a material misapprehension of the state of facts disclosed by the evidence in the case. The property covered by the mortgage was the mortgagor's stock of goods, "constant in bulk, but changing in specifics," contained in the Planters' Bank Building in Americus, Ga. The evidence disclosed that at the time the mortgage was made it was known to a representative of the mortgagee, who acted for it in taking the mortgage, that the mortgagor had and was doing business in two stores in Americus, the one in the Planters' Bank Building and another on Lamar street. The mortgage was signed and delivered in the Lamar street store. It was given to secure the payment of the price of about $500 of goods presently sold—

"and all other credits and advances which may be extended to us by the said Dannenberg Company during one year after this date, so that the balance due after making all credits for payments will not exceed $10,000, whether evidenced by note or open account charged in the books of said the Dannenberg Company against us."

The testimony of the representative of the mortgagee, who in its behalf extended the credit evidenced and secured by the mortgage, showed, not, as stated in the above-quoted part of the opinion rendered, that the mortgagee agreed to sell the mortgagor all the goods the latter needed, but that the latter only agreed to buy all the goods it needed for the store containing the mortgaged stock. The evidence did not show the existence of the supposed state of facts relied on to support the conclusion that the mortgagee did not contemplate that the mortgagor would seek credit elsewhere. Having knowledge that the mortgagor was conducting a store or stores other than the one containing the mortgaged stock, for which alone the mortgagee was to sell goods, and that the mortgagor made no promise as to where it would buy goods for such other store or stores, it might well be inferred that the mortgagee contemplated that the mortgagor would seek credit from sellers other than the mortgagee.

It is true that prior to the date of the making of the mortgage the mortgagor had been through bankruptcy, and that at that time a mortgage given by it to secure an amount borrowed to carry out a composition of the debts owing to creditors affected by the prior bankruptcy was on the public record, which did not then show that that mortgage had been satisfied. But undisputed evidence showed that the debt secured by the last-mentioned mortgage was paid in full a considerable time before there was anything on the record to show that it was satisfied, and that the mortgagor bought goods on credit from merchants who were apprised that the debt secured by that mortgage had been paid in full, and who, before such information was imparted to them, sold the mortgagor goods only when the payment of the price

of them was guaranteed by a third party of unquestioned solvency; and it further appeared that the mortgagor so obtained credit for goods sold after the seller was apprised of the payment of the debt secured by the recorded mortgage, and while the mortgage to the Dannenberg Company was withheld from the record and the seller was ignorant of its existence.

In view of the evidence just mentioned, plainly it is an unwarranted conclusion that no creditors could have been deceived by the failure to record the subsequent mortgage to the Dannenberg Company. While the Dannenberg mortgage was withheld from record the mortgagor conducted a store at Dothan, Ala., and bought goods on credit which were consigned to it at that place. Nothing in the evidence indicated that this was contrary to any understanding or agreement between the mortgagor and mortgagee. The evidence plainly indicates that credits were extended by other sellers of goods while the Dannenberg mortgage was withheld from record, which would not have been obtained if the existence of that mortgage had been known to such other creditors.

[1, 2] The mortgage in question was subject to be vacated as a fraud upon creditors, if it was withheld from record by agreement or understanding between the parties to it, so as not to affect the mortgagor's credit. Clayton v. Exchange Bank, 121 Fed. 630, 57 C. C. A. 656; National Bank of Athens v. Shackelford, 208 Fed. 677, 125 C. C. A. 575. The evidence on the subject was conflicting. It consisted mostly of oral testimony given in the presence of the trial judge. The conduct of the mortgagor's representative who executed the mortgage in its behalf was such as plainly to indicate to the mortgagee's representative that secrecy was desired. In the course of his testimony the latter stated:

"Mr. Warlick had two stores, and I went to both stores. We went to the Planters' Bank Building store, and, being smaller, more crowded, he suggested that we go around to the Lamar street store, where the clerks would not overhear our conversation, and we went there, and sat way off in a corner under the steps."

Warlick stated that the mortgagor's representative, with whom he dealt when the arrangement for a credit was made, said, with reference to the paper which was signed, that—

"It was just a paper between him and myself, and nobody would know anything about it except us; he would put it in the back end of his safe; the safe was in the room, and no one would know anything about it."

The person to whom that statement was attributed denied that anything like it was said. When asked why he did not put the mortgage on record, he first said that it was not necessary. Afterwards he said it was carelessness. It fairly appears, from the opinion rendered by the trial judge, that this conflicting evidence was not duly considered, and that the court, in reaching its conclusion, was influenced by the supposed existence of attending circumstances not disclosed by the evidence. We will not undertake to pass on the conflicting evidence, as obviously the trial court is in a better position to weigh it properly. The opportunity for it to do so uninfluenced by unwarranted considerations

will be afforded by reversing the decree appealed from and remanding the cause.

In the course of the argument the ruling made by this court in the case of Martin v. Commercial Bank of Macon, Ga., 228 Fed. 651, 143 C. C. A. 173, was called to our attention. There is an obvious distinction between the facts of that case and those of the instant one. The conclusion that there was an absence of fraud in withholding from record the mortgage in question in that case was supported by a finding, sustained by the evidence, that when the mortgage was given it was expressly stipulated that no subsequent credit should be given. Not only was no such stipulation shown by the evidence in the instant case, but at the time the mortgage here in question was made the mortgagee was apprised that the mortgagor's situation and business occupations were such that it was to be anticipated that it would seek credit from sellers of goods other than the mortgagee. The evidence was such as to justify an inference that the mortgagee was aware that the mortgaged stock of goods was really subject to no incumbrance other than the mortgage in question. Other sellers of goods on credit, who were apprised of the actual satisfaction of the only incumbrance disclosed by the public records, may well have been influenced to extend credit by the buyer's apparent unincumbered ownership of the considerable stock of merchandise in the Planters' Bank Building store in Americus.

Reversed.

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BASSETT v. EVANS et al. (two cases).

In re PHILLIPS.

(Circuit Court of Appeals, Eighth Circuit. October 14, 1918.)

Nos. 192, 4991.

1. BANKRUPTCY ⟸440—REVIEW—MODES.

Where review of the facts in a proceeding to set aside a mortgage as a preference is sought, appeal is the proper remedy, and a petition to revise should be dismissed.

2. BANKRUPTCY ⟸166(4)—"PREFERENCE."

A mortgage given by a bankrupt to secure certain creditors *held* preferential, within Bankruptcy Act, § 60 (Comp. St. 1916, § 9644); the circumstances being sufficient to charge the creditors with reasonable notice they were securing a preference.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Preference.]

3. BANKRUPTCY ⟸166(4)—PREFERENCES—NOTICE.

Actual knowledge or belief of an intent to prefer is not necessary to render a transaction open to attack under Bankruptcy Act, § 60 (Comp. St. 1916, § 9644), as preferential, nor is a mere suspicion of a preference enough to invalidate; but the rule applicable to negotiable paper should not be applied, and instead "what is reasonable cause to believe," etc., must depend on the facts of each case.

4. BANKRUPTCY ⟸166(4)—"REASONABLE CAUSE TO BELIEVE."

"Reasonable cause to believe," under the Bankruptcy Act, covers substantially the same field as "notice," under the equitable doctrine of good-faith purchaser.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reasonable Cause.]

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the District of Kansas.

Petition to Revise Order of the District Court of the United States for the District of Kansas.

In the matter of the bankruptcy of Dave Phillips. Petition by George R. Bassett, trustee in bankruptcy, against Ferd Evans and others to set aside a mortgage as a preference. From a decree denying the petition, the trustee appeals, and also petitions to revise. Petition to revise dismissed, and decree reversed.

E. L. Foulke, of Wichita, Kan. (Jesse D. Wall, of Wichita, Kan., on the brief), for appellant and petitioner.

George Gardner, of Wichita, Kan. (T. A. Noftzger and George W. Cox, both of Wichita, Kan., on the brief), for appellees and respondents.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. [1] This was a proceeding brought by Bassett, as trustee in bankruptcy of Dave Phillips, to set aside a mortgage as a preference. The referee and the trial court denied the petition and sustained the mortgage. The trustee brings the case into this court both by petition and appeal. As he seeks a review of the facts, appeal is the proper remedy, and the petition is dismissed.

[2] The controlling facts are as follows:

In 1910 Phillips, the bankrupt, purchased a stock of drugs and fixtures at Coldwater, Kan., for $4,000, all of which was secured by a chattel mortgage back on the property. He ran the business until January, 1913, when he had reduced the mortgage debt to $1,800, but had built up a large indebtedness to the trade. His principal creditors were C. E. Potts Drug Company, $2,271.26, the Southwestern Drug Company, $533.11, and C. A. Tanner & Co., $338.87. These concerns were wholesalers at Wichita who had acted together for many years in matters affecting retail merchants. In January, 1913, they felt dissatisfied with Phillips' condition, and sent Mr. Wintle, credit manager of the Potts Drug Company, to Coldwater to make an investigation. He not only talked with Phillips personally, but made a careful examination of his books, and ascertained the course and state of his business, and what he was owing to other creditors. What he ascertained is, in our judgment, indicated fully as well by what he did as by what he says he discovered. He took notes for the Potts Drug Company account for $200 each, payable monthly, and for the other accounts notes for $100 each, payable at like periods. The accounts were closed, and a new arrangement made by which Phillips, instead of having the usual commercial credit, was required to settle by cash for all new goods supplied him by these parties twice a month, and certainly not to exceed 30 days. Phillips went forward with his business. At the end of the year he had paid on the notes, so that the indebtedness stood C. E. Potts Drug Company, $1,490.40; Southwestern Drug Company, $347.62; C. A. Tanner & Co., $521.16. It is manifest, therefore, that he was badly in de-

fault on his notes. During this time he kited checks in paying debts for new purchases, and allowed some of them to go to protest, but finally made them good. At the close of the year 1913, Phillips had made no further payment on the purchase-price mortgage on his stock. He owed unsecured debts, in addition to what he was owing appellees, amounting to $2,731.80. He must have known that he was near the road's end.

Early in January, 1914, he agreed with one Dykes to exchange his stock and fixtures for a lot and store building valued for purposes of the trade at $6,000, Dykes to pay the boot in cash. To these negotiations appellees were parties, and, we think, were fully informed. They canvassed the whole transaction with Dykes personally, and discussed it by phone with Phillips. Notes for the amounts due them, and a mortgage upon the store property which Dykes was to deed to Phillips in the trade, were prepared by counsel for appellees, and delivered to Mr. Fisher, an employé of the Potts Drug Company, to take to Coldwater for execution by Phillips. Fisher had talked with Dykes about the property, and was employed by him as his representative in taking an inventory of the stock of drugs. He was engaged in that work for about three days. When the inventory was completed, and before it was footed up, he had Phillips sign the notes and mortgage, and sent them to appellees. The footings of the inventory showed the stock to be worth $7,475. This was $325 less than the $6,000 at which the store building was valued, and the $1,800 which was still due on the mortgage for the purchase price against the stock. Dykes was to have a clear title. He had only $1,000 cash to put into the deal. The Potts Drug Company loaned him $500 with which to make up the sum needed to pay off the mortgage on the stock. The holders of the mortgage accepted Dykes' note for $325 for the balance.

Appellees insist that at the time they accepted the notes and mortgage they believed that Phillips would get enough in the trade to pay all other creditors. They were very careful, however, not to wait for the inventory to be footed up, so they could ascertain as a fact whether this would prove to be the case. Notwithstanding their testimony, we do not believe they really entertained any such expectation. They themselves loaned Dykes $500 with which to pay off the mortgage. Their man, Fisher, had participated in making the inventory. He had a very good chance, as the result of that work, to make a close estimate as to what the stock would foot up, and, although he was not appellees' employé for purposes of taking the inventory, the knowledge which he acquired in view of the fact that he held the notes and mortgage as their agent, and was sent to Coldwater to close up the deal by taking the notes and mortgage, can fairly be imputed to appellees. It is also true that appellees must have been thoroughly familiar with Phillips' business during the year 1913. They were urging him all the time to pay his notes and to take care of his protested checks. Their traveling salesman visited his place of business twice a month to collect for current sales. Through Mr. Wintle, their credit man, they had carefully canvassed Mr. Phillips' situation at

the time the first notes were taken. It is likewise true that the mortgage here involved covered all of Phillips' property except such as was already encumbered for its full value. It covered all that Phillips received in exchange for his stock of drugs. If the mortgage had been taken on the stock of drugs direct, its preferential character would have been plain. What difference can it make that the mortgage was taken on the property which Phillips received in exchange for his stock?

From all the facts we think the conclusion is inevitable that they had reasonable cause to believe that Phillips was insolvent, and that the taking of the notes and mortgage would result in a preference to themselves over the other unsecured creditors. If they did not actually know the facts, the evidence leaves no doubt that they willfully abstained from getting the knowledge until after the notes and mortgage were executed and delivered to them. A circumstance occurred a few days later which throws a strong backward light upon the frame of mind of appellees at the time the mortgage and notes were taken. The Potts Drug Company wrote a letter to Phillips, urging him to move into the store building, so that he could claim it as a homestead. This would not only put the building beyond the reach of creditors, but it would likewise put appellees in a place where the other creditors could not complain, because their mortgage was taken upon exempt property. Reluctant as we are to disturb a finding concurred in by a referee and the trial court, we feel constrained to hold that the mortgage constitutes a voidable preference and ought to have been set aside. Courts must hold parties standing in the position which appellees occupied to have "reasonable cause to believe" what sensible business men standing in their place and possessing their knowledge would have believed. When such a standard is applied to appellees, we think the conclusion is too strong for any reasonable doubt.

The observations of Judge Hook in Pittsburgh Plate Glass Co. v. Edwards, 148 Fed. 377, 78 C. C. A. 191, are equally applicable to the mortgagee here:

> "An examination of the record impresses us with the belief that the appellant's attorney was so well satisfied of the bankrupt's insolvency and its effect upon the mortgage he was about to take that he purposely traveled as close to the edge of actual knowledge as he could without obtaining it."

[3] The authorities tell us that section 60 of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1916, § 9644]) does not, on the one hand, require actual knowledge or actual belief of an intent to prefer (In re Eggert, 102 Fed. 735, 43 C. C. A. 1; In re Virginia Hardwood Mfg. Co. [D. C.] 139 Fed. 209); and, on the other hand, that mere fear or suspicion of a preference will not invalidate a transfer (Powell v. Gate City Bank, 178 Fed. 609, 102 C. C. A. 55). Thus between actual knowledge and actual belief, on the one side, and fear and suspicion, on the other, lies the "reasonable cause to believe" mentioned in the section. This classification, however, is not as helpful in the decision of a concrete case as it appears. Fear and suspicion of insolvency, if they be strong enough, become belief, and the

difficulty with the classification is that there are no criteria by which it can be said that one set of facts ought to engender fear or suspicion only, while another set of facts furnish reasonable cause for belief. It is impossible to group the ever-changing facts of business life into hard and fast categories, and say that one category produces fear, another suspicion, and another belief. Again, the rule of negotiable paper, that facts which arouse suspicion will not defeat the title of a holder (Hotchkiss v. Bank, 21 Wall. 354, 22 L. Ed. 645; Clark v. Evans, 66 Fed. 263, 13 C. C. A. 433), ought not to be applied to a question of preference because that rule "was framed in order to encourage the free circulation of negotiable paper" (Goodman v. Simonds, 20 How. 343, 356, 15 L. Ed. 934), and has no proper application to transfers of property. "Reasonable cause to believe," under section 60 of the Bankruptcy Act, covers substantially the same field as "notice" in determining whether a person is a bona fide purchaser of property. Both relate to transfers of property rather than negotiable paper. Hence, under section 60, the same as in the equitable doctrine of good-faith purchaser, "notice of facts which would incite a person of reasonable prudence to an inquiry under similar circumstances, is notice of all the facts which a reasonably diligent inquiry would develop." Coder v. McPherson, 152 Fed. 951, 82 C. C. A. 99; Grandison v. National Bank of Commerce, 231 Fed. 800, 809, 145 C. C. A. 620.

[4] What constitutes "reasonable cause to believe" under this section is a pure question of fact, and each case is best disposed of by an independent consideration of its own facts. What the statute requires is that the facts and circumstances known to the purchaser shall be ascertained, and then the question answered whether those facts and circumstances would have caused an intelligent business man to believe that a preference was intended, or would have put such a man upon an inquiry that would have discovered the true character of the transaction. If such be the case, the transfer is void. Otherwise it is valid.

We think the mortgage here involved was void, and should have been set aside. The decree below is reversed.

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## KEEFE v. WORCESTER TRUST CO.

### In re RUSSELL FALLS CO.

(Circuit Court of Appeals, First Circuit. October 22, 1918. On Petition for Rehearing, November 27, 1918.)

No. 1361.

1. BANKRUPTCY ⟸205—TRUSTEE—RIGHTS OF.
Though the trustee in bankruptcy of a mortgagor be conceded to have the rights of an attaching creditor, and not mortgagor, in property of bankrupt, he would not have any greater rights than mortgagor to fixtures annexed to mortgaged property prior to bankruptcy.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. APPEAL AND ERROR ⊜501(3)—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—ASSIGNMENTS OF ERROR.
An assignment of error, based on an offer of proof therein set forth, presents nothing for review, where the record fails to disclose that it was excluded, or, if excluded, that an exception was taken thereto.

Appeal from the District Court of the United States for the District of Massachusetts: Jas. M. Morton, Jr., Judge.

In the matter of the bankruptcy of the Russell Falls Company. Certain property and the proceeds thereof were claimed by the Worcester Trust Company, which claim was opposed by Joseph P. Keefe, trustee. From a decree for claimant (249 Fed. 260), the trustee appeals. Affirmed.

Arthur T. Johnson, of Boston, Mass. (Joseph P. Keefe, of Boston, Mass., on the brief), for appellant.

Edmund K. Arnold, of Boston, Mass. (Peabody, Arnold, Batchelder & Luther, of Boston, Mass., on the brief), for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

PER CURIAM. This case presents the question whether certain machines in a paper mill were so annexed to the realty and with such an intent as to become fixtures, so that they passed to the mortgagee of the realty.

The referee in dealing with the matter has classified the machines into groups. The first group consists of machines which both the referee and the District Court found the trust company, as mortgagee, was entitled to under its mortgage. The second group consists of what is called the second paper machine. This machine the referee awarded to the trustee in bankruptcy, but the District Court reversed the referee and awarded it to the Trust Company. 249 Fed. 260. The question involved, as to each group, is a mixed one of law and fact. The parties are practically in accord as to the law; the divergence is as to the weight to be given the evidence and the deductions to be made therefrom. The case was very fully presented and carefully considered in the court below, and, after a re-examination of the evidence and a consideration of the arguments of counsel, we are of the opinion that the findings and rulings of the District Court as to the annexation of both groups of machines to the realty were correct.

[1] If the trustee in bankruptcy, as he contends, has the rights of an attaching creditor and does not stand in the place of the mortgagor (the bankrupt), his rights in the mortgaged property did not accrue before bankruptcy, and, if prior to that event the machines had become annexed to the mortgaged realty, the rights of the trustee in the property would not be different, whether he stood as an attaching creditor or as the bankrupt. When the District Judge in his opinion said the case is one wholly between the mortgagor and the mortgagee, and that the trustee in bankruptcy stood in no better position than the mortgagor, he meant nothing more than that, in determining the question of intention with which the machinery was annexed to the realty,

the circumstances attending the ownership of the property at the time of the annexation could be taken into account, and that, as the property was then subject to a mortgage, it might be inferred from this fact that the mortgagor intended that the machinery should be permanently annexed rather than temporarily.

[2] The appellant takes nothing by his fifth assignment of error. If the offer of proof there set out was made, the record fails to disclose that it was excluded, or, if excluded, that an exception was taken thereto.

We think the question of fees, costs, and charges was rightly determined.

The decree of the District Court is affirmed, with costs to the appellee.

On Petition for Rehearing.

PER CURIAM. The appellant's petition for rehearing is denied. If the record ought to be corrected to show that the appellant duly excepted to the exclusion of his offer of proof, and if the proof therein disclosed was competent and should have been received, we are still of the opinion that, taking it into consideration with the other evidence in the case, no other conclusion should be reached than the one arrived at in our opinion handed down October 22, 1918.

The petition for rehearing is denied.

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## O'HARE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5111.

1. ARMY AND NAVY ⊂⊃40—OBSTRUCTION OF RECRUITING—INDICTMENT.
An indictment charging that defendant made statements in a public address that any person who enlisted for service in France would be used for fertilizer, etc., with the intent of obstructing the enlistment service of the United States, *held* sufficient to charge the offense of obstructing the recruiting and enlistment service, in violation of Espionage Act, tit. 1, § 3.

2. ARMY AND NAVY ⊂⊃40—ENLISTMENT AND RECRUITING—"OBSTRUCT."
A speech in which defendant stated that any one enlisting for service in France would be used for fertilizer, etc., *held* to violate Espionage Act, tit. 1, § 3, denouncing the offense of willfully obstructing the recruiting or enlistment service of the United States; the expression "obstruct" contemplating more than a physical obstruction.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

3. CRIMINAL LAW ⊂⊃829(1), 834(2)—TRIAL—INSTRUCTIONS.
The refusal of a requested instruction substantially covered by the principal charge was not error, for the court is not required to use the precise language of counsel.

4. ARMY AND NAVY ⊂⊃40—OBSTRUCTION OF ENLISTMENT—ESSENTIALS.
To sustain a conviction of willfully obstructing the recruiting and enlistment service, etc., in violation of Espionage Act, tit. 1, § 3, by speeches calculated to have that effect, it is not necessary to show any particular person was prevented from enlisting.

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⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Error to the District Court of the United States for the District of North Dakota; Martin J. Wade, Judge.

Kate Richards O'Hare was convicted of violating Espionage Act June 15, 1917, tit. 1, § 3, and she brings error. Affirmed.

Chester H. Krum, of St. Louis, Mo., and V. R. Lovell, of Fargo, N. D. (H. F. Horner, of Fargo, N. D., on the brief), for the plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. [1] On July 17, 1917, when the United States was at war with the Imperial German government, and was engaged in enlisting or recruiting its forces for the army and navy, Kate Richards O'Hare, a professional Socialist lecturer, delivered an address at a public meeting in the town of Bowman, N. D., before an audience of 100 or more people, in the course of which she said in substance and effect:

> That any person who enlisted in the army of the United States for service in France would be used for fertilizer, and that is all he was good for, and that the women of the United States were nothing more nor less than brood sows, to raise children to get into the army and be made into fertilizer.

She was indicted for violating that part of section 3, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30), which provides that "whoever, when the United States is at war, * * * shall willfully obstruct the recruiting or enlistment service of the United States to the injury of the service or of the United States" shall be punished as therein provided. She was tried, convicted, and sentenced to imprisonment for five years. It is contended that the indictment did not charge an offense under the statute, and that the trial court erred in excluding evidence, and in giving and refusing instructions to the jury. Of these in their order.

The first count will illustrate the claim of the insufficiency of the indictment. It charged that at the time and place mentioned the defendant "did commit the crime of willfully obstructing the enlistment service of the United States to the injury of the service of the United States, committed as follows, to wit." Then follow averments that she made the statements under the circumstances already recited, that she did so with the intention of willfully obstructing the enlistment service of the United States, to the injury of that service, and that there was then war between the United States and the Imperial German government. We will assume, without consideration, that the attack upon the indictment was seasonably made. It is urged that the defendant was merely charged with an attempt and an intention to obstruct the service, whereas the statute requires an actual willful obstruction. But counsel ignore the first part of the count, which, coupled with those following, is equivalent to a charge that the defendant did not merely attempt to obstruct, but

actually did so, and willfully. The final averment of intent may be taken as an additional elaboration of the element of willfulness.

[2] Again, it is asserted that to "obstruct" the recruiting or enlistment service some physical force, obstacle, or impediment must be employed; that mere speech is not sufficient. Doubtless in some relations the word has that meaning; but manifestly it is not so limited in the statute before us. In the very nature of the evil sought to be avoided there could be no more potent means of obstructing, or even defeating, a country in raising its forces for war, especially in a time of voluntary enlistment, than a campaign of abuse calculated to inflame the ignorant or lawless against the operations of their duly constituted government, and to incite or encourage them to resistance. In the sense of the statute to obstruct means also to hinder, impede, retard, or embarrass, and any efficient means to that end is within the condemnation. If counsel were right in this, the picketing of recruiting stations by orators and lecturers would be admissible, if they stopped short of physical violence.

Complaint is made of the exclusion of some evidence of a local political controversy, upon which witnesses for the government and for the defense were divided. The defendant was not a party to it, and it did not affect her, except as it bore upon the feeling of the witnesses toward each other, and therefore rather remotely upon their credibility, and for that limited purpose sufficient of the evidence was admitted by the trial court.

[3] As to the instructions: It is urged that the court erred in refusing a requested instruction that the defendant could not be convicted, unless she used the language set forth in the indictment literally or in substance. The full effect of the instruction was given in the general charge. The court was not required to use the precise words of counsel.

[4] Finally, it is said that the court erred in instructing the jury that it was not necessary that the government show that some particular person was induced not to enlist. The instruction was right. The phrase "recruiting or enlistment service," as employed in the statute, signifies more than the mere induction into service of identified individuals. It means the particular governmental function or establishment as a whole, and comprises the means, agencies, and instrumentalities which it adopts, or upon which it relies, to accomplish its object. If language and the time and circumstances of its use are such as would necessarily result in obstructing the recruiting or enlistment service as so defined, the result will be presumed to have followed. That is the case here. Moreover, there was substantial proof that the defendant embraced the occasion, and that her language set forth harmonized with the trend of her address and accorded with her design.

The other criticisms of the court's charge are clearly without merit.

The sentence is affirmed.

## ROGERS et al. v. CHICKAMAUGA TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. November 2, 1918.)

No. 3213.

1. COURTS ⟸308—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.
   Suit is not maintainable in federal court on ground of diversity of citizenship, defendants and one of plaintiffs being citizens of the same state.

2. BANKRUPTCY ⟸293(1)—SUIT ANCILLARY TO BANKRUPTCY PROCEEDING.
   A suit having for one object discharge of one plaintiff from liability on payment of fund into court, to be interpleaded for by defendants, one of whom was trustee in bankruptcy, and for its other object enjoining proceedings by the trustee against the other plaintiff, *held* not ancillary to bankruptcy proceeding, as regards jurisdiction of federal court without diversity of citizenship.

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by the Chickamauga Trust Company and another against Effie Rogers and others. From an adverse decree, defendants appeal. Reversed, with direction.

R. A. Hendricks, of Nashville, Ga. (W. E. Martin, Jr., of Macon, Ga., on the brief), for appellants.

Geo. S. Jones and Orville A. Park, both of Macon, Ga., E. K. Wilcox, of Valdosta, Ga., and John P. Knight, of Nashville, Ga. (Wilson & Bennett, of Waycross, Ga., and Hardeman, Jones, Park & Johnston, of Macon, Ga., on the brief), for appellees.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. [1] This was a bill in equity, filed in the District Court by the appellees, the Chickamauga Trust Company, a Tennessee corporation, and W. R. Smith, a citizen of Georgia, against the appellants, citizens of the state of Georgia. One of the plaintiffs being a citizen of the same state of which the defendants are citizens, the suit was not maintainable in the court in which it was brought, unless that court had jurisdiction upon some ground other than diversity of citizenship of the opposing parties.

[2] In behalf of the appellees it is contended that the suit was such a one that the court's jurisdiction was not dependent upon a diversity of citizenship. This contention is based upon the circumstance that an object of the suit, as disclosed by the bill, is to enable one of the plaintiffs, the Chickamauga Trust Company, to obtain a discharge of liability for a fund in its possession upon the payment of it into court, which was asked to require the several defendants to interplead and set up conflicting claims, which it was alleged they asserted against the fund; one of the defendants being the trustee in bankruptcy of Effie Rogers. The fund was that part of the purchase price of land of the bankrupt, sold under a foreclosure of a

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

first lien or charge given or created to secure a debt to the Chickamauga Trust Company, which was left after satisfying that secured debt and paying other amounts claimed to have been properly disbursed out of the purchase price. It was contended that the suit was ancillary or auxiliary to the bankruptcy proceeding, and, because of that fact, was maintainable in the court in which it was brought, though one of the plaintiffs was a citizen of the same state of which the defendants are citizens.

The bill did not profess to be in aid of the bankruptcy proceeding. It made no mention of that proceeding, except by averments to the following effect in regard to a petition which it was alleged the defendant trustee in bankruptcy, several months before the filing of the bill, addressed to the referee in bankruptcy:

The petition mentioned averred that said Smith was in possession of a sum alleged to be the balance of the amount paid on the sale under the above-mentioned foreclosure, after paying the secured debt owing to the Chickamauga Trust Company and the costs of foreclosure, and that said trustee claimed that balance, but said Smith failed and refused to pay it over to the trustee; that, pursuant to the prayer of said petition, the referee made an order requiring said Smith to appear and show cause why he should not turn over said alleged balance to said trustee in bankruptcy; that said Smith duly made answer to said petition; and that the proceeding so brought by the trustee in bankruptcy was pending and undisposed of at the time the bill in this case was filed. The relief sought and obtained in this case included an injunction restraining the further prosecution of the proceeding commenced by the filing by the trustee of the above-mentioned petition in the bankruptcy proceeding.

So far as the object of the pending suit was to obtain relief inuring to the benefit of the plaintiff Smith, there was nothing in it to suggest that it was in aid of the bankruptcy proceeding. It was not alleged that any fund was in Smith's possession at the time the bill was filed. The bill contained no offer to surrender to the court anything in the possession of Smith. So far as he was concerned, the bill sought an injunction restraining the further prosecution of a proceeding instituted by the trustee in bankruptcy, which was pending and undisposed of. As to this phase of the pending suit, instead of it being one auxiliary to or in aid of the bankruptcy proceeding, it is rather to be regarded as one seeking to interrupt and thwart the prosecution of a petition filed by the trustee in the bankruptcy proceeding. If the Chickamauga Trust Company had been the sole party plaintiff, it seems that the suit could not properly have been regarded as ancillary to the bankruptcy proceeding, when it was not made to appear that that plaintiff had or sought to have any connection with the bankruptcy proceeding, and that the only relief sought in behalf of that plaintiff was an injunction restraining the defendants from proceeding against the plaintiff after its payment into court of the fund in its possession; the bill showing that the defendant trustee in bankruptcy was one of several adverse claimants of that fund. If, without bringing this suit, the Chickamauga Trust Company had

paid into the bankruptcy court the fund in its possession, that court could have required all claims against that fund to be there asserted.

But the Chickamauga Trust Company was not the sole plaintiff. So far as the suit was in behalf of its coplaintiff, Smith, it had no semblance of a suit ancillary to the bankruptcy proceeding. As to this phase of the suit it was one independent of the bankruptcy proceeding against several defendants, one of whom happened to be the trustee in bankruptcy. It was suggested in argument that the presence of Smith as a plaintiff in the suit may be ignored, and the suit treated as one by the Chickamauga Trust Company alone, because Smith was a mere formal and unnecessary party. A sufficient answer to this suggestion is that the bill sought relief inuring to the sole benefit of the plaintiff Smith, and that such relief was awarded by the decree appealed from. The bill showed that Smith was materially interested in relief sought. The prosecution of a pending proceeding against him alone was enjoined.

Nothing is disclosed which prevents the fact that one of the plaintiffs materially interested in the relief sought and granted is a citizen of the same state of which the defendants are citizens, having the effect of making the case one not within the jurisdiction of the court in which it was brought.

It follows that the decree appealed from was erroneous. It is reversed, with direction that the bill be dismissed for lack of jurisdiction.

Reversed.

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## HUGHES v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5139.

1. INTERNAL REVENUE ⟸11—HARRISON ANTI-NARCOTIC ACT.
The Harrison Anti-Narcotic Act (Comp. St. 1916, §§ 6287g–6287q) is valid as a revenue measure, having substantial relation to the raising of revenue, by bringing the traffic in such drugs into the open, and it is immaterial that another purpose of Congress may have been the suppression of the drug habit.

2. CRIMINAL LAW ⟸304(4)—JUDICIAL KNOWLEDGE—MEANING OF WORDS.
Evidence that morphine, heroin, and cocaine are derivatives of opium and coca leaves is unnecessary, on prosecution for violation of the Harrison Anti-Narcotic Act (Comp. St. 1916, §§ 6287g–6287q); it being a matter of meaning of words long in common use, about which there is no obscurity, controversy, or dispute.

3. POISONS ⟸4—HARRISON ANTI-NARCOTIC ACT—SALE BY PHYSICIAN AS DEALER.
Relative to violation of the Harrison Anti-Narcotic Act (Comp. St. 1916, §§ 6287g–6287q) by selling without written orders from purchasers, it is immaterial that defendant is a physician; his sales not being in the practice of his profession, but as a registered dealer.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

*Rehearing denied January 13, 1919.

J. H. Hughes was convicted of violation of the Harrison Anti-Narcotic Act, and brings error. Affirmed.

B. F. Pursel, of Kansas City, Mo., for plaintiff in error.

Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. Hughes complains of a conviction and sentence for violating section 2 of the Harrison Anti-Narcotic Act of December 17, 1914 (38 Stat. 785, c. 1 [Comp. St. 1916, § 6287h]), by the sale of morphine, heroin, and cocaine to persons not producing written orders on forms issued by the Commissioner of Internal Revenue. He contends that the statute is unconstitutional, that the indictment charged no offense, and that the evidence at the trial was insufficient to justify his conviction.

Section 1 of the act (section 6287g) requires, among other things, all dealers in and dispensers of opium and coca leaves, their salts, derivatives, or preparations, to register with the collector of internal revenue and pay a tax. Section 2 prohibits, with exceptions, the sale or dispensing of the drugs, except upon the written order of the person seeking to purchase, made upon blank forms issued by the Commissioner of Internal Revenue. It also provides that to obtain the blanks the applicant must have registered and paid the tax required by section 1. Duplicate orders in each sale must be made, one to be retained by the purchaser and the other delivered to the dealer, both to be kept for a prescribed period and subject to official inspection. Section 9 (section 6287*o*) prescribes the penalty for violations. The effect of the provisions is to limit sales to registered dealers, save the excepted instances. One exception authorizes physicians and certain others to dispense the drugs in the course of "professional practice only," and the obtaining of them from a dealer upon a physician's prescription, both without the written order above referred to. The accused registered as a dealer and paid the tax, but he sold without written orders from the purchasers.

[1] It is urged that the purpose of the statute was the suppression of the drug habit, and that it is therefore not a revenue measure, but one of police, within the exclusive province of the states. But we think it cannot be said that the provisions referred to have no real or substantial relation to the raising of revenue. If they have such relation, we have nothing to do with any other purpose of Congress. The traffic in such drugs is of a peculiar character. Considerable of it is carried on covertly by peddlers, and the small bulk of the articles facilitates clandestine distribution. The difficulties of subjecting the traffic to excise and preventing frauds on the revenue are obvious, and it was competent for Congress to bring the traffic into the open. That there may be consumers of the drugs, who cannot or will not obtain them in the ways provided, is not enough to condemn the statute. Substantially the same result might have followed a heavy tax on such transactions, as to which there would be no col-

or for claim of unconstitutionality. In a case involving another provision, this same statute was held to be a revenue measure. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854; Id. (D. C.) 225 Fed. 1003.

[2, 3] It is also urged that there was no evidence that morphine, heroin, and cocaine are derivatives of opium and coca leaves. We think that is a matter of which notice may be taken. In a sense the question is one of the definition or meaning of words long in common use, about which there is no obscurity, controversy, or dispute, and of which the imperfectly informed can gain complete knowledge by resort to dictionaries within reach of everybody. Had it deemed it necessary, the court might have affirmatively told the jury the nature of the drugs sold by the accused, but instead of doing so it assumed without question that they were of the kind covered by the statute, as in fact they were. The entire trial proceeded without objection upon that assumption. Common knowledge, or the common means of knowledge, of the settled, undisputed, things of life, need not always be laid aside on entering a courtroom.

It may be said, in conclusion, that, though the accused was a physician, he was not indicted and charged as one, and it was clearly shown that his sales were not in the practice of his profession. His position was that of any other nonprofessional dealer.

The sentence is affirmed.

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## HUGHES v. UNITED STATES. *

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5140.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

U. S. G. Hughes was convicted of violation of the Harrison Anti-Narcotic Act (Act Dec. 17, 1914, c. 1, 38 Stat. 785 [Comp. St. 1916, §§ 6287g–6287q]), and brings error. Affirmed.

B. F. Pursel, of Kansas City, Mo., for plaintiff in error.

Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. This case is like No. 5139 (253 Fed. 543, —— C. C. A. ——) in all essential particulars. The sentence is affirmed for the same reasons.



*Rehearing denied January 13, 1919.

McNEE v. WHITEHEAD.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5126.

1. TAXATION ⟸181—INDIAN LANDS.
The Atoka Agreement (Curtis Act) § 29, providing that allotted lands shall be nontaxable while title remains in the original allottee, did not continue the exemption from taxation which a Choctaw Indian of the half-blood enjoyed to his heirs of less than half Indian blood.

2. TAXATION ⟸181—INDIAN LANDS.
Under Act May 27, 1908, §§ 1, 2, 4, 6, 9, relating to restriction on alienation of lands allotted to Indians, and declaring that death of any allottee removed restrictions, *held* that on the death of a half-blood allottee and descent of lands to heirs of less than half Indian blood the lands became subject to taxation prior to their sale through the Oklahoma probate court; the provisions as to minority not changing the matter.

In Error to the United States District Court for the Eastern District of Oklahoma; J. W. Woodrough, Judge.

Action between George A. McNee and James E. Whitehead. There was a judgment for the latter, and the former brings error. Reversed and remanded for further proceedings.

James S. Twyford and Solon W. Smith, both of Oklahoma City, Okl., for plaintiff in error.

F. E. Riddle, of Tulsa, Okl., and J. E. Whitehead, of Oklahoma City, Okl., for defendant in error.

S. P. Freeling, of Oklahoma City, Okl. (Hunter L. Johnson, of Oklahoma City, Okl., on the brief), amicus curiæ.

Before HOOK and STONE, Circuit Judges, and WADE, District Judge.

HOOK, Circuit Judge. The question in this case is whether lands in Oklahoma allotted to a Choctaw Indian of the half-blood, and therefore exempt from taxation while held by him, become taxable upon his death and the descent of the title to his heirs of less than half Indian blood, prior to their sale through the probate courts of the state. The trial court held them exempt.

[1] There was no vested, contractual right of exemption beyond the power of Congress to abrogate. The Atoka Agreement (section 29 of the Curtis Act [Act June 28, 1898, c. 517, 30 Stat. 495]) provides that the allotted lands "shall be nontaxable while the title remains in the original allottee," but manifestly this does not apply when the title has passed to his heirs by inheritance. To hold otherwise would require the judicial interpolation of the words "or his heirs" after the word "allottee," and we are not authorized to make it.

[2] The case really turns upon sections 1, 2, 4, 6, and 9 of the Act of May 27, 1908 (35 Stat. 312, c. 199). So far as pertinent they are as follows:

Section 1: "That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five

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Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. * * *"

Section 2 provides that the term "minor" or "minors," as used in the act, shall include all males under the age of 21 years and all females under the age of 18 years.

Section 4: "That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes. * * *"

Section 6: "That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the state of Oklahoma."

Section 9: "That the death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: Provided, that no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. * * *"

As regards restrictions upon the alienation of allotted lands and their exemption from taxation, it was the practice of Congress, recognized by repeated decisions of the courts, to make a clear distinction between those lands still held by the original allottees and those acquired from them by inheritance, and that distinction should be borne in mind in the present case. It is conceded here that, if sections 1, 4, and 9 stood alone, the lands in question would be taxable; but it is argued that the definite prescription of ages of minority and the subjection of the lands of minors so defined to the orders of the local probate courts amount to the imposition of another restriction upon alienation, with its accompanying exemption from taxation, notwithstanding the removal of "all restrictions" in sections 1 and 9. We do not think the argument is sound. Where Congress so unmistakably manifested an intention to remove all restrictions, it would take language more clear than that before us to indicate that it imposed another at the same time. In one sense the definition of minority and the commission of jurisdiction to the probate courts of the state constitute a limitation or restriction but the purpose was to avoid the rules, sometimes loosely applied, of estoppel, waiver, and ratification in respect of the acts of minors and to prevent premature majority by decree of a court or by marriage as provided by state statutes. This was but a recognition and strengthening of the ordinary disabilities of minority in behalf of those of Indian blood, not an exception to the removal of restrictions upon alienation generally.

The judgment is reversed, and the cause is remanded for further proceedings in conformity herewith.

DALY-WEST MINING CO. et al. v. SAVAGE et al.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 4914.

APPEAL AND ERROR ⊜766—BRIEFS—SPECIFICATION OF ERRORS—COURT RULES.
Brief for plaintiffs in error not containing a specification of errors on which they rely, as required by Circuit Court of Appeals rule 24 (188 Fed. xvii, 109 C. C. A. xvi), judgment must be affirmed.

Hook, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Action by Catherine Savage and others, widow and minor children of John Savage, deceased, against the Daly-West Mining Company and others, for death of deceased. Judgment for plaintiffs, and defendants bring error. Affirmed.

Hiram E. Booth, of Salt Lake City, Utah (William H. King, P. T. Farnsworth, Joel Nibley, E. O. Lee, Carl A. Badger, and Benjamin L. Rich, all of Salt Lake City, Utah, and William E. Hutton, of Denver, Colo., on the brief), for plaintiffs in error.

Culbert L. Olson, of Salt Lake City, Utah (Albert J. Weber, of Salt Lake City, Utah, on the brief), for defendants in error.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. The brief filed by counsel for plaintiffs in error does not contain a specification of errors upon which they rely, as required by rule 24 of this court (188 Fed. xvi, 109 C. C. A. xvi). In City of Lincoln v. Sun Vapor Street Light Co., 59 Fed. 756, 8 C. C. A. 253, decided on January 29, 1894, this court announced that this rule "will be enforced by the court, to the end that the vital issues in the case may be clearly presented." It has been enforced ever since. Kinser v. United States, 231 Fed. 856, 146 C. C. A. 52, Cooper v. Jewett, 233 Fed. 618, 628, 147 C. C. A. 426. The latest case is City of Goldfield v. Roger, 249 Fed. 39, — C. C. A. —.

The judgment must therefore be, and is, affirmed.

SMITH, Circuit Judge (concurring.) I fully concur in the foregoing opinion and if I had any doubt upon the question raised by Judge Hook still I think there is no prejudicial error shown and the case must in any event be affirmed.

HOOK, Circuit Judge (dissenting.) Our rules of appellate practice, like those of the Supreme Court, are not rules of substantive law determining rights, but are designed merely to facilitate the machinery of justice. Being made by the court, they are applied not inexorably and literally in all cases but with a tempered consideration of their purpose and the efforts of counsel to observe them. We have so ap-

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*Rehearing denied January 7, 1919.

plied them in innumerable instances, and in very many in which compliance has been much less apparent than in the case at bar.

The brief for plaintiffs in error is admirable for its conciseness. True, it does not contain a formal assemblage in one place of the assignments of error relied on, but there is what I think should be regarded, consistently with our custom, as an equivalent. After a narrative of the case and of the trial the brief is divided into eight separately numbered divisions, each disclosing a matter of complaint. I will refer to but two of them, one relating to an instruction asked and refused, and the other to an instruction given. The two instructions, one denied and the other given, are antithetic, and they present a question that goes in a direct way to the very root of the verdict and judgment. At the hearing that question was argued at length without suggestion that it was not sufficiently brought to our notice. What does the brief contain by way of specification of the two errors asserted? The heading of the division relating to the instruction denied gives the number of the assignment of error covering it. Then are given the pages of the record where the assignment, the request for the instruction and the exception to the ruling of the court may be found. Following this, the requested instruction itself it set out "totidem verbis," to use the expression of our Rule 24, with a statement that the court erred in refusing it. Then the argument. The division of the brief allotted to the instruction which the court gave is similarly arranged and is equally specific.

Beyond doubt counsel sought to comply with our rules and they succeeded in all that concerns substance as distinguished from form. We could not help but know from the brief alone precisely what the trial court did, that exceptions were reserved and that our jurisdiction and duty to review were specifically invoked, all with appropriate references to the printed record, and an orderly presentation and discussion of each point separately.

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## GRAVELLE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5087.

INDIANS ⇐13—ALLOTMENT—SELECTION.

As Act Feb. 8, 1887 (Comp. St. 1916, § 4195 et seq.), Act Jan. 14, 1889, and Act April 28, 1904, do not require the distribution of all lands embraced in the White Earth reservation, reservation of land by the Secretary of the Interior in accordance with the treaty of 1867 for an agency farm, etc., will not be reviewed, and, there being other land, an Indian is not entitled to select such land as an allotment.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Annie Fairbanks Gravelle against the United States. From a decree for the United States, complainant appeals. Affirmed.

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George B. Edgerton and Charles N. Dohs, both of St. Paul, Minn., for appellant.

Alfred Jaques, U. S. Atty., of Duluth, Minn., and Francis J. Kearful, Asst. Atty. Gen., and Leslie C. Garnett, of Matthews, Va., for the United States.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. This is an appeal by Annie Fairbanks Gravelle from a decree denying her right to an allotment of a particular 80-acre tract of land in the White Earth Indian reservation in Minnesota. She is a mixed-blood Indian of the Mississippi band of Chippewas and resided on the reservation. Under the treaty of 1867 (16 Stat. 719) and subsequent acts of Congress she was entitled to 160 acres of the lands in the reservation, half of which had been allotted to her before the present controversy arose. In February, 1901, the Secretary of the Interior reserved from allotment a large tract of land in the reservation, including the 80 acres in controversy, for administrative and school purposes, and particularly the 80 acres as an agency farm and pasture. Notwithstanding this the appellant in May, 1916, selected it, and insisted that it be set apart to her to complete her allotment right. She contended that the withdrawal of the land by the Secretary was without authority of law. The trial court held otherwise.

Of course, the Secretary of the Interior has no power to defeat the purpose of an act of Congress directing the disposition of Indian lands, but as the general representative of the government in its relation to the Indians there is much that he may consistently do to carry out its policy towards them while they are still in a state of dependence, and especially in fulfilling its continuing treaty obligations. While the acts of Congress bearing on the present case (Act Feb. 8, 1887, c. 119, 24 Stat. 388 [Comp. St. 1916, § 4195 et seq.]; Act Jan. 14, 1889, c. 24, 25 Stat. 642; Act April 28, 1904, c. 1786, 33 Stat. 539) do not expressly authorize the Secretary to withhold from allotment any part of the White Earth reservation, on the other hand, they do not require the distribution of the entire 36 townships of land embraced in it. Undoubtedly there was a substantial surplus after the completion of the allotments to all entitled. At any rate there is no question here of an insufficiency in quantity or quality created by the withdrawal by the Secretary.

The treaty of 1867 made provisions, rather comprehensive for that period, for the establishment of schools and the promotion of agriculture on the reservation, and pledged substantial aid by the government for those objects. We need not recite in detail what has been done in fulfillment of the treaty. It is sufficient to say that in the years following extensive buildings and other facilities have been provided for the education of the Indians and their instruction in the arts of husbandry. The setting apart of 80 acres for an agency farm and pastures fits well within the treaty, and is not inconsistent with the allotment statutes. It is for the common benefit of all the In-

dians of the reservation, like schools for a city or an agricultural college and farm for a state, and not merely for part of them, as was the case in Leecy v. United States, 111 C. C. A. 254, 190 Fed. 289. The quantity reserved does not appear unreasonable for the purpose, and the location was for the judgment of the Secretary of the Interior, which the courts will not review. That the tract reserved has not yet been used as an agency farm and pasture is unimportant. A view of future needs was permissible, especially when they might be defeated by individual selections and allotments.

The decree is affirmed.

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URY et al. v. MAZER CIGAR MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5045.

1. COURTS ⟸328(10)—FEDERAL COURTS—JURISDICTIONAL AMOUNT.
The federal court had jurisdiction of a suit for unfair and fraudulent competition, where the value of the right to be protected by the injunction exceeded the jurisdictional amount, even though the damages recovered were less than such amount.

2. TRADE-MARKS AND TRADE-NAMES ⟸78—UNFAIR COMPETITION—WHAT CONSTITUTES.
Where defendant copied complainant's cigar containers, the fact that each did business in distant cities, and defendant's containers did not come into competition with those of complainant, other than containers on which complainant pasted a customer's name, *held* not to defeat a suit for unfair competition.

3. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—UNFAIR COMPETITION—EVIDENCE.
Evidence *held* to show that defendant, who was bookkeeper and salesman, engaged with another, who was guilty of unfair competition, was a guilty participant.

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit by the Mazer Cigar Manufacturing Company against Harriet Ury and another. From a decree for complainant, defendants appeal. Affirmed.

Chester H. Krum, of St. Louis, Mo., for appellants.

James Love Hopkins, of St. Louis, Mo., for appellee.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. In a suit by the Mazer Cigar Manufacturing Company against Harriet and Richard Ury for unfair trade and fraudulent competition by closely copying the size, color, and marks of its tin containers for hand-made cigars, the trial court gave plaintiff a decree of injunction and for an accounting. Upon the accounting plaintiff was awarded $346.60 and interest. The defendants appealed, and have specified four errors on which they rely.

[1] 1. That the amount in controversy was not sufficient to confer jurisdiction. But there was proof that plaintiff's property right

which it sought to protect by the suit was of a value much more than the jurisdictional requirement. It is a familiar rule that the test is the value of the right to be protected against a continuing violation, not the amount of loss or damage actually caused by the trespass to date.

2. That plaintiff's claim on the merits was without equity. Upon this a comparison of the containers shows a close resemblance well calculated to deceive the ordinary purchaser. Moreover, there was convincing proof that the defendants had the plaintiff's containers copied in form, marks, and appearance, with the evident intention of appropriating to themselves its trade and good will.

[2] 3. That defendants were not competitors of plaintiff, and therefore there was no unfair competition. This contention rests upon the fact that plaintiff, a Michigan corporation, made and sold its product from Detroit, and that defendants' sales were confined to St. Louis, Mo., and neighborhood; also that the only competitive contact in St. Louis was with a customer and distributor of plaintiff, whose name was printed on the containers. This practice was in accord with established business methods, in which there was no intent to deceive the public, and it does not affect the right to protection. There was in fact a fraudulent competition.

[3] 4. That the liability of defendant Richard Ury was not shown. The evidence disclosed that the business in which the unfair and fraudulent acts were committed belonged to Harriet Ury, and was conducted largely by her two sons. One of them, Richard, was a salesman and the bookkeeper. He conducted the correspondence with the concern in Pennsylvania which resulted in the manufacture of the imitating containers. We have no doubt of his guilty participation.

The decree is affirmed.

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In re PORTER.

HANECY v. TAYLOR (two cases).

(Circuit Court of Appeals, Seventh Circuit. May 16, 1918. Rehearing Denied September 6, 1918.)

Nos. 2543, 2560.

BANKRUPTCY ⊂=170—ATTORNEY'S FEES—RETURN.

Where payment by bankrupt to his attorney, in contemplation of bankruptcy and for services rendered or to be rendered in the bankruptcy proceeding, was in excess of the fair and reasonable value of the services rendered, the attorney was properly required to return the excess.

Petition to Review and Revise Order of, and Appeal from, the District Court of the United States for the Eastern Division of the Northern District of Illinois.

In the matter of Francis G. Porter, bankrupt. Petition by James W. Taylor, trustee in bankruptcy, against Elbridge Hanecy. There was an order in favor of petitioner, and defendant petitions to review

and revise, and also appeals. Petition to review and revise dismissed, and order affirmed.

William A. Rogan, of Chicago, Ill., for petitioner.
Carlos S. Andrews, of Chicago, Ill., for respondent.

Before BAKER, KOHLSAAT, and EVANS, Circuit Judges.

PER CURIAM. On the hearing upon trustee's petition to have certain moneys paid to him, the referee found that the bankrupt, Porter, had paid his attorney for legal services rendered and to be rendered in the matter of the bankruptcy the sum of $2,491.21; that the maximum reasonable attorney's fees for such services were $500. The referee directed the attorney to pay the excess to the trustee. This order of the referee was duly approved by the District Court, and is here attacked, both by petition to review and revise and by appeal.

Petitioner, Hanecy, asserts that the money was paid to him pursuant to an agreement made shortly before the bankruptcy proceedings were instituted, and the agreement thus made called for services to be by him rendered in matters entirely disconnected with these bankruptcy proceedings; that such petitioner was in fact not even aware that bankruptcy proceedings were contemplated. He also asserts that part of the moneys by him received came directly from the bankrupt's wife, while the trustee contends the property converted into cash, if ever the wife's property, was given by her to her husband, and thereby became a part of the bankrupt's estate. The issues thus presented go to the sufficiency of the evidence to support the findings of the referee, and not to the sufficiency of the findings to support the order.

We have examined the evidence carefully and find it conflicting. Nothing could be gained by setting forth the conflicting statements. We conclude that such evidence amply supports the referee's finding that the payment was made by the bankrupt out of his estate in contemplation of bankruptcy, and was for services rendered or to be rendered such bankrupt in the matter of his bankruptcy proceedings. The amount thus received being in excess of the fair and reasonable value of the services rendered, the recipient was properly required to return the excess.

The petition to review and revise is dismissed, and the order affirmed.

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BRINKMAN v. MORGAN, Warden.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5114.

CRIMINAL LAW ⊜1216(2)—SENTENCE—SUFFICIENCY—"CONCURRENTLY."

Where petitioner pleaded guilty to an indictment charging eight forgeries of postal money orders, and under Criminal Code, § 218 (Comp. St. 1916, § 10388), he might have been sentenced to cumulative imprisonment for 5 years for each offense, a sentence to 10 years' imprisonment, to run concurrently on all counts, is valid, and cannot be treated as a sen-

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tence for 5 years, because of the word "concurrently," as that means in unity, and may be treated as providing the imprisonment should run on all the counts in the aggregate.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Concurrently.]

Appeal from the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Petition for a writ of habeas corpus by August Brinkman against Thomas M. Morgan, Warden of the United States Penitentiary at Leavenworth, Kan. From an order denying his discharge, petitioner appeals. Affirmed.

August Brinkman, of St. Louis, Mo., pro se.

Fred Robertson, U. S. Atty., and L. S. Harvey, Asst. U. S. Atty., both of Kansas City, Kan., for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. This is an appeal from an order in habeas corpus denying the discharge of Brinkman, the appellant, from imprisonment in the United States penitentiary at Leavenworth, Kan. He was indicted in eight counts for that number of separate offenses by forging and uttering postal money orders. He pleaded guilty and was sentenced to imprisonment in the penal institution mentioned for 10 years, commencing on a day specified "and to run concurrently on all counts of the indictment." He contends that the words above quoted from the sentence either make it one of imprisonment for 5 years, which with credit for good conduct he claims to have served, or that they are without sense and render the sentence wholly void.

Under the statute applying to his case the appellant might have been sentenced to cumulative imprisonment for 5 years on each count, a total of 40 years. Section 218, c. 8, Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1131). But he contends that a sentence in gross on several counts greater than the statutory provision for one is invalid, and that the 10 years imposed upon him, being more than the punishment authorized for a single offense, cannot properly be said to run "concurrently" on 8. We can conceive of no sound legal objection to a single sentence for several offenses charged in one indictment, if it does not exceed the statutory maximum for all. We have held such a sentence valid. Myers v. Morgan, 139 C. C. A. 641, 224 Fed. 413. It is true that the word "concurrently" is generally used when terms of imprisonment are imposed separately for each of two or more offenses charged in the same indictment, and to indicate that while the convicted prisoner is serving one he is serving all. When so used, the sentence is the opposite of cumulative. But that use is not exclusive. Concurrently is also defined as "in combination or unity." When found in a sentence like that before us, the reasonable construction is that the years of imprisonment specified run as a unit upon all the counts in the indictment; that is to say, not upon each of the counts severally, but all of them in the aggregate.

The prior history of this case—a first sentence, a decision in habeas corpus, and then the present sentence—indicates that the above was intended by the court in which the appellant was tried.

Some other contentions are made. They are either not sustained by the record or not open in habeas corpus.

The order is affirmed.

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CHICAGO, R. I. & P. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5046.

MASTER AND SERVANT ⟸13—REGULATIONS—RAILROAD TELEGRAPHER—HOURS OF SERVICE.

An hour allowed a telegrapher for meals, during which he was subject to recall, etc., cannot be deducted from the whole time he was on duty within the Hours of Service Act, § 2 (Comp. St. 1916, § 8678), so as to allow a railroad company to escape penalty for violating the act by keeping the telegrapher on duty more than 9 hours.

In Error to the District Court of the United States for the District of Kansas; John C. Pollock, Judge.

Proceeding by the United States of America against the Chicago, Rock Island & Pacific Railway Company for violation of the Hours of Service Act. There was a judgment for the United States, and defendant brings error. Affirmed.

Paul E. Walker and Luther Burns, both of Topeka, Kan., for plaintiff in error.

Fred Robertson, U. S. Atty., of Kansas City, Kan., and Roscoe F. Walter, Sp. Asst. to U. S. Atty., of Washington, D. C.

Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The railway company was held by the trial court to have violated section 2 of the Hours of Service Act of March 4, 1907 (34 Stat. 1415, c. 2939 [Comp. St. 1916, § 8678]), by requiring or permitting a telegraph operator in one of its day and night stations to remain on duty more than 9 hours in a 24-hour period. On November 25, 1913, the operator went on duty at 2 p. m. and left at 11:40 p. m., but in the meantime had been absent an hour for supper. The question in the case depends upon the conditions of his absence for supper, and is whether the time should be deducted from the 9 hours and 40 minutes, or whether he was still on duty within the intent of the statute.

The usual daily service of the operator was from 2 p. m. to 11 p. m., with an hour out for rest and his evening meal. The hour, generally from 6 o'clock to 7, was not definitely fixed, but depended upon the requirements of the work. The understanding between him and the company, and the practice, was that, though at some time he should have his hour off, it was alterable and adjustable to

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the needs of the office; also that, while off duty during the hour, he was subject to recall by the company whenever its business required. It is clear that the time allowed was so uncertain and restrained that it was not a period for refreshment, rest, and recreation within the meaning of the law. It was not his own, to occupy as he deemed best. He was at his employer's beck at any time, and might even be called to the office from the table. He was not free to go from his home beyond reach of a summons to active duty, but had to hold himself within call and in readiness to respond at any moment. Instead of that sense of freedom essential to mental and physical relaxation, a tenseness was imposed as by an alarm clock sounding peremptorily, but with uncontrolled irregularity. The hour of rest and refreshment was dominated by the business requirements of the company. That on the day in question he was not called before it expired is immaterial. The arrangement between them and the practice determined their relation, and whether the operator should be regarded as free or on continuing duty. This conclusion is in harmony with the decisions of this and other courts. It is enough to cite Missouri, Kansas & Texas R. Co. v. United States, 231 U. S. 112, 34 Sup. Ct. 26, 58 L. Ed. 144.

The judgment is affirmed.

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## HUNNICUTT et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. October 18, 1918.)

No. 3222.

CRIMINAL LAW ⊂=1038(1)—APPEAL—OBJECTIONS TO CHARGE.

Errors in charge are not available in reviewing court, where court's attention was not directed thereto before jury's retirement.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

Will Hunnicutt and others were convicted of illicit distilling, and they bring error. Affirmed.

John R. Cooper, of Macon, Ga. (E. W. Butler and Sam Hunter, both of Macon, Ga., on the brief), for plaintiffs in error.

E. M. Donalson, U. S. Atty., of Macon, Ga.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. A reversal is sought because of alleged errors in parts of the court's charge to the jury. The record fails to show that before the jury retired any exception was so made as to direct the court's attention to either of the parts of its charge now complained of. The judgment is not to be reversed because of rulings made in the course of the trial, of which complaint was not made to the court before the case went to the jury.

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# UNION SPECIAL MACH. CO. v. QUAKER CITY FLOUR MILLS CO.

# QUAKER CITY FLOUR MILLS CO. v. UNION SPECIAL MACH. CO.

(Circuit Court of Appeals, Third Circuit. August 2, 1917.)

Nos. 2201, 2202.

1. PATENTS ⊜328—NOVELTY—USE OF PRIOR ART.
Bigelow patent, No. 875,314, claims 67–75, inclusive, for a machine for sewing the mouths of filled sacks, is valid; the production of such machine not being, in view of the prior art, the mere exercise of mechanical skill in assembling existing mechanisms, but a problem calling for a high order of inventive genius.

2. PATENTS ⊜328—INFRINGEMENT.
Bigelow patent, No. 875,314, claims 67–75, inclusive, for a machine for sewing the mouths of filled sacks, *held* infringed by defendant's machine, which is illustrated by the drawings of the Burghardt patent, No. 766,111, for a thread cutter for bag-sewing machines, but which, in so far as the issues are concerned, does not purport to be made under a patent.

Cross-Appeals from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Bill by the Union Special Machine Company against the Quaker City Flour Mills Company. Bill dismissed (236 Fed. 246), and complainant appeals; defendant prosecuting cross-appeal. Decree vacated, and record remanded, with directions.

Fraley & Paul, of Philadelphia, Pa. (Joseph C. Fraley, of Philadelphia, Pa., and C. L. Sturtevant and E. G. Mason, both of Washington, D. C., of counsel), for appellant.

J. Edgar Bull, of New York City, and Wm. N. Cromwell, of Chicago, Ill. (Cromwell, Greist & Warden, of Chicago, Ill., of counsel), for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Union Special Machine Company filed a bill in equity against the Quaker City Flour Mills Company, charging infringement of two patents granted to it as assignee. One of said patents, No. 875,314, to John Bigelow, on December 31, 1907, was for a filled-bag sewing machine; the other, No. 875,339, to Charles H. Foster, also dated December 31, 1907, was for apparatus for delivering filled bags to sewing machines. That court adjudged each patent invalid as to the claims in suit, holding, in an opinion reported at 236 Fed. 246, that:

"In view of the prior art, the subject-matter claimed therein involved only the exercise of mechanical skill, and did not require invention."

The case is an important one. It concerns machines in general use, of high mechanical effectiveness, and of much economic and commercial value in industries where the mouths of filled bags of different sizes are sewed. The plaintiff is a large manufacturer of special sewing machines for factory, as distinguished from domestic, use, and,

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while the defendant is engaged in milling flour, its bag-sewing machine is manufactured by the Washburn-Crosby Company, which is defending this test case. No questions of title or accounting for past profits are here involved, and the purpose of the parties is to make this a test case between the two manufacturers. It will therefore be seen the issues involved are simply validity and infringement.

[1] Turning first to the question of validity, we note that it is now clear that the successful solution of the problem of constructing a filled-bag sewing machine involves the successful co-ordination of several dependent mechanical elements. In the first place, for successful commercial practice, it is necessary that the passage of the bags on the endless conveyor be rapid; otherwise, the machine could not be used. In the next place, for mechanical reasons, it is necessary that the travel of the bags be continuous and nonintermittent, as it is obvious that a conveyor should not be subjected to the sudden and numerous jerks incident to an intermittent, interrupted forward movement of a number of heavy filled bags. In the next place, the sewing by machine of a fabric requires that there must be an intermittent dwell or interrupted movement of the fabric during the instant the needle is in it. It follows, therefore, that to make a bag-sewing machine mechanically operative, that portion of the bag which is immediately adjacent to the stitch-forming mechanism, and which is being sewed, must have an intermittent forward movement to permit needle disengagement from the fabric, while at the same time there must be a continuous, nonintermittent advance of the main body or bulk of the bag; in other words, there must be a distinct, individual, intermittent fabric feed, and a distinct, individual, continuous bag feed, different in themselves, but so coupled and co-ordinated by combining mechanism that the continuous travel of the body of the bag and the intermittent travel of the mouth of the bag shall be actuated from a single driving shaft, so as not to conflict with each other.

That filled bags could be conveyed rapidly was, of course, well known. That filled bags could be successfully machine sewed was equally well known. That bag conveyance was and must be continuous and nonintermittent, and that sewing was and must be intermittent, were recognized facts. It was, however, to the very difficult problem of the harmonizing of these two latter seemingly antagonistic, indispensable factors, that the patent of Bigelow was, in the claims here concerned, addressed. In addition to the above antagonistic elements of fabric feed and bag feed, three other complicating factors were also involved. In the first place, the bag was filled and open-mouthed, and it had to stand upright on the conveyor; hence the sewing mechanism had to overhang the upright bag, and therefore the fabric to be sewed must be presented to the needle in a vertical position, and the needle must reciprocate back and forth in a horizontal, instead of in the customary vertical, way. Moreover, as the bags themselves were of different heights, it is evident that the conveyor, which has continuous motion, as we have seen, and had to be co-ordinated to the intermittent motion requirement of the sew-

ing mechanism, had to be so constructed that it could be adjusted to handle different heights of bags without disturbing such co-ordinated relation between it and the sewing machine. These several features are aptly described by one of the plaintiff's witnesses in these words:

"In such a machine it is important that the feed or carrier belt or conveyor should be capable of being moved up and down relatively to the sewing machine, so that the same machine may be used for bags of different sizes. The movement of the conveyor or carrier belt is automatic; it being fed or moved along by a connection with the same driving mechanism which drives the stitching mechanism, thereby insuring a proper feed of the bag as the stitching proceeds. This involves co-ordination between the automatic driving mechanism and the mechanism for raising and lowering the carrier belt, in order that the carrier belt may be driven at the proper speed, irrespective of its elevation. The feed of the material in an ordinary sewing machine is commonly an intermittent or step-by-step feed. In dealing, however, with so large a weight as a filled bag, it is important that it should be fed continuously, to avoid the abrupt movement of an intermittent feed."

The final development in this art of a successful filled-bag sewing machine has now brought into clear light that these fundamental factors and conflicting elements confronted the art, and had to be overcome and co-ordinated, if a commercially successful machine was to be produced. It is also clear from the testimony that the need of such a machine was felt in the art, that sewing machine constructing companies of long experience recognized the difficulty of its solution, and that men of large mechanical ability addressed themselves to the problem. It has therefore seemed probable to us from the proofs that the production of such a machine was not the mere exercise of mechanical skill in assembling existing mechanisms, but rather a problem that called for a high order of inventive genius. That such was then the view of those versed in the art is shown by the correspondence in 1897 between two such experienced firms as the Washburn-Crosby Company, the real defendant in this case, and the well-known Willcox & Gibbs Sewing Machine Company. The letter which is printed in the margin [1] shows that the Washburn-Crosby Company were un-

[1] New York, November 16, 1897.

Washburn-Crosby Co., Minneapolis, Minn.—Gentlemen: We duly received your esteemed favor of October 21st, and since its receipt have had under consideration this matter of *stitching the mouths of flour sacks when filled.* Several of our experts have looked the subject over, and we regret to say to you that none of them are able to advise us that the thing is very easy of accomplishment, nor is it very clear to any of them how the thing is to be done at all, and, under any circumstances, it cannot be discovered that there is very much money in this thing, however well it might be done. You tell us in yours of October 21st that some Chicago people already have "a large machine for packing seeds and grain from the spout and sewing them into the automatic stitch." It would seem to us (and the same recommendation comes from every one who has looked into this matter in your behalf) that those are the people to go to, to get done the work you want on flour sacks. If they have got so far as to have a machine successfully working in the stitching of sacks filled with seeds, it would appear to be a simple matter to apply it to sacks filled with flour. If we wanted anything of this kind done, we should betake ourselves at once to these Chicago people, in preference to attempting any device of our own getting up. In this way we should avail of experience already gained, and in all probability find the broad ground so covered with patents by these Chicago people as to make anything outside

able to solve the problem of a filled-bag sewing machine, and had appealed for help to the Willcox people. The experts of the latter, however, were unable to see how it could be done, but advised the Washburn people to confer with Bigelow, the patentee, as a man with large experience in mechanical matters. It is also clear that the Timewell machine, made under patent No. 607,810 of July, 1898, applied for July 31, 1897, and several others, and which is now urged as an anticipation, was confessedly inadequate to meet the standard of efficiency required in a commercially successful bag-sewing machine. In that regard the testimony of Harding, the superintendent of the Washburn-Crosby Company, was that they returned the Timewell machine to the manufacturer because it was not a success in their work; that he suggested some changes, which were made; that these were not successful, and the machine was again returned to the Timewell people. As to the capacity of the machine, the testimony of Scott, a millwright, was:

"We can sew all the way from 6 to 10 bags per minute, but 6 bags a minute is about as fast as they can handle them and truck them away, 100-pound bags."

So, also, Harding's testimony was:

"Q. Do you know about how many bags per minute or per hour you were able to sew with that machine? A. I think while the machine was running we were able to sew about 6 or 8 a minute. Q. Is that sufficient speed to make a machine of that kind desirable and profitable to the owner? A. It is not. Q. In your opinion, about how many sacks per minute ought to be the capacity of a machine to be a successful and desirable one for that purpose? A. From 15 to 20."

From the testimony of the same witness, it appears that he himself sought to solve the problem, and had a machine built, but that even a skilled operator was only able to get a speed of from 12 to 15 per minute on it, and that its use was finally abandoned. From our examination of the prior art, we may regard Timewell as the high-water mark of development prior to Bigelow; but as such it is clear that it left no impress on the milling industry, and had it, or indeed any other attempt prior to Bigelow, been all the art developed, that art would never have gone to the use of bags and the discard, in large part, of barrels. Moreover, it is clear that in Bigelow selecting from the prior art the separate individual elements not only was a wise choice required in the selection of usuable elements, but there was a corresponding wisdom required in discarding elements or parts of elements

of them somewhat inefficient. Mr. John Bigelow, of your city, is a long-time friend of ours, and during the past week he was in here. Being in the same business as yourselves, we interviewed him on the subject and went over the correspondence. He suggests that upon his return to Minneapolis he will look into the matter a little, and he thinks, if you will see him, a talk over the matter might be interesting and to your benefit. Mr. Bigelow has had a large experience in mechanical matters. We wish, after his return home (which will be about the 1st of December), you will see him for a talk; he will give you some idea of how we feel about this subject.

Yours very truly, [Signed] Willcox & Gibbs S. M. Co.,
J. Parmly, Treasu.

inconsistent with the co-ordination essential to the successful working of a bag-sewing machine. The state of the art when Bigelow turned his attention to it, and its failings, and what he had to do, are fairly set forth in the summary made by counsel, viz.:

"In the case of the Timewell machine, which constituted the high-water mark of the prior art, the inventor mutilated the sewing machine, by omitting its feed mechanism, and thus precluded the possibility of proper co-operation between the needle and the feed of the fabric, so that imperfect sewing and breakage of needles must occur. So, also, the frame of the machine was made to completely inclose the critical portion of the bag where the stitching was being performed, and hence the operator could not have access thereto at the critical moment. The fabric at the region of the seam was rigidly clamped in a vertical plane. * * * The prior patentees, Onderdonk and Williams, associated a complete sewing machine (which otherwise might have worked properly) with a belt driven wholly by gravity, and consequently at a nonuniform rate, and without the co-ordination between the progress of the bag, as a whole, and the progress of the seam, as an individual part of that whole. Curtis and Timewell, who employed an adjustable carrier, persisted in driving it by a chain and sprocket device, which would not permit the carrier to be raised or lowered without at the same time actuating it backwards and forwards. Curtis had no supporting table, and only raised or lowered one end of the carrier. Taking the most extreme view against the Bigelow invention, and asserting that he only took one element from one inventor, a second element from another inventor, and so on, his work has this double aspect: First, intelligent recognition of the proper elements to select for a total new combination; and, second, rejection of certain structural features which theretofore had been associated with these elements in old combinations, and which would have precluded the realization of their latent possibilities, if united in the total new combination. These mistakes in the former machines were due to the fact that the inventors did not appreciate the tout ensemble, and failed to see the practical disadvantage of certain structural features. Bigelow, on the other hand, not only perceived all the desiderata, for the total combination, but recognized the non desiderata of various old elements, and eliminated the disadvantageous details. * * * In popular language, Bigelow found certain very desirable elements of the prior art, in bad company. He disassociated the individuals from their undesirable companions and recombined them in such form as to permit the efficient assertion of their own best qualities."

Bearing these matters in mind, we turn to the disclosure made by Bigelow, first noting that his machine, in addition to the co-operating mechanism adapted to the sewing and the conveying of the bags and for adjustment of the conveyor to different sized bags, also embodied other mechanism; e. g., for cutting thread, etc., which need not be here discussed. Putting, therefore, these nonessential matters aside, it suffices to examine the specification with a view to understanding the several claims which embody the sewing, conveying, and conveyor adjusting features above referred to; and in that connection it should be noted that Bigelow developed these different separate features of his machine at different times, and his testimony that he completed his machine at a certain time must be understood, not as referring to the completion of these separate agencies involved in the present case, but to the completion of the machine as a whole and involving these other mechanisms. Turning, therefore, to the patent, and confining our attention to the sewing, conveying, and the conveyor adjusting mechanism, and to the mechanism by which these three elements are co-ordinated, we note that Bigelow states:

"The invention relates to means for sewing filled bags; and the object of the invention is to provide means whereby bags of flour or other material may be quickly closed and sewed. A machine for this work must be capable of holding the filled bags, grasping the folded tops thereof, feeding the same to the sewing machine proper, sewing the bag top, and clipping the thread, so that the bag will be delivered from the machine ready for shipment. Such a machine should be constructed and adapted for very rapid operation, and in order to permit the same, and the rapid manipulation of the parts by the operator and in accordance with the hand movements that are required, it becomes necessary to add many novel features to the sewing machine as it is commonly known. Portability is another feature which it is desirable to secure, as a single bag-sewing machine, if capable of being moved about a mill, will take care of the product of a number of packers. The difficulties that arise in this art are due to the weight of the bags to be handled, the lack of uniformity both in shape and size of the bags, the nature of the cloth or the paper from which the bags are made, the adjustments necessary in the sewing and feeding members, the necessity for stopping and starting the machine frequently, and the weight and cost of the mechanism that must be assembled to perform the various functions of a bag-sewing machine. These difficulties I have avoided in the invention fully described and claimed hereinafter."

He further says:

"My invention may be briefly described as comprising a frame carrying an adjustable automatic feeding table and a sewing head, which latter comprises a stitch-forming mechanism provided with a much longer work plate than usual, and which work plate carries or has associated with it an automatic bag starting and feeding mechanism, wherein the operator may arrange the flap of the bag when the machine is stopped, and which mechanism will automatically feed the bag forward to the sewing mechanism when the machine is started."

Turning to Figure 1, we note, first, that the central and novel element in combination of Bigelow's machine, around which all the elements here concerned center, and which co-ordinates the sewing feed, the bag feed, and the conveyor shift, is the (brown) telescopic shaft member, *100*. Turning first to the conveyor, we note that it consists of the rigid (yellow) table *12*, over which moves the (green) flexible belt *23* which travels on (purple) pulleys *28* and *27*, the latter being driven from the head of the machine. This table, *12*, is adjustable vertically (see Figure 3).

"The table preferably comprises a long plank or plate *12*, fastened upon the brackets *13*, which have horizontal extensions or ends *14* (see Figure 1) adapted to slide up and down upon the guideposts *4*, being arranged upon opposite sides of the sleeve *5*. The backs of the brackets *13* are provided with the racks *15*, with which the pinions *16* mesh. These pinions *16* are fixed upon the shaft *17*, having bearings in the tops of the brackets *6*, and provided with a handwheel *18* at one end. By turning the handwheel the brackets *13* and hence the table *12* may be raised and lowered. For securing the table at the desired elevation I provide the pawls *19* to engage the pinions *16*. These pawls, in order that they may be adjusted at the same time, are preferably placed upon a single shaft *20*, held in the tops of brackets *6*, and which shaft may be rocked by the handle *21* thereon, which being thrown back will withdraw the pawls from the pinions."

It will be noted that the shaft *27'* of (purple) pulley *27*, which actuates the conveyor, intermeshes (see Figure 7) with the dominating (brown) telescopic shaft *100*.

Turning next to the sewing mechanism, we note (see Figure 5) that the (saffron) machine head is mounted on bracket *34* and overhangs the feed table. As it is stated in the patent in suit that any conventional form of bag-sewing machine can be used, and as the particular type here employed is a matter of indifference, we refrain from a detailed description of the sewing machine, and confine ourselves to pointing out that its intermittent feed is controlled by engagement with the (brown) dominant telescopic shaft *100*. In that regard, referring to the feed bar *45* (a number on patent sketches not here shown) Bigelow says:

"The whole forward edge of the bar is toothed or serrated. As the (saffron) operating shaft *37* of the sewing head is rotated, the bar will be alternately moved out through the work plate and toward the needle, and drawn back and returned, to *intermittently* advance the goods or fabric upon the work plate."

That this intermittent feed of the sewing mechanism is regulated by the (brown) telescopic shaft *100*, is shown by Fig. 5, where (saffron) shaft *37* is provided with (pink) cog *95*, which intermeshes with cog *94* mounted on (blue) shaft *89*, provided with threads *98* engaging cogged wheel *99*, mounted on (brown) dominating shaft *100*, which also dominates the various mechanisms extending by another path from the outer end of (blue) shaft *89*, through parts *93*, *109*, *110*, etc., to the sewing head.

The operation and function of the (brown) dominating telescopic shaft *100* is thus described by the patentee:

"The feed on drag belt *23* on the table *12* moves very slowly compared to the shaft *37* of the sewing head, *but should be driven from the same shaft in order that it may be started and stopped in exact time with said shaft* 37 *and the parts dependent thereon.* Therefore I provide the (blue) shaft *89* with a worm to drive the worm gear *99* on the upper end of the (brown) telescoping shaft *100*. The lower end of this telescoping shaft (see Figure 7) is connected with the shaft *27'* (see Figure 4) of the (purple) belt pulley *27* by the bevel gears *101* and *102*. The ends of the shaft *100* are held in yokes *103* and *104*, journaled respectively upon the shafts *89* and *27'*. A *slow* movement is thus communicated to the feed belt of the *table, and this movement remains constant and positive*, regardless of the height to which the table is adjusted."

It will thus be seen that the telescopic shaft *100* is the element which served to co-ordinate and properly synchronize the intermittent feed of the sewing machine and the continuous feed of the conveyor, and that it also, by its telescopic function, enabled the table to be shifted vertically without affecting the co-ordination of such bag and fabric feeds. This telescopic shaft, in itself a known mechanical agency, had never before been used for the purpose of co-ordinating the fabric and bag feed of a bag-sewing machine, and to our mind the use of its function in such art was novel, useful, and of marked inventive character. It follows, therefore, the patent for such device is valid, if Bigelow was the inventor thereof. In that regard we have the record of the interference between him and Foster, the patentee of No. 875,339, wherein Bigelow was awarded priority, and the grant to him of the generic claims involved in such interference.

The status of the bag-sewing art in 1894 is shown in patent No. 529,769, granted to Williams that year, wherein he says:

"Heretofore it has been the common practice, in flour mills and other establishments where cotton sacks or sacks of other fabric are employed, to sew the lips of the same together by hand, which, as is well known, is a slow and tedious process. The closing of the sacks by machine such as herein described must, as will readily be seen, not only result in the sack being rapidly closed, but in the production of such close and uniform stitches as to prevent the leakage or sifting through of the powdered or pulverized contents of the sack."

This shows the art was then practically without any mechanical sewing device. It is quite clear that Williams' contribution to the art was of small moment; that it left no practical impress upon it; that it wholly lacked the telescopic bar of Bigelow, and embodied no mechanism or relation of parts which in any degree suggested the use of such co-ordinating member between a sewing mechanism and a conveyor. In Williams, the conveyor moved by gravity—had no co-ordinating relation to the sewing mechanism. Indeed, we may dismiss Williams from the situation by saying we agree with the estimate of his device given in defendant's brief, viz.:

"A bag-sewing device in its most primitive and elementary form."

Three years later Onderdonk, by patent No. 583,388, of May 25, 1897, disclosed a filled-bag sewing machine in which there was an inclined feeding mechanism and an overhang sewing machine; but it lacked any co-ordinating shaft connection between the sewing mechanism and the conveyor, the latter being moved by gravity and a foot brake used to prevent its too rapid movement. It is needless to say its separate, non-co-ordinated movement of fabric feed and bag feed shows that Onderdonk was wholly lacking in the connecting mechanism which gave inventive character to Bigelow's disclosure. Both Williams and Onderdonk, lacking this central and co-ordinating element, had no commercial value, and it is quite apparent that other designers realized the problem of a filled-bag sewing machine was not solved by them, and that there was room and a call for those further efforts evidenced by the efforts of Foster and Harding. We have not overlooked the contention, earnestly made, that Bigelow was visited with knowledge of what Williams and Onderdonk did, and that by combining features separately disclosed in the two and adding known mechanical agencies he evolved his machine. Of course, Bigelow is visited with knowledge of those devices and of the functional work of their several parts. But what, after all, did Williams and Onderdonk teach Bigelow, but the way to the scrap heap?

Of the work of the Timewell Company we have already spoken; but, in view of the fact that the evidence shows that the Timewell machine, as well as an attempted improvement of it by Harding, a man experienced in the art, were unsuccessful, we deem it needless to discuss its mechanism, simply noting that one all-sufficient reason for failure of machines of that type can be attributed to limitations set forth in a criticism of them by Curtis in patent No. 639,216, of December 19, 1899, for a filled-sack sewing machine, where he says:

"In both these types of machines the forward movement or travel of the holder or sewing mechanism, the one in respect to the other, is relied upon to accomplish the feed of the sack mouth to the needle during the sewing opera-

tion and to hold the sack mouth in position against the thrust of the needle; the sewing mechanism itself not having the customary feed device."

In other words, the Timewell machines had no intermittent feed movement, but had simply the continuous feed movement of the conveyor. Apart from the other consideration of the machine not being of the speed required, this characteristic of the Timewell device, viz. absence of intermittent bag feed, stamped it as of a different class from Bigelow's.

We turn next to this Curtis patent, No. 639,216, just referred to. It was taken out by Curtis' assignee, the Timewell Sack-Filling & Sewing Machine Company, which company, as we have already noted, had attempted unsuccessfully to make a bag-filling sewing machine for the Washburn-Crosby Company. The proofs show that Curtis, the patentee, was familiar with the Timewell patents and had made the drawings for a number of them. He was called by defendant as a witness, and was evidently familiar with the development of the Timewell machines. He gave no testimony whatever as to the use of his own device, whether any practical use had been made of it, or, indeed, whether a machine embodying its features had ever been constructed. In view of the business in which the Timewell Company was engaged, of its desire to make a successful machine, its inability to do so, its ownership of the Curtis patent, and of Curtis himself being on the stand and silent as to its merits, we are justified in regarding this patent as representative of the mere paper, as contrasted with the practical art. To allow such paper failure of Curtis to nullify the practical success of Bigelow would defeat the whole spirit of the patent law, which seeks to reward successful disclosures and avoids nullifying such successful disclosures by abortive and unsuccessful suggestions. We do justice to the situation by refusing to give to the Curtis patent any more practical weight than its patentee, its owner, and the art gave it, which was no merit whatever. We may add, further, that we are satisfied, as noted below, that the combination of elements in the claims here involved was completed by Bigelow before March 27, 1899, and therefore, whatever the significance of Curtis' patent, the application for which was made March 27, 1899, it could not affect the earlier invention of Bigelow.

This brings us to a consideration of Harding's alleged prior use. The court below found against Harding on this issue, and with that finding we agree. We have carefully considered the contentions as to Harding's machine, as it was originally built and as it has been since altered. It would serve no useful purpose to here enter upon a lengthy discussion of the evidence, since our conclusion is that, whatever the alterations that have since been made upon the machine were, and however much or little they changed the Harding machine, three things stand out in uncontradicted prominence, viz.: First, Harding was a man in authority in a business where there was a call for a successful bag-sewing machine; second, that with power to use his own machine for such work, it was not after trial used by

his own company; and, third, Harding's own letter of March 31, 1899, in which he says:

"The Union Special Sewing Machine Co., Chicago, Illinois—Gentlemen: The writer learned in a roundabout way that you have a sewing machine sewing sugar sack. We have been agitating the sewing of our small sack, by power, for some two years back, but up to this time have nothing satisfactory to do the work. If you have perfected anything that will do our work rapidly, we should be pleased to hear all about it and try one of the machines at once. Kindly address the writer care of this company"

—clearly shows either that at that date he had produced no machine of his own, or that, if he had produced one, it would not do the work. The evidence clearly satisfies us that, while Bigelow did not complete his machine as a whole until midsummer, 1899, that part of his machine which is embodied in the claims here in issue was conceived and perfected by him in advance of March 27, 1899. We are therefore of opinion, as was the court below, that no such prior use by Harding has been established as will invalidate the claims here involved.

[2] We turn next to the question of infringement. This involves the several claims quoted in the margin.[2] They all involve, in various terms, the mechanical operation effected in Bigelow's machine by the (brown) telescopic shaft, marked *100*, which co-ordinates the

[2] 67. An apparatus for feeding and sewing filled sacks, including a supporting framework and a driving shaft, a sewing mechanism, connections between the two for operating the latter, said sewing mechanism embodying a head overhanging the edge of the framework, a conveying mechanism outside the framework and in proper relation to the sewing mechanism, with connections between the conveying mechanism and driving shaft, for operating the former, and means for adjusting the conveying mechanism bodily with respect to the sewing mechanism, and simultaneously automatically adjusting its operative connections with the driving shaft, substantially as described.

68. An apparatus for feeding and sewing filled sacks, including a supporting framework, and a driving shaft, a sewing mechanism, said sewing mechanism being arranged to overhang the edge of the framework, connections between the driving shaft and the sewing mechanism for operating the latter, a conveying mechanism arranged outside the framework and in proper relation to the sewing mechanism, and including a horizontal endless carrying belt, connections between the same and the driving shaft for operating said conveying mechanism, and means for adjusting the conveying mechanism bodily with respect to the sewing mechanism, and simultaneously automatically adjusting its operative connections with the driving shaft, substantially as described.

69. In an organized apparatus for feeding and sewing filled sacks, a suitable supporting framework, a sewing mechanism thereon, a driving shaft, a horizontal conveying mechanism outside the supporting framework, connections between the driving shaft and the sewing mechanism and between the driving shaft and the conveying mechanism, and means for raising and lowering the conveying mechanism bodily and simultaneously raising and lowering the operative connections between the conveying mechanism and the driving shaft, substantially as described.

70. The combination in a filled-bag sewing machine, with a sewing head of a table, open at one side to receive the filled bags, a driven carrier belt arranged upon said table and adapted to continuously move the filled bags along said table and past said sewing head, driving connections for the carrier belt and the sewing mechanism, and means for relatively adjusting the

sewing feed and the bag feed. They were framed by the Patent Office and constituted the issue in the interference proceeding between Bigelow and Foster. On the determination of that issue in favor of the former, these claims, which embody the real gist of Bigelow's invention, were embodied in Bigelow's application at the suggestion of the Patent Office authorities.

The defendant's machine is illustrated by the drawings of patent No. 766,111, granted August 23, 1904, to E. H. Burghardt, for a thread cutter for bag-sewing machines. It should be noted that, while the defendant's machine is represented in Burghardt's patent, that such patent being for a thread cutter only, which is not here involved, the defendant's machine, in so far as the issues here involved are concerned, does not purport to be made under a patent. Turning to the claims of Bigelow, we note, for example, that in claims 67 and 68 is the element, "Means for adjusting the conveying mechanism bodily with respect to the sewing mechanism and simultaneously automatically adjusting its operative connections with the driving shaft;" in claim 69, "connections between the driving shaft and the sewing mechanism and between the driving shaft and the conveying mechanism;" in claim 70, "driving connections for the carrier belt and the sewing mechanism;" and in 71, "means for relatively adjusting the

sewing head and table, and means for maintaining the driving connections in various adjusted positions.

71. An organized machine for feeding and sewing filled sacks, a suitable supporting framework, a sewing mechanism thereon, a driving shaft, a conveying mechanism outside the supporting framework, operative connections between the driving shaft and the sewing mechanism and between the driving shaft and the conveying mechanism, and means for relatively adjusting the sewing mechanism and the conveying mechanism and simultaneously adjusting said operative connections between the driving shaft and the conveying mechanism, substantially as described.

72. The combination in a filled-bag sewing machine of a sewing head, a table open at one side to receive the filled bags, and a driven carrier belt supported upon said table and adapted to continuously move along the upper face of said table to carry the filled bags along the same and past the sewing head, substantially as described.

73. An organized apparatus for feeding and sewing filled sacks, comprising a table, open at one side, to receive the filled sacks, a sewing head carrying stitch-forming mechanism overhanging the table, a driven carrier, arranged upon said table, and adapted to move the filled sacks along the table and past the sewing head, and means for relatively adjusting the sewing head and table whereby varying sizes of sacks may be sewed, substantially as described.

74. An organized apparatus for feeding and sewing filled sacks, comprising a supporting framework, a sewing head supported thereby and projecting beyond the edge of said framework and carrying a needle reciprocating substantially horizontally, a table beneath the sewing head, and a carrier on said table upon which the filled sacks are supported, means for operating the carrier, and means for relatively adjusting the sewing head and carrier, substantially as described.

75. An organized apparatus for feeding and sewing filled sacks, comprising a supporting framework, a sewing head supported thereby and projecting beyond the edge of said framework and carrying a needle reciprocating substantially horizontally, a driven carrier arranged beneath the sewing head upon which the filled sacks are supported and fed past the sewing mechanism, and means for operating the carrier, and means for relatively adjusting the sewing head and carrier, substantially as described."

sewing mechanism and the conveying mechanism, and simultaneously adjusting said operative connections between the driving shaft and the conveying mechanism."

The claims embodying this general element of means for so connecting the stitch and bag progression were in the interference proceeding, as we have seen, awarded Bigelow, who illustrated such means by a two-part shaft, one part telescoping within the other, and relative engagement between the two parts being maintained by means of a longitudinal spline and groove. It will thus be seen that the generic claim for means was awarded Bigelow, while a claim, inter alia, for the specific means of a sliding worm splined upon a one-part shaft and engaging a worm wheel, was allowed to Foster. Now, as Foster's claim was specific, and was servient to Bigelow's generic claim for means, it is manifest that defendant, who has followed Foster's specific means, has thereby subjected itself to the generic claim of Bigelow. As the claims of Bigelow we have cited afford ground for enjoining the defendant's machine, and no accounting is here involved, we limit ourselves to holding claims from 67 to 75, both inclusive, are infringed. Although no appeal was taken as to the finding of the court below in reference to the Foster patent, that patent has necessarily been considered as a part of the history of the case; but it is proper to add that we are not to be understood as passing upon the question of its validity.

The decree below will therefore be vacated, and the record remanded to that court, with directions to reinstate the bill, to enter a decree adjudging claims 67 to 75, inclusive, of Bigelow's patent, valid and infringed, and to issue an injunction thereunder.

## HAILEY et al. v. OREGON SHORT LINE R. CO.

(District Court, D. Idaho, S. D. September 4, 1918.)

1. CARRIERS ⊂=218(10)—CARRIAGE OF LIVE STOCK—INTERSTATE SHIPMENT—NOTICE OF LOSS.
   Where an interstate shipment of horses was unnecessarily and carelessly held in the railroad yards at an intermediate point, notice of claim for loss was unnecessary; the shipping contract following Act Feb. 4, 1887, § 20, as amended by Act March 4, 1915, § 1 (Comp. St. 1916, § 8604a), declaring notice unnecessary for damage in transit by carelessness or negligence, etc.

2. PLEADING ⊂=364(3)—STRIKING REDUNDANT MATTER—ANSWER.
   Notice of damage to live stock in transit, caused by the carrier's negligence, being unnecessary, under Act Feb. 4, 1887, § 20, as amended by Act March 4, 1915, § 1 (Comp. St. 1916, § 8604a), an allegation, in answer in action for such damage, as to lack of notice, will be stricken as redundant and immaterial.

At Law. Action by J. A. Hailey, J. W. Smeed, and C. R. Smeed, copartners doing business as the Caldwell Horse & Mule Company, against the Oregon Short Line Railroad Company, a corporation. On motion to strike a portion of the answer, and demurrer thereto. Motion allowed.

Wood & Driscoll, of Boise, Idaho, for plaintiffs.

Geo. H. Smith, of Salt Lake City, Utah, and H. B. Thompson, of Pocatello, Idaho, for defendant.

DIETRICH, District Judge. [1, 2] The plaintiffs, doing business under the firm name of Caldwell Horse & Mule Company, have brought this action to recover from the defendant the aggregate sum of $6,553.40, on account of damages which they claim to have suffered as a consequence of the negligence of the defendant company and connecting carriers in transporting for them 139 head of horses from Caldwell, Idaho, to East St. Louis, Ill., on the 24th day of January, 1917. In substance it is charged that the time consumed in the transportation was 16 days, whereas it should have been only 7, and that the horses were unnecessarily and carelessly held at Green River, Wyo., for 8 days, in the yards of the railroad company, without proper shelter and care, or proper facilities therefor. As a consequence of such delay and carelessness, it is alleged, 1 horse was never delivered at all and 2 of the horses were dead at the time the shipment arrived at St. Louis, an aggregate loss of $450; $585 was necessarily spent by plaintiffs for feed at Green River; $518.40 in caring for and feeding the horses at East St. Louis, in bringing them up to a fair condition for the market; and there was a depreciation in the market value of $5,000.

As a part of its defense the defendant sets forth the shipping agreement, one provision of which is to the effect that, unless notice of damages was presented in writing within 90 days from the unloading

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of the horses at St. Louis, all claims would be deemed to have been waived, with the proviso, however, that:

"If loss, damage, or injury complained of was due to delay or damage caused or contributed to by the carrier, or its employés, while being loaded or unloaded, or if damaged in transit by carelessness or neglect of the carrier, or its employés, then no notice of claim or filing of claim" would be required.

The plaintiff interposes a motion to strike out the part of the answer setting up this defense, and also interposes a demurrer to reach the same point. The question raised by both the motion and demurrer, upon which the cause is presently submitted, involves a construction of the language above quoted from the shipping contract, or, more accurately, a construction of substantially the same language contained in the amendatory act of March 4, 1915 (38 Stat. 1196, c. 176, § 1 [Comp. St. 1916, § 8604a]). In so far as it is material, this act is as follows:

"It shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, that if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

So far as appears, the plaintiffs never gave any notice or made any claim of loss. As already stated, the horses were held at Green River for the period of 8 days, and it is to be inferred from the complaint that most, if not all, of the damage resulted from such detention. It is the defendant's position that while the horses were so detained they were not "in transit," within the meaning of the proviso above quoted, and that therefore the plaintiffs were not relieved from presenting a claim within the time prescribed, and, having failed to present such claim, they cannot now recover. It must be admitted that the meaning of the proviso is extremely obscure. The subject-matter which Congress had under consideration was the extent to which the carrier should be permitted to go in exacting notice and the presentation of claims for damages. In the principal clause it is declared that it shall be unlawful to require notice in less than 3 months, the filing of claims in less than 4 months, or the bringing of suit in less than 2 years. Such a provision would seem to be both clear and reasonable. But why an exception to it? Why, in the absence of fraudulent concealment or some extraordinary disability, excuse the shipper in any case from giving notice or filing his claim or commencing his suit within the period prescribed? No satisfactory answer has been suggested, and apparently none is at hand. We cannot with assurance, therefore, interpret the proviso in the light of the object intended to be accomplished, nor can a construction be condemned merely because thereunder the provision does not commend itself to us as being entirely reasonable.

If, then, we take the only course open to us and give to the terms employed their common import, what is the result? To say that the phrase "in transit" is applicable only while a shipment is actually moving is to give to it an unusual and strained construction. Ordinarily a shipment is understood to be in transit from the point of origin until it reaches the point of destination. So long as it is in the course of being delivered to the place to which it is being shipped, it is in transit. A piece of baggage billed from New York to Boise is in transit all the time it is in the possession of the carrier for delivery at Boise—just as much when it is upon a car standing at a station, pursuant to or awaiting orders, or upon a truck or station platform for transfer to another car, en route, as when it is upon a car moving 40 miles an hour. Not only would we do violence to the ordinary meaning of the phrase if we hold that here it is to be understood as equivalent to "while actually moving," but such a construction would necessarily result in absurd distinctions. As to the duty of giving notice or filing a claim, why should a discrimination be made between the case of a collision, where the car carrying the shipment is standing on a siding, and one where it is moving on a siding? Nor, if we say "in transit" is limited to cases where the shipment is actually in a car, is the construction any more defensible. No semblance of reason can be assigned for requiring notice if the freight is burned in or stolen from a car, and at the same time relieving the shipper from such obligation if the theft or fire was in an adjacent freight depot. True, the phrase may sometimes be used in a narrow sense; but there is nothing here in the attendant language to suggest the exceptional use, and, to say the least, such a use would contribute nothing to the reasonableness of the provision as a whole. The phrase is therefore to be understood in the sense in which it is commonly employed.

Upon consideration, I am inclined to the view that the basis of classification intended by Congress must be found in the phrase "by carelessness or negligence." It is used in no other place in the entire section, and in the absence of some other ground for classification it appears to be not improbable that the legislative mind made a distinction between liabilities resulting from the carrier's negligence and those which rest upon a different basis, and accordingly declared that the carrier should not require notice of claims for damages arising out of its own negligence. While, for reasons which it is unnecessary to explain, we may be unable to assent to the wisdom or justice of denying to the carrier this right, such seems to be the intent of the proviso. So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damaged "in transit," as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase "carelessness and negligence" undoubtedly qualifies "damaged in transit."

In the case of a claim for damages suffered in the loading or unloading of a shipment, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in

some particulars the grammatical construction is manifestly defective, and, that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic, perhaps a different view should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after "unloaded" or inserting it after "transit." In this view the proviso in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in there unloading it. A claimant must either allege and prove notice, and the filing of a claim, or must allege and prove negligence. Here the plaintiffs have alleged negligence, but neither the giving of notice nor the filing of a claim, and to succeed it will therefore be incumbent upon them to prove negligence.

It follows that the matter in the answer to which their motion is directed is redundant and immaterial, and accordingly the motion will be allowed.

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## CARDONER v. DAY et al.

(District Court, D. Idaho, N. D. January 25, 1918.)

No. 680.

1. DESCENT AND DISTRIBUTION ⟸84—PURCHASE BY ADMINISTRATOR FROM HEIR—EFFECT OF DISTRIBUTION—"PROPERTY OF ESTATE."
   Rev. Codes Idaho, § 5543, providing that no executor or administrator may purchase any "property of the estate" he represents, nor must he be interested in any sale, does not apply to property which has been distributed to an heir by a formal order of the probate court.

2. DESCENT AND DISTRIBUTION ⟸84—PURCHASE BY ADMINISTRATOR FROM HEIR—VALIDITY.
   The purchase by an administrator in person directly from an heir of the latter's interest in the estate is not absolutely void, but voidable only, at the option of the vendor.

3. MINES AND MINERALS ⟸55(8)—SALE OF INTEREST IN MINE—RESCISSION FOR FRAUD.
   Evidence *held* insufficient to entitle complainant to a rescission of the sale of her one-sixteenth interest in a mine to defendant, part owner and manager, on the ground of fraud in misrepresenting or concealing facts about the mine.

In Equity. Suit by Mathilde Cardoner against Eugene R. Day and others. Decree for defendants.

Graves, Kizer & Graves, of Spokane, Wash., Morgan J. O'Brien, of New York City, and Joseph R. Wilson, for plaintiff.

C. W. Beale, of Wallace, Idaho, James E. Babb, of Lewiston, Idaho, John P. Gray, of Cœur d'Alene, Idaho, and I. N. Smith and John H. Wourms, both of Wallace, Idaho, for defendants.

DIETRICH, District Judge. Plaintiff prays for a rescission of the sale by her to certain of the defendants of her one-sixteenth undi-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

vided interest in the Hercules mine, one of the large operating lead properties in Shoshone county, Idaho. The sale was definitely agreed upon October 28, 1916, at which time a part of the consideration was paid and the deed executed, and the balance of the consideration was paid and the deed delivered on November 14, 1916. Pursuant to the direction of defendant Eugene R. Day, to whom, through the agency of defendant Allen, the plaintiff negotiated the sale, the deed was made to the defendant Eleanor Day Boyce. At the time of the transaction each of the defendants, with the exception of Allen, had separate undivided interests in the property, the operating organization being in the nature of a mining partnership, as provided by the laws of the state. Besides a mill, which it had maintained from the beginning, the company had recently made provision for the more direct marketing of its product by the acquisition of stock in a smelter and refinery. For her entire interest—that is, a sixteenth of all the partnership assets, including the cash reserve carried for operating purposes—the plaintiff received $350,000. Eugene R. Day, who for convenience will hereinafter be referred to as Day, was, and for several years had been, the partnership manager. He was also the administrator of the estate of Damien Cardoner, the plaintiff's deceased husband, from whom she inherited her interest. At the time of the commencement of the suit the interest was owned in four several parts, by Day, his sister, Eleanor Day Boyce, and his brothers, Harry L. Day and Jerome J. Day, who are the only defendants having any real interest in the controversy; the others having been joined for procedural purposes only.

There are charges of both actual and constructive fraud. As to the former, in substance the plaintiff's claim is that the defendant Allen, instigated by, and in collusion with, Day, made false representations to the plaintiff as to the condition of the property and its future prospects, for the purpose of alarming her and inducing her to make a hasty and improvident sale, and that, because of her friendship for and confidence in him, she believed him, and was thus fraudulently induced to sell at a grossly inadequate price. In bringing about the sale, Allen undoubtedly acted as the plaintiff's agent, and the few circumstances which upon their face were perhaps sufficient to warrant suspicion of collusion are satisfactorily explained. Allen was not in the employ of Day or his sister, nor did he act in concert with or at their suggestion. I am convinced that he endeavored to get as high a price as possible. True, he suggested certain considerations to the plaintiff, which it may be assumed were intended to put her in a frame of mind to give serious thought to Day's offer; but such is the practice of real estate brokers who are trying to bring together the owner and prospective purchaser. He made no misrepresentation of facts, and laid before or discussed with her only possibilities which furnished legitimate subjects for consideration. Moreover, I am satisfied that at no time did the plaintiff entertain the view that he was representing Day's interests, rather than hers. To say the least, the earlier conferences between them are entirely consistent with the theory that she regarded him as her agent, and later, be-

fore the sale was consummated, she so designated and empowered him by a formal written instrument.

True, at the bank, when the escrow was being deposited, upon the question of Allen's compensation being raised, she seems to have made the suggestion that he was working for the Days. But I am inclined to think that the remark is more significant of thrift than of candor, and was not very seriously intended. Certain it is that she did not press the point, but, without objection or protest, aside from the single suggestion, she promptly turned over to Allen a check which she held, for $5,000, the amount mutually agreed upon. Their relations continued to be friendly, and Allen continued to act as her agent in looking after her property interests in Shoshone county. In respect to all other matters, as appears from the letters in evidence, he seems to have been painstaking and to have protected her with the most scrupulous care. His apparent candor and directness as a witness left no doubt in my mind of his good faith, and, besides, to take the plaintiff's view is necessarily to accept the wholly improbable theory that not only Day and Allen, but the latter's aged father-in-law, a state district judge, with whose family the plaintiff had long been upon terms of intimate friendship, and his wife, had entered into a conspiracy to defraud her. I have no hesitation in dismissing this charge.

It is urged, however, that Day's relations to the plaintiff were of such character that (1) under the statutes of Idaho he was without the capacity to make the purchase, or (2) if not wholly incompetent, his disability was such that he could purchase only for a fair price, after disclosing to plaintiff all the information within his possession, and that not only did he withhold material facts from her, but the price paid was in fact grossly inadequate.

[1] The first contention is predicated upon section 5543 of the Idaho Revised Codes, which provides that "no executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale"; and the precise question is whether, at the time of the transaction of sale, or the negotiations pertaining thereto, the property sold was "property of the estate" of Damien Cardoner, of which Day was the administrator. The material facts are as follows:

Damien Cardoner died in February, 1915. Upon the request of his daughter, and apparently with the plaintiff's approbation, Day was appointed administrator (with the will annexed) on July 29, 1915, and immediately qualified and entered upon the discharge of his duties. On September 27, 1916, he filed his final account, praying for its approval, and also for a decree distributing the estate. Upon the same day the plaintiff filed a petition representing that all claims had been paid, and that the estate was ready for distribution, and prayed for a decree distributing the whole thereof to her. Upon October 14, 1916, both plaintiff and Day, and their respective attorneys, being present, the court duly entered an order approving the account, and in compliance with the plaintiff's prayer, distributing the entire residue of the estate to her, consisting of about $120,000 in cash, and

other property of the value of approximately $35,000, besides the mining interest here in controversy, all of which Day forthwith turned over to her. This order or decree was filed for record in the office of the county recorder of Shoshone county on October 25, 1916.

The order formally closing the estate and discharging Day from further responsibility was not entered until November 1, 1916; but this fact, upon which the plaintiff chiefly relies to support her contention, is thought to be unimportant. Under the state laws, the property of a deceased person passes to the heirs "subject to the control of the probate court, and to the possession" of the administrator. Section 5701. But upon the entry of a decree of distribution the right of possession in the administrator terminates and his authority relative to the property ceases. Sections 5626 and 5627. The property distributed is no longer a part of the estate intrusted to the care of the administrator. Touching it, both his rights and his obligations are at an end. If upon such distribution the property does not cease to be a part of the estate, when, if at all, is it withdrawn from administration? In a popular sense, of course, it may always be spoken of as the deceased's estate. But section 5543 is to be understood in a legal sense. The principle or reason upon which the section is predicated is obvious: A trustee (the administrator) is not to purchase property to which his trust relates. But distributed property is no longer a part of his trust; it is out of the trustee's possession and control.

Plaintiff directs attention to section 5631 et seq., where provision is made for the partition by proceedings in the probate court of distributed property; but, even if it were conceded that this is a matter with which the administrator is in any wise concerned or touching which he has any right or duty (which is extremely doubtful), it will be noted that to invest the probate court with jurisdiction for this purpose some person interested must file a petition for partition before the decree of distribution is made. Section 5632. In the absence of such petition the property not only ceases to be under the control of the administrator, but passes out of the jurisdiction of the court. Buckley v. Superior Court, 102 Cal. 6, 36 Pac. 360, 41 Am. St. Rep. 135; Morffew v. San Francisco & S. R. R. Co., 107 Cal. 587, 40 Pac. 810; Moore v. Lauff, 30 Cal. App. 452, 158 Pac. 557. There is no pretension here that such petition was filed, or, indeed, that it was a case where it could be filed. Hence, when the decree of distribution was entered upon October 14th, not only did Day lose control of the property, but it passed beyond the jurisdiction of the court. Cases like Jones v. Broadbent, 21 Idaho, 555, 123 Pac. 476, McCrea v. Haraszthy, 51 Cal. 151, and Dohs v. Dohs, 60 Cal. 255, are not thought to be in point.

We are not concerned with the question when the administration of an estate terminates, but when specific property ceases to belong to the estate—when it ceases to be held by the administrator in trust. It would be quite as reasonable to say that property which an administrator has sold and conveyed, pursuant to valid orders of the court, continues to be property of the estate until the administration is closed

and the administrator discharged. The decree of distribution in the one case is quite as effectual as the administrator's deed in the other to terminate the trust. (Incidentally it may be observed that, were the California cases in point, plaintiff would not be warranted in her contention that we are bound to give to the Idaho statutes the same construction as was there given to the corresponding California statutes. Assuming that Idaho adopted the statutes from California, such adoption took place in 1864, long before the cases relied upon as controlling were decided. See Laws Idaho [First Sess.] 1864, Probate Practice Act, §§ 193, 258, 259, 264, 279.)

[2] But, if a different view could be taken, the result must be the same. The purchase by an administrator in person directly from the heir, of the latter's interest in the estate, is not absolutely void, but voidable only, at the option of the vendor. Mills v. Mills (C. C.) 57 Fed. 873, 878, 879; s. c. (C. C.) 63 Fed. 511; Haight v. Pearson, 11 Utah, 51, 39 Pac. 479; Golson v. Dunlap, 73 Cal. 157, 14 Pac. 576; French v. Phelps, 20 Cal. App. 101, 128 Pac. 772; Littell v. Hackley, 126 Fed. 309, 61 C. C. A. 295; Black on Rescission and Cancellation, vol. 1, p. 114, § 48; Perry on Trusts (6th Ed.) § 205; Woerner's American Law of Administration (2d Ed.) § 487. And compare Hammond v. Hopkins, 143 U. S. 224, 249, 12 Sup. Ct. 418, 36 L. Ed. 134, with the earlier case of Michoud v. Girod, 4 How. 503, 11 L. Ed. 1076. In Blackinton's Estate, 29 Idaho, 310, 158 Pac. 492, there are expressions of ambiguous import upon the subject, but these were expressly declared by the court itself to be obiter. The administration here was technically closed, and Day discharged as administrator, upon November 1st. Thereafter admittedly he had the capacity to purchase, and from that time on for over two months the plaintiff stood upon the contract of sale. After November 1st she accepted the larger part of the purchase price, and, by such acceptance and her failure to object or protest, approved the transaction and authorized the escrow holder to deliver the deed. Indeed, if I have correctly read the record, never was this objection raised or suggested by her until urged by counsel in the oral argument at the close of the trial. It would be necessary, therefore, to hold that she acquiesced in and ratified the transaction, even were the view taken that the original agreement was made when Day was under disability to contract by reason of the estate not having been formally closed. 39 Cyc. 370; Hammond v. Hopkins, 143 U. S. 224, 251, 12 Sup. Ct. 418, 36 L. Ed. 134; Mills v. Mills, supra. I do not hold that the comparatively short delay necessarily constitutes laches or estoppel. But by actively participating in the consummation of the unexecuted agreement, after such disability as Day may have had was removed, she directly confirmed the sale.

[3] Finally, can a reason be found in the fact that Day was, and for a long time had been, the manager of the mine, for holding the sale voidable? In this aspect we have the case of an agent dealing with his principal touching property to which the agency relates. Under what limitations or subject to what conditions could he make a valid purchase? His position doubtless gave him peculiar oppor-

tunities for knowing all the facts and estimating the reasonable probabilities, and it was his duty to deal fairly with the plaintiff. He could lawfully purchase her interest, but before doing so he was bound to disclose to her the facts and conditions, which had come to his knowledge as manager, bearing upon the value of the property. He could take no advantage by misrepresentation, concealment, or omission to disclose. He was not required to express himself relative to matters merely of speculation or surmise, but in so far as he chose to give an opinion he was bound to act honestly and in good faith. Byrne v. Jones, 159 Fed. 321, 90 C. C. A. 101. In a sense, of course, the two parties could not be put upon the same footing. Personally the plaintiff had had no practical experience in mining, and presumably, therefore, was less competent than Day to form an intelligent opinion, or to speculate upon the ultimate question of the commercial value of the property. But the sale cannot be set aside for that reason alone. The plaintiff was not an ignorant, unsophisticated woman, nor was she without knowledge of the mining business. While her speech is marked by a strong foreign accent, she is not without facility both in using and understanding our language. She has not lived a cloistered life, nor does she give the impression of being by nature abnormally trustful or confiding. She is fairly well educated, to say the least, and has the poise and self-reliance which come from travel and the rigorous experiences of a pioneer life. In short, I would think that in any ordinary business transaction she could not easily be deceived or overreached. She came into the Cœur d'Alenes from France in 1886 with her husband, who thereupon engaged in merchandising. Their controversies with each other need be referred to only in so far as, in a circumstantial way, they tend to disclose a disposition upon her part to assert her rights. For 20 years she resided in Shoshone county, during which period the defendants and her husband had gradually developed the Hercules claim into a producing property. Mining was the one industry of the community, and living a considerable part of this period, as the plaintiff did, within a "stone's throw" of the Hercules and other claims and operating properties, she must have gotten some conception of mines and mining. In 1906 she went with her husband and daughter to Spain, where they all remained until her husband died, in 1915. Apparently he at once became active in mining operations there, with which, as she somewhat reluctantly disclosed, she had a measure of familiarity. But, retaining his interest in the Hercules and in other property in Idaho, he not infrequently came to this country, presumably upon business relating thereto. They subscribed for and read a Spokane paper and a Wallace paper, each of which, it is to be inferred, published mining news of the Cœur d'Alenes, and reported mine dividends.

Upon Mr. Cardoner's death, their daughter came to Idaho, and while here procured the appointment of Day as administrator. Later, the plaintiff, who in the meantime had had some disagreement with her daughter and son-in-law, returned, after an absence of 10 years, arriving at Spokane on April 17, 1916. In the meantime, too, it ap-

pears, she had decided to ignore her husband's will, by which a considerable part of the estate was bequeathed to the daughter and some legacies were left to religious or charitable orders, and to claim all of the property, upon the theory that, belonging to the community, it was not subject to testamentary disposition, but came to her as of right under the state law of succession. When Day first learned of this change of attitude does not clearly appear, but it was doubtless after her return. It would unduly extend the discussion to relate with any detail the subsequent course of events. Plaintiff took up her residence at Spokane, from which point it was easy to communicate with the mine, and especially with Wallace, where the principal offices of the company were maintained, and where the court sat in which the estate was being probated. At Spokane, too, the defendants Paulsen and Hutton, two of the wealthiest owners of the Hercules, lived and had large business interests. In so far as she knew or the record discloses, their relations with her husband had been friendly, and they would not be inclined to treat her ungenerously. Immediately upon arriving at Spokane she communicated by telephone with Day at Wallace, and by appointment visited him there, at the offices of the company, two days later. Upon at least three other occasions prior to the distribution of the estate, twice in August, she conferred with him there. He is insistent that she came to his office and discussed the affairs of the company with him at least a dozen times. But, inasmuch as she may have spent several days at Wallace upon a single visit, the apparent conflict in the testimony may be reconciled by assuming that she went to the office more than once during each visit.

Unfortunately, upon the important question of what information relative to the mine Day gave her, the direct evidence, consisting almost exclusively of the testimony of the two parties most concerned, is highly conflicting. In substance her contention is that he made no disclosures at all, but repeatedly put her off, generally with the excuse that he had no time. Upon the other hand, he very positively testifies that again and again he explained truthfully and in detail the status of the property, and advised her of what had been done and what they were planning and expecting to do. With equal emphasis, too, she makes the specific contention that she did not learn that the company had engaged in the smelting or refining business until she read about it in a mining journal, in November, 1916, after she had gone to New Mexico. Upon this point I am wholly unable to give her testimony credence. If we are not permitted to take judicial notice of facts of local and familiar history, still we cannot avoid the inference or presumption that this smelter enterprise, together with the conditions out of which it grew, must have been an important event in the industrial life of the "Inland Empire," including North Idaho and Eastern Washington. It must have been in the newspapers, and the chances of its success or failure must have been common topics of discussion. True, the plaintiff came to this country after the public interest had abated; but, as already stated, she was receiving newspapers from Wallace and Spokane while in Spain, and, besides, her son-in-law and daughter were here in the sum-

mer of 1915, and it is wholly unlikely that they failed to hear of it or inform her.

But, if we put aside these considerations, we find that in the monthly statement of the company for February, 1916, which admittedly she received soon after coming to Spokane, there is shown a large expenditure on account of the smelter. Day testified that at their first conference she told him that her husband had been opposed to going into the smelting business, and questioned him about it. Allen testified that immediately after the decree of distribution, in conversation with him about the mine, she discussed the new smelter and refinery. Paulsen, a disinterested witness, testified that when she called upon him in October, shortly before the sale, and inquired why certain dividends had been passed, he explained "that the Hercules had gone into the smelter business and branching out, and that they had to build up a reserve to take care of these additional business propositions, and also that we had a large amount of ore in transit to the smelter, which had not then been settled for"; and he also sought to quiet her apparent agitation over a newspaper report to which she directed his attention, to the effect that the "Guggenheims or the American Smelting & Refining Company * * * were going to absorb all of the Day interests in the Cœur d'Alenes, and smelters and everything they had."

With much alacrity, I thought, and with unnecessary frequency, the plaintiff, in testifying, sought to give the impression that she knew nothing about business customs in general, or about her husband's business or the Hercules mine in particular. Admittedly her husband regularly received the monthly statements which the company had long been accustomed to send to its members, upon which were shown, not only the summarized items of operating receipts and disbursements for the month, but the aggregate of all dividends paid during the entire life of the mine. It is true that when, upon cross-examination, her attention was directed to the contents of these statements, she explained that she could not understand, and perhaps did not read, them; but in that connection it is thought to be significant that when upon her direct examination she was first asked why she called Day up by telephone immediately after coming to Spokane, and why, according to appointment, she went to Wallace two days later, she answered:

"To see Mr. Day and ask him for the statements. Since Mr. Cardoner died he never sent us any more statements, and I went up to ask him for the statements."

It is difficult to avoid the belief that she was measurably familiar with these monthly statements, and was able to interpret them in their main features. Plainly she is not without some aptitude for, and experience in, business matters. She seems to have been careful and methodical, and even exacting, in respect to other transactions brought into evidence. She was quick to discover apparent discrepancies and inconsistencies in the administrator's accounts, and proceeded in an intelligent way to procure explanation and rectification. She kept a diary with unusual care, required receipts for disbursements, and

altogether made inquiries and gave directions, not in the language of an unsophisticated woman, but in terms signifying that she was not a stranger to business transactions. It is not a case where the principal is at a distance and wholly dependent upon the information furnished him by his agent or associate, or is a stranger with no one to whom to turn for assistance or advice. The company's mill was within a few moments' walk from the offices at Wallace, and the mine a few moments' ride upon the train or by automobile. They were at all times accessible and open to the plaintiff, and so were the books and records of the company. Of this there is no question. She had agents at Wallace, and she had acquaintances and friends. If she did not understand an item in one of the monthly statements, she could as readily and as reasonably have asked Allen for assistance as in the case of the administrator's account, or she was abundantly able to employ service of that character. She had engaged counsel, who was not only qualified to care for her interests in their legal aspects, but was also exceptionally familiar with the history and operation of the Hercules as well as other mines in the district. At intervals she was a guest at the house of the presiding judge of the state district court, at one time her attorney, who also was familiar with the history of the district, and in a general way with the various properties therein.

For Day to have repeatedly denied her information about the Hercules would have been a flagrant violation of his duty, both as manager and as administrator, on account of which the plaintiff might very reasonably, and I think would, have been deeply offended. Yet, so far as appears, she made no complaint to her friends or to her attorney, nor did she suggest criticism of him as manager to her associate owners, Paulsen and Hutton. Instead, she seems to have continued to hold him in high esteem, and to entertain for him a friendly feeling until, after going to New Mexico in December, she was advised by her attorney from the East (acting in perfect good faith, I doubt not) that upon inquiry he believed that the price she had received was inadequate. Furthermore, if we credit her story, we must also believe that, without suspicion or resentment against him, notwithstanding the ill treatment which she now charges at his hands, upon five days' consideration she sold to Day the very property concerning which he had persistently denied her information, and upon representations chiefly made by Allen, whom she looked upon as Day's agent. However tenderly we may regard her rights by reason of her sex and widowhood, we cannot give credence to the incredible. From the whole record I am convinced that from the beginning she was aware of the smelting enterprise, and was concerned about it. The mine had been shut down for some length of time in 1915, because of the smelter controversy. Her husband had not looked with favor on the company going into the smelting business, and upon his death she would be likely to succeed to his views. Not unnaturally, therefore, at her first interview with Day she would raise the question, and quite as naturally, as manager, he would defend the new enterprise and explain the reasons which induced him and the other

owners to undertake it. Such explanation and defense would almost of necessity lead to a comprehensive account of the mining operations, the condition of the mine, and the future plans and prospects of the company, and, in giving it, Day's natural inclination would be to paint a bright, rather than a gloomy, outlook for the property.

Such, I say, are the probabilities, and such, in substance, I believe to be the facts. It may very well be that, not being fully satisfied touching the smelter enterprise, or her fears being revived by the passing of dividends, or by suggestions in the press or from friends of the peril of a local company fighting what was popularly referred to as the smelting trust, she renewed her questionings from time to time as she talked with Day, until, becoming impatient, he declined again to review the situation in detail, and put to her the inquiry whether she desired to sell her interest; and it is this phase of his treatment of her that, in her resentment, upon being advised that she had been overreached, she has perhaps unconsciously put in the foreground of her recollection until it has obscured all else. In some respects I am satisfied she has unwittingly lost the true perspective. By her testimony she gives the impression that Allen and Judge Woods and his wife made misrepresentations from which it would follow that the property, if not practically worked out, had only a speculative value, and yet for such a property Day, its manager, was admittedly making an offer based upon a value of $5,000,000, a price in excess of anything ever paid or offered for any interest in the mine before. If, as apparently she would now have us believe, she became panic-stricken, and by Allen and her other friends was induced to believe the property was practically worthless, did she think that in receiving at the rate of $5,000,000 from Day she was overreaching or getting the best of him? It was probably suggested to her that the price of lead, then abnormally high, might drop back to a lower level at any time; but surely that was a legitimate consideration. It probably was not said that when she went away Day would send her no more dividends, but upon the other hand it probably was said that at times, as had been the case in the last two years, she might get no dividends; whereas, if she sold her property, and the proceeds thereof were put out at interest, she would be sure of regular interest returns—again a legitimate consideration. It was probably not represented that the Days were speculating upon the lead market, in the sense that they were illegitimately using the company's funds for that purpose, and that they would be smashed by the Guggenheims, and that the plaintiff would thus lose all; but it may very well have been stated that in going into the smelting business the company would have to market its own product, and that in doing so it would come into competition with the Guggenheims, or the so-called smelting trust, and that therefore there was danger of disaster or loss. There probably was no representation that the property had been mined out; but I have no doubt that by different persons she was informed that above the No. 5 or Hummingbird tunnel, which was the lowest possible tunnel level, the ore was almost exhausted, and that the lower shafts and works were still incomplete,

leaving the lower ore bodies not fully developed or disclosed, and as to their extent there was some doubt and uncertainty. And such appear to have been the facts. Paulsen, whose intelligence and good faith there is no reason to question, testifies that when she called upon him, a few days before the sale, he told her that "there was a good deal of guesswork connected with fixing the price of the mine in the state of development that the mine was in at that time"; that they were behind with their developments, their shaft from the Hummingbird tunnel was not started early enough, and that the ore reserve above the tunnel level was getting pretty low, and that at that time they "did not have such an awful lot of ore exposed or developed." Indeed no one described the physicial condition of the property more conservatively, or gave more prominence to the uncertainties involved in making an estimate of the value of the mine, than Paulsen, and yet at the same time he told the plaintiff that his interest was not for sale, thereby intending to convey the meaning that he regarded the mine as a good property; and the plaintiff admits that she understood him to advise her to hold on to her interest.

Doubtless in the course of the discussions which took place her attention was drawn to the fact that some of the other mines in the district had been worked out at a certain depth, and the inference was drawn that the ore shoots in the Hercules would probably terminate at about the same depth. But the record abundantly shows that such a view was not unreasonable. True, the plaintiff may have attached undue importance to some of these considerations, and may not have given due weight to Paulsen's advice to hold her interest; she was suffering somewhat from the asthma, and was probably anxious to get into a different climate, and may have acted hastily. But in the light which she had, or which was then available, did she act in a panic or unreasonably? If we strike from the record the expert testimony of the two engineers, which, of course, was not available to her or any one else at the time, and put out of mind the fact that our country is now at war, and the conditions bearing upon the net value of the product of this mine, which did not arise or were not disclosed until after October, 1916, in the light of the other facts and circumstances of record, can it be confidently said that from the standpoint of an intelligent, independent owner, the plaintiff made a bad bargain?

Suppose we look at the situation for a moment from her standpoint. She knew that a little more than a year before her interest had been valued by the appraisers of the estate at $250,000; that there had in the meantime been paid to the administrator, for her credit, by way of dividends, over $100,000, so that, if the appraisement was originally correct, the residual value of her interest could not at the time of the sale have exceeded $175,000; and for this she was considering an offer of $350,000. Through her husband she probably knew that in 1905, when, of course, the mine was in fact of much greater value than in 1916, he and the other owners gave an option to purchase the entire property for $4,000,000; and again in 1906 an option to purchase at $6,000,000; and in each case the optionee

declined to purchase, in the latter case suffering a forfeiture of $20,000. She may very well have known that two or three years later a one-sixteenth interest—the Reeves interest—had been sold for $250,000. She had the very recent opinion of Hutton, one of the owners, whom she doubtless thought to be intelligent and disinterested, that the property as a whole was then worth about $4,000,000. Paulsen, another intelligent owner, who she had the right to think would advise her fairly, declined to make an estimate of the value, because it involved too much guess work, discouraged the idea of selling, and yet suggested that in either case, she would doubtless have all she needed. She knew that current profits were enormous, but she also knew that the price of lead was abnormally high, owing to conditions which might pass at any time, and that the cost of production was also upon the increase. There were elements of uncertainty about the extent and value of the remaining ore bodies, which had been but meagerly explored. The smelting enterprise was giving her concern. It might be safe, but her husband had disapproved, and there were questionings touching its wisdom; it was a new field, with unknown possibilities. For reasons of health she did not desire to reside in this section of the country. She had other property holdings in the Cœur d'Alenes which were likely to give her some annoyance, and Day was agreeing to take them over as a part of the transaction, at a price apparently in excess of what he thought they were really worth. In case of sale she would have, besides her interest in the estate in Spain, approximately a half million dollars in money, and this, if conservatively invested in high-class securities, would, without substantial risk, yield a regular income abundantly sufficient for her wants, and she would be relieved of all responsibility and concern. Besides—and I think this consideration had much weight with her, regardless of its merit or want of merit in point of law—she was not without fear that the legatees named in her husband's will would seek to assert rights thereunder, and she reasoned that such a contingency was much less likely to happen, or to turn out adversely to her, if she disposed of all her interest in the specific property of the estate. Upon the whole, I do not think it can be held that under the known conditions her decision to make a sale was precipitous or improvident.

When we come to consider what in fact was the actual value of the property, we are met with difficulties which both courts and legislators have recognized as well-nigh insurmountable. Because of these difficulties, in this state, as in some other jurisdictions, no attempt is made to estimate the value of mines for taxation purposes. But it does not follow, because the value is difficult accurately to estimate, that an agent or part owner cannot legitimately purchase from his principal or associate owner.

The ultimate question with which we are here concerned, of course, is not how much ore there was in the mine, but what the property was reasonably worth upon the market in cash—what it should have reasonably sold for under the circumstances. The plaintiff had the right to sell her interest. She was not bound to keep it indefinitely and exploit it. So the ultimate question is, not what she might have

made out of it if she had chosen to retain it, but what it was worth—what it could have been sold for outright. The value of a dairy cow is what she will presently sell for upon the market, and not what she will ultimately yield in profit, if kept indefinitely in the dairy. Nor, of course, does the inquiry here relate to the amount of ore that subsequent developments may disclose to have actually been in the mine. The mineral content of the mine is a material inquiry only because it is a matter to which both the owner and the prospective purchaser would give consideration. They would undertake to estimate the amount of the ore, and the estimates would have some bearing upon the price which an owner would take and the price which an investor would pay. Hence the question is, not what the mine actually contained, but what, under the light then available, was a reasonable estimate of its content. Such estimate, of course, is only one of the important factors, and when we consider all of them we find that the margin of uncertainty is so great that any opinion of the value must be measurably speculative.

The truth of this observation is strikingly illustrated in the evidence given by the two experts who testified, one for the defendants and the other for the plaintiff. Even with a mine so far developed and so fully equipped, there is a wide range of uncertainty as to the extent and quality of the ore bodies. There is next the question of the cost of extracting, treating, and marketing the ores—a process which must extend over a period of years, with uncertainty touching wages, rates of transportation, and other expenses. Then the uncertainty as to the price at which the product can be sold; and still the further question, in estimating the present worth of ores in the earth, of how long it will be before they can be marketed and turned into cash, thus releasing the invested capital, which, until so released, is, of course, unproductive. Furthermore, at the time of the sale it was wholly uncertain whether this country would or would not be drawn into the world war. Should we enter the war, how soon would it end, and what effect would its termination have upon the mining industry? If our country declared war, what effect would such declaration have upon the cost of production and the price of the product? Would the prices be fixed by governmental agency, and what burdens would be levied upon such properties by way of taxation? One contemplating the possible purchase of a sixteenth interest in the mine would further consider the question of labor, the tendency to increase of wages, the possibility of strikes, and, I think, would very seriously consider the question of management. Apparently the management had been conservative and intelligent. What would be the effect on the market value of a sixteenth interest, if, for example, the Days and Paulsen should combine and sell out their controlling interest to an unknown and inexperienced investor, whose policies were unknown, and who might unwisely manage the property, or entangle it with speculative and more perilous enterprises?

In view of these admitted uncertainties and the wide variance between the estimates of the experts, manifestly no safe conclusion as to the reasonable value of the property in October, 1916, can be predi-

cated upon their testimony alone, and therefore I refrain from setting forth an analysis of it. It is of value and weight in connection with the other evidence upon the subject, and I give it consideration in that connection. What, in the main, is the other evidence? Day, though not an expert geologist or mining engineer, and perhaps without experience in marketing mines, was an intelligent, practical operator, with intimate knowledge of the general conditions in and about this property. His judgment is entitled to some weight, and I am satisfied that he would not have given more for the plaintiff's interest. Some point is made that he bargained with her and sought to secure the property for a much lower figure. But it is not material to the present inquiry to determine whether or not he had the right to deal with her as an equal, if it be assumed that she had all the information that he possessed. It might very well be held that, if she knew as much about the mine as he, he had the right to buy her interest at such price as she was willing to take. But, be that as it may, whether we condemn or justify his conduct in seeking to get the property for less than he finally paid for it, the fact is that he added to his first offers until he reached the sum of $312,500, exclusive of the cash on hand, or a price upon the basis of $5,000,000 for the assets, exclusive of the cash on hand, and there he declined to go further. Through Allen the plaintiff sought to get him to increase his bid; but Day definitely declined, and I think was unwilling to pay more. His testimony now as to what he considers the property worth, as well as that of his brothers, Harry L. Day and Jerome J. Day, is in the nature of expert testimony, and, coming from an interested source, is, of course, to be considered in the light of such interest. But if, for that reason, we put aside entirely their opinion testimony, and impute to that of the opposing engineers equal weight, what have we? We have Day's decision at the time not to pay more. We have the testimony of the two disinterested witnesses, Paulsen and Hutton, the one that the property was worth no more than was paid, and the other that it was worth less. We have no instance where a larger price was ever paid or offered for any interest in the property. We have the sale of the Reeves one-sixteenth interest, seven or eight years before, when undoubtedly the actual value was greater than in 1916, for $250,000. We have the unaccepted offers of the owners to sell the whole property in 1905 for $4,000,000, and in 1906 for $6,000,000. If it be said that to Day the interest had a special value, because it gave "the Days" control of the mine, the obvious reply is that to an independent investor, generally speaking, so small an interest would be less salable, and that therefore its market value, when offered alone, could hardly be said to be equal to one-sixteenth of the market value of the property as a whole.

Upon consideration of the entire matter, my conclusion is that, not only was the plaintiff informed of the known conditions and facts bearing upon the value of the property, but that the price paid approximated the reasonable market value of her interest, and was probably as much as she could have obtained from any other source, and, in any view of the bearing of the question of value upon the issue here, an approximation of the true value is all that is required. Brooks v. Martin, 69 U.

S. (2 Wall.) 70, 17 L. Ed. 732; Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 866, 37 L. Ed. 790.

From these considerations, it follows that the bill must be dismissed; and such will be the decree.

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## UNITED STATES v. FABATA et al.

(District Court, N. D. New York. October 26, 1918.)

1. BAIL ⟸79(1)—BREACH OF CONDITION—RELIEF FROM LIABILITY.
Under Rev. St. § 1020 (Comp. St. 1916, § 1684), providing that a court may in its discretion remit the whole or a part of the penalty of a forfeited criminal recognizance, whenever it appears "that there has been no willful default of the party," etc., the court can exercise such discretion only when the failure of defendant to appear was not willful.

2. BAIL ⟸79(1)—RELIEF FROM LIABILITY—"WILLFUL" DEFAULT.
That the failure of defendant in a criminal case to appear at the time required by his recognizance was by advice of his attorney does not make his default other than "willful."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful.]

Action by the United States against Antonio Fabata and the National Surety Company. On application by the Surety Company for remission of penalty of bail bond. Denied.

This is an application by the National Surety Company for the remission of the whole or a part of the penalty of a bond in a criminal case executed by Antonio Fabata, as principal, and the National Surety Company, as surety, for the appearance of said Fabata to stand trial on an indictment found against him and which bond has been reduced to a judgment.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y.

Wm. J. Griffin, of New York City, for defendant National Surety Co.

RAY, District Judge. The defendant Antonio Fabata was duly indicted in this court, and with the National Surety Company, as surety, executed a bond for his appearance in this court at a designated term held at Auburn, N. Y., to answer to such indictment and abide the orders and judgment of the court. On the day and at the term of court designated the defendant Fabata was called, but failed to appear or answer, and the surety was duly called and required to produce its principal, which it failed at that time to do, whereupon the court made an order forfeiting such bond and directing its prosecution and collection. Thereafter this action was brought and judgment recovered against both defendants for the sum of $2,060.40, and now defendant the National Surety Company moves under section 1020, U. S. R. S. (U. S. Comp. St. 1901, p. 719; U. S. Comp. St. 1916, § 1684), for an order remitting the whole or a part of such judgment, on the ground it appears on petitioner's showing that there has been and was no

willful default of the party, and that a trial could, notwithstanding, be had in the case, and that public justice does not require the penalty of the bond to be enforced.

[1] The section of the Revised Statutes referred to provides as follows:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

In United States v. Robinson et al., 158 Fed. 410, 85 C. C. A. 520, the Circuit Court of Appeals (Fourth Circuit) said, and accordingly held:

"Among other things, the foregoing section provides that the court may, in its discretion, remit the whole or a part of the penalty, whenever it appears that there has 'been no willful default of the party,' etc. While in a case like the one at bar a surety may suffer a hardship, owing to the provisions of this statute, nevertheless its terms are plain and unmistakable. It clearly defines the circumstances under which the court may exercise its discretion, and remit the whole or a part of the penalty, to wit, when there has been no willful default; and inasmuch as the court in this case found as a fact that the default was willful, it necessarily follows that it was not within the discretion of the court to vacate or modify the judgment in question."

I think this the true construction of the statute, and that, to authorize a remission of any part of the penalty of the bond, it must appear there "was no willful default of the party"—that is, of the defendant in the indictment, who failed to appear.

In this case the claim of the Surety Company is that Fabata, the principal, went with his attorney to the United States courthouse, but outside of same, in the city of Auburn, N. Y., at the time and place and term of court where required by the bond to appear, but that Fabata, by direction of his counsel, remained outside the courthouse; that it was arranged and agreed between them that Fabata was to remain outside, while his attorney went inside, and remain in a position where he could observe a preconcerted signal from his attorney, the attorney telling Fabata "that in the event of his considering it advisable for him, the said Fabata, to appear before the court a certain unmistakable signal would be given, and in the event that his attendance was deemed unadvisable at the time that another signal, which could in no event be mistaken for the other, would be given, in which latter case the said Fabata should immediately go to the railroad station and return to New York on the first possible train"; that after waiting quite a while the said attorney, a New York City lawyer, appeared at the entrance to the courthouse and gave the agreed signal last above referred to, the one on receipt of which Fabata was to return to New York; and that Fabata, "relying on and in compliance with the advice of his counsel, then and thereupon left Auburn on the first train and returned to New York." The affiadvit that this took place, as claimed, is not made by the attorney of Fabata, or by

Fabata, but by the attorney for the Surety Company, who simply says that Fabata has so informed him. This falls short of proof that such an occurrence took place. It is the merest hearsay.

[2] But, even if such an arrangement was made and carried out between Fabata and his attorney from New York City, it falls far short of showing that there was no willful default on Fabata's part. On the other hand, it shows there was a willful default. Fabata and the Surety Company knew that Fabata's duty and obligation under the bond was then and there, at Auburn, to appear and answer, and abide the order of the court. Fabata did not appear, nor did the surety produce him. He was duly called and failed to respond in person, but his attorney did appear and requested a delay or postponement, which was refused, as there had been several adjournments of the case. In open court at said time and place, as this court well remembers, and as Mr. D. B. Lucey, the United States attorney, who was present, makes affidavit, the said attorney for Fabata, when Fabata and the surety were called as set forth, stated in open court "that on the preceding day he had made an engagement with the said Fabata to meet him the next morning, to wit, November 16, 1917, at the Grand Central Terminal to take a train from there to Auburn for the purpose of appearing in court (court then being in session at said place); that when O'Neill (the said attorney) arrived at the station in New York he looked around for the said Fabata, and he was unable to see or find him; and that he had no knowledge of where he then was." Fabata was not in court, and this is not disputed. The surety did not produce him, when called and required so to do, and this is not disputed. That he was not in Auburn, remaining outside the courthouse, is shown by what occurred in the courtroom at the time. Plainly, in either event, it was a willful default and failure to appear on Fabata's part, and a failure to produce the defendant on the part of the surety. Such practice, even if it occurred as now claimed, cannot be encouraged or approved, or held to be other than a willful default.

The motion to remit the whole or any part of the penalty of the bond or judgment, or reduce such judgment, must be and is denied.

The incorrect order, headed as of the Syracuse term commencing April 2, 1918, when the motion was first presented, and which was inadvertently and prematurely signed, and which the clerk was directed not to enter, and which has not been filed or entered, is canceled, annulled, vacated, and set aside.

## CASEY et al. v. CITY OF CANTON.

(District Court, N. D. Ohio, E. D. February 28, 1918.)

1. CONTRACTS ⟸284(4)—DECISION OF ENGINEER OR ARCHITECT—EFFECT.
Where construction contract provided that work should be done under the supervision of an engineer, who was empowered to determine classification and allow estimates, his decision can be impeached only for fraud and gross mistake, implying bad faith.
2. MUNICIPAL CORPORATIONS ⟸374(1)—CONTRACTS—CONSTRUCTION.
Where city enters into a contract with a contractor to build a building or lay a sewer, it warrants, just the same as a private owner would warrant, delivery of the site upon which the work is to be constructed, and in event of failure is responsible to the contractor for damages resulting.
3. MUNICIPAL CORPORATIONS ⟸370—CONTRACTS—LIABILITY.
Where municipality, which contracted for the laying of a sewer, did not have title to the site selected, and the contractor was by that reason delayed and injured, *held* that, the municipality being liable for such damages, payment could properly be made without any supplemental contract.
4. MUNICIPAL CORPORATIONS ⟸370—CONTRACTS—LIABILITY.
Where a municipality, which contracted for the laying of a sewer, did not own the site selected, and the contractor was damaged, *held* that, having paid such damages, the municipality could not recover the same, nor set them off in an action by the contractor, though the procedure for payment was irregular.

At Law. Action by John F. Casey and others against the City of Canton. On motion of plaintiff to direct a verdict. Motion granted.

Squire, Sanders & Dempsey and Wm. L. Day, both of Cleveland, Ohio, for plaintiffs.

Clarence A. Fisher, City Sol., and Walter S. Ruff, both of Canton, Ohio, for defendant.

WESTENHAVER, District Judge. [1] The attitude of counsel for the defendant as to the larger item of the counterclaim renders unnecessary any discussion of that. I need only repeat, so far as that is concerned, what counsel have said, that whether or not that foundation embankment should be classified and paid for under item 29 of the specifications was a matter to be determined by the engineer. He was agreed upon by the city of Canton, or the proper authorities of the city of Canton, on the one part, and the John F. Casey Company, upon the other, as the person under whose supervision and direction the work should be done, and who was empowered to determine the question of classification, and to make estimates and allow them. He made his determination, and there is nothing here to impeach the good faith or honesty of his determination.

The law is perfectly well settled in this jurisdiction, although it seems to be a little confused in the state courts, that the decision of an engineer or an architect in that situation is binding upon both parties, and can be impeached only for fraud or such gross mistake as implies bad faith.

Therefore, as to the larger item of 2,961 cubic yards of foundation embankment, I concur entirely in the judgment of the representatives

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

of the city of Canton in saying that there is no basis upon which to seek to recover any part of it back, and there is no ground upon which to defend against an action by the Casey Company to recover the amount of the final estimate, which was approved.

Now, let us pass to the other item, the $2,000 item, which is the item embodied in the so-called supplementary contract of August 24, 1915. The testimony here shows that, at the time the contract was let and the work of construction begun, the city of Canton had not provided the right of way over which the sewer was to be laid.

[2] When the city enters into a contract with a contractor to build a building, or to lay a sewer, or to do any other work of that kind, it warrants, just the same as a private owner would warrant, the delivery of the site upon which the work is to be constructed. In other words, if the city of Canton makes a contract with the Casey Company to build a sewer between station 1 and station 50 of a certain type and dimensions, it guarantees absolutely the delivery to the contractor of that site, and it is responsible in damages to the contractor, just as a private owner would be responsible for damages to the contractor, and if the city or owner, from whatever cause, whether blamelessly or wrongfully, is unable to deliver the site upon which the contractor is to construct the sewer or other improvement, they would be responsible in damages to the same extent and in the same degree for the interruption of his work.

Now, in point of fact, the city of Canton did not have the entire right of way for the sewer. The sewer ran through the property of a gentleman by the name of Mr. Barber, according to the original plan, and he refused to permit them to cross, and thereupon the work of constructing the sewer by the plaintiff company was interrupted, and, while it does not appear, it may be safely inferred from this testimony, that when they did get the right of way and the right to cross over the property of Mr. Barber, they had to cross somewhere else, and the sewer had to be constructed under different conditions and to a certain extent of different materials, that is, as to the foundation item, and by that action, as testified to here by the engineer, and as the court would imply if the engineer had not testified to it, certain damage resulted to the contractor.

[3] I have carefully examined the contract, and it seems to me that the engineer was entirely right in his position that items of damage due to an interruption of the work, such as added expense due to disorganization of his force and the shifting of his material to other positions, were items of damage and expense which the contractor had the right to make demand for under article 17 within a certain number of days, and which it was the duty of the engineer and the authorities to estimate and to allow.

It would have been entirely proper for the city authorities to have made the payment, without requiring any supplementary contract in order to warrant the payment. It does not require a separate appropriation of any kind from the council of the municipality, but it is an expense that was included within the original authority conferred upon the service director by the resolution of the council and was

properly chargeable to the fund then appropriated and set apart for the construction of the sewer.

In view of the action of the engineer, and in view of these facts and the subsequent conduct of the city authorities, there can be no question here before this jury but that the contractor was entitled to his money. The city has gotten the benefit of it, the contractor having been afflicted with a loss. If there was damage resulting, it was damage which was due to the conduct of the city, and not to the conduct of the contractor, and, if the city had refused to pay it, the contractor would not have been without remedy.

For that reason alone it would seem to me that irregularities in the method of making the payment would not warrant the city, after it had made it, in recovering back that which the engineer allowed, and which should have been allowed and included in the first instance, and which, in my opinion, he would have been entirely justified and ought to have allowed in his final estimate, instead of handling it in the way in which it was done.

[4] That being so, irregularities in the method of making payments, of these added precautions, due perhaps to a mistaken opinion on the part of some one that it should not be done that way, but ought to be done through a supplementary contract, or that a supplementary contract ought to have been entered into in the first instance, will not justify an action by the city to recover back money paid under those circumstances.

Now, the law as to irregularity in the making of contracts of this kind works very differently when a plaintiff sues upon a contract made in violation of law, and when the city sues to recover back money rightfully paid or paid upon a contract which has been made in violation of law, but which has been performed. The latter situation was involved in the Fronizer Case, 77 Ohio St. 7, 82 N. E. 518.

In the case of Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 54 N. E. 372, it was held, where the county authorities refused to pay for a bridge which they had gotten from the contractor under a contract entered into in violation of the statutes on the subject, that the contractor could not recover when he sued on the contract for the price of the bridge; the court holding that it would leave the parties to such unlawful transaction in the situation in which they had placed themselves. In other words, the contract having been entered into without conformity to the legal requirements, the contractor could not, when he came into court, prove the legality of the contract that he had acted under, and could not, therefore, maintain the burden of proof.

However, in the case of State v. Fronizer, 77 Ohio St. 7, 82 N. E. 518, the reverse of that situation was presented. There the county authorities had gotten the bridge, and when the estimates were presented they paid for it, and thereafter the county undertook to get that money back, claiming the contract illegal because of the lack, through inadvertence, of a certificate of the county auditor that the money is in the treasury to the credit of the fund, or had been levied and was in process of collection. There the Supreme Court said that the money

so paid could not be recovered back, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution of the contract for such work, nor any claim of effort to put the contractor in statu quo by the return of the bridge or otherwise; the same having been accepted by the board of commissioners and incorporated as part of the public highway.

The court in that case in effect said:

"The plaintiff here is not suing on an illegal contract to get his money back. He is holding onto money which he got, it is true, by virtue of a contract made in violation of law; but, inasmuch as the public got the property for that money, we will not permit the public's representatives to recover it back. He who comes in and seeks redress of that kind will not be heard to urge the illegality of the contract, in order to recover back that which had been paid, at least in good morals, in dealing with the other party."

That, I think, is the law, and that would be the law that would apply here, if a supplementary contract under section 4331 had been necessary back in May, 1915.

Perhaps, if a supplementary contract had been necessary, and the Casey Company had not been able to get an estimate, or had not been able to get the money and had to sue, they would fail to sustain the burden of proof; in other words, they would not be able, perhaps, to show or to prove a contract binding legally upon the city authorities to pay them that money. But if the city authorities, recognizing their normal obligation to pay for that which was morally due and ought to have been covered by the contract originally, issued a proper voucher and paid it, certainly the city authorities afterwards have no standing in court when they undertake to recover that money back, and it does not take from the strength of the position of the person who has received the money that he has thereafter, and at a date so late that on its face it looks as if it were a superfluity, or almost a subterfuge, gotten that contract under the circumstances shown in evidence in this case.

So that it seems to me that, viewing the counterclaim in any angle and from any aspect, the city is not entitled to recover from the Casey Company on either one of these items. The money has been paid to them, and they are entitled to the payment.

That leaves nothing, gentlemen of the jury, here for your consideration, except that which results from the admitted and conceded facts. It is admitted here, both in the answer and verbally before you, that the city of Canton, which is the defendant, is retaining three sums of money as a reserved percentage of 2 per cent. of the price to be paid to the plaintiff for constructing the sewers. The aggregate amount of these three items is $3,891.45; $1,190.99 bears interest from October 16, 1916, $1,190.81 bears interest from July 15, 1916, and $1,509.55 bears interest from August 20, 1916. The interest should be computed until the first day of this term of court, February 5, 1918, and you should return a verdict for the aggregate amount thus ascertained in favor of the plaintiff.

OLIVIER et al. v. MT. UNION TANNING & EXTRACT CO.

(District Court, M. D. Pennsylvania. November 16, 1918.)

No. 962.

1. REPLEVIN ⊂=8(5)—WHO MAY MAINTAIN—JOINT OWNERS.
Where at most an assignment could only make plaintiff a joint owner of property held by defendant as joint owner, replevin cannot be maintained; for, being a possessory action, replevin cannot be maintained, unless plaintiff is entitled to immediate exclusive possession.

2. CARRIERS ⊂=58—TRANSFER OF BILL OF LADING—EFFECT ON TITLE—BULKY ARTICLES.
The transfer to plaintiff of bills of lading for a shipment of logwood consigned by the owner to defendant, together with an assignment, etc., *held*, in view of the bulky character of the property to vest plaintiff with title thereto.

3. SALES ⊂=233(3)—RIGHTS AS AGAINST THIRD PERSONS—NOTICE—EVIDENCE —SUFFICIENCY.
Defendant *held* to have had notice, etc., of the transfer to plaintiff of logwood consigned to defendant, before the logwood was manufactured into extract.

4. REPLEVIN ⊂=108—ACTIONS—RECOVERY OF DAMAGES.
Replevin is a mixed action, being both a demand for a thing and damages for withholding; and in replevin for property that defendant knew belonged to plaintiff, *held*, that plaintiff could recover damages for that eloigned.

At Law. Action of replevin by Marcel Olivier, Maurice Rosier, and Daniel Brun, copartners doing business as Olivier & Co., against the Mt. Union Tanning & Extract Company. Judgment for plaintiffs.

Fox & Geyer, of Harrisburg, Pa., for plaintiffs.

James S. Woods and H. H. Waite, both of Huntingdon, Pa., for defendant.

WITMER, District Judge. This is an action of replevin brought by the plaintiffs, Marcel Olivier, Maurice Rosier, and Daniel Brun, copartners doing business under the firm name of Olivier & Co., against the Mt. Union Tanning & Extract Company, for the recovery of 1,576 tons of logwood in the yards and possession of the defendant at Mt. Union, Pa.

The case came on for trial, a jury having been called and sworn, and after proceeding with the trial and taking the testimony of witnesses for plaintiff and some for defendant, upon agreement of counsel, the jury was dismissed, and the case proceeded agreeably to the provisions of the act of April 22, 1874 (P. L. 109).

The plaintiff has alleged that in the month of June, 1916, in the city of New York, the Bothamley Chemical, Color & Extract Company, having arranged to acquire certain logwood then being imported, borrowed from it, the plaintiff, certain sums of money, giving its collateral note promising to repay such sum, and at the same time pledged a lot of logwood, described in certain invoices and weigh notes; that it also by writing assigned said logwood to plaintiff, at-

taching to such instrument bills of lading of the carrier company. It is stated that there were seven individual and like transactions. The plaintiff further alleges that the logwood thereafter came into the possession of the defendant; that when the notes fell due they were not paid, and the plaintiff became entitled to the possession of the logwood. Demand having been made for it, the defendant wrongfully refused to deliver the same to plaintiff.

The plaintiff having filed the required bond, the writ was served by the marshal, and, on failure of defendant to provide a bond for detention, delivery was made to the plaintiff.

The defendant denies the title and right of possession of the plaintiff as alleged, averring generally that such was and always belonged to it, for that in May, 1916, the defendant entered into a contract with the Bothamley Chemical, Color & Extract Company, by which it was agreed that the Bothamley Company would secure logwood to be manufactured by the defendant, the manufactured product to be turned over to the Bothamley Company and sold, the money deposited in a special account, and first used for the payment of the cost of the logwood and freight, and after an allowance of three cents per pound for manufacture, the remaining or net profit to be divided between the two. The defendant further alleges that it had no notice of the plaintiff's claim to the wood until October, 1916; that it had manufactured all or nearly all of the wood into extract and was willing and ready to manufacture the balance as undertaken and agreed with the Bothamley Company; that under its contract with the latter it had received the logwood into its yards, and a certain portion of it was at once taken from the cars and manufactured into extract; that of the 1,576 tons claimed, 984 tons were not stored, but manufactured at once, yielding 787 barrels of extract, of which 700 were delivered to the Bothamley Company, which in turn delivered 400 barrels of it to the plaintiff, of the value of $60,000, which the plaintiff neglected to credit to the Bothamley Company. The defendant also denies the authority of the Bothamley Company to transfer and assign the logwood purchased from H. Mann & Co., being 815 tons of the amount embraced in the total shipment of 1,576 tons, claiming that such purchase was the joint purchase of the defendant and the Bothamley Company. It is further contended that the wood was so commingled in plaintiff's yards that it was not possible to determine how much, if any, of the wood in question was remaining, and, further, that if there was any there defendant had a lien upon it for any balance due from the Bothamley Company on final settlement of their account.

The issue here presented is one of ownership and right of possession of the property in dispute. The plaintiff's claim of title is clearly and fully set forth in its declaration, with an averment of wrongful dispossession, and this it is bound to sustain by the fair weight or preponderance of the evidence in order to maintain its action. Has it done so?

The matter can be best understood and more readily disposed of by considering individually the logwood purchased from H. Mann

& Co., as distinguished from the wood obtained through other sources from the Bothamley Company. Now, as to the former, the court is readily satisfied, and so finds, that the purchase was made by the defendant jointly with the Bothamley Company, and that the defendant obtained delivery and full possession of the same without any knowledge of the assignment or attempted assignment of it by the Bothamley Company to the plaintiff. Were a discussion of the proof here required in support of this conclusion, it could be readily supplied; suffice to say that plaintiff well knew, judging from the notes and agreements in evidence, that it was supplying only half of the money to pay for these shipments. Had plaintiff made diligent inquiry, as it was in duty bound, it could readily have ascertained that the defendant had obligated itself for the other half, for which it ultimately made payment, and thus ascertained the real and complete ownership of the property to which it sought title.

[1] Though the Bothamley Company did assign to the plaintiff this wood, it nevertheless remains that defendant was not affected thereby since such assignment could only in effect operate to substitute the assignee for the assignor as the joint owner of the defendant; assuming now that these assignments, of which more will hereafter be said, were sufficient to convey ownership of the property recited. It follows, therefore, that the most favorable position that can be allowed plaintiff is to concede to him, jointly with defendant, ownership of the purchases and shipments from H. Mann & Co., which admittedly will defeat its right to recovery to this extent. The action of replevin, being a possessory action, cannot be maintained unless the plaintiff established property and the exclusive right of immediate possession. Lake Shore & Michigan Ry. Co. v. Ellsey, 85 Pa. 283; Strong et al. v. Dinniny, 175 Pa. 586, 34 Atl. 919; McFarland Meade Co. v. Doak, 63 Pa. Super. Ct. 31.

Having decided in Reinheimer v. Hemingway, 35 Pa. 432, that one tenant in common of a chattel cannot maintain replevin for it, without joining his cotenants, Justice Strong, in delivering the opinion of the court, said:

"An action of * * * replevin * * * operates specifically upon the chattel. If it can be brought by one of three tenants in common, it may be by each of the others. And if the writs be in the sheriff's hands at the same time, how is the property to be replevied? In Hart v. Fitzgerald, 2 Mass. 511 [3 Am. Dec. 75], it was ruled that a part owner of a chattel cannot maintain replevin for his undivided part, and if it appear in the writ, the court will arrest the judgment. Part ownership in another is therefore pleadable in bar, and not exclusively in abatement. So in Rogers v. Arnold, 12 Wend. [N. Y.] 30, it was held that, if the plaintiff in replevin fail to establish an exclusive right in himself to possess and control the property, the defendant is entitled to a verdict."

[2, 3] Taking up the remaining shipments, aggregating 761 tons, purchased by the Bothamley Company from the Fruit Dispatch Company and the American Products Exchange, it may be noted that each and every of them was secured to the plaintiff for the purchase money, advanced by check payable to the vendor for the logwood purchased by the Bothamley Company giving its note to plaintiff,

collateral in form, promising to repay the amount in three months, and an instrument assigning and transferring unto the plaintiff the respective shipments of logwood. Accompanying the collateral note was the original invoice for this wood, together with the weigh notes further describing it. Subsequently the Bothamley Company delivered to the plaintiff the bills of lading of the Pennsylvania Railroad Company, consigning the shipment to the defendant. Accompanying the bills of lading was the written assignment mentioned, transferring and assigning to the plaintiff all of its right, title, and interest in and to the logwood, which assignment was in terms supplemental to the assignment contained in the collateral note, and subject to all the terms thereof.

This arrangement between the parties is undoubtedly binding, and vested the title to the property in the plaintiff. The bulky character of the property rendering it difficult of actual physical delivery, the transfer of such is as a general custom usually made by symbolic delivery; that is, by the transfer of bills of lading, warehouse receipts, or other documents, describing the property and showing the location and possession of it. That the title to property of such character under the circumstances may be shifted by the delivery of such evidences of ownership, and without actual physical delivery, has been held in the well-recognized case of Century Throwing Co. v. Muller, 197 Fed. 252, 116 C. C. A. 614, where the court took judicial notice of the special custom concerning such transactions. Whether such transfer of title without actual physical delivery is, however, binding upon third parties generally without notice, need not be here decided; it being established that the defendant had knowledge of the transfer of title by the Bothamley Company to the plaintiff before the same passed out of its possession, either in its raw state or as manufactured into extract. It is not difficult to find that the defendant was without notice of the plaintiff's claim of title until October, 1916. The written agreement between the Bothamley Company and defendant bore the date of May 24, 1916. Delivery was made during the month of June following. Defendant contends that a portion, if not the greater portion, of the deliveries or shipments, were used up from aboard cars and manufactured into extract as delivered in its yards by the railroad company without storing, and that the product thereof was immediately turned over to the Bothamley Company without knowledge of the plaintiff's claim, and that the remaining portion, which was stored, was so commingled with its own wood that it was impossible to distinguish it or to determine the amount so stored. That the latter contention is true can hardly be doubted, and whether such commingling was due to the negligence of the defendant, or resulting necessarily from the method or means usually employed in the course of manufacturing liquid extract at defendant's plant, is not deemed important in the face of defendant's admissions.

In reply to a letter of October 2, 1916, written to defendant by plaintiff's attorneys, advising it of its claim on the logwood purchased and shipped at the instance of the Bothamley Company, transmitting

therewith a list of shipments in detail, and furthermore requesting advice as to the location of each carload lot, defendant promised in return a few days later to write fully after investigation and checking of figures submitted. The matter was then no doubt turned over to defendant's attorney, who opened a correspondence with plaintiff's attorneys regarding the assignment and the location of the wood, lasting until the latter part of February, 1917. It may not be important, but it does not appear that it was at any time hinted that the wood or any portion of it was no longer in defendant's yards at Mt. Union. In fact, the correspondence proceeds on the assumption that it was all there. However, during the beginning of January, 1917, plaintiff's agent, E. H. Peck, visited Mt. Union, and states that he was there informed by Mr. Green, president of the defendant company, that the wood was piled in the yard with other wood belonging to the Mt. Union Company and the Bothamley Company.

Referring to Mr. Peck's visit and his report of what he heard and saw, the plaintiff on January 23, 1917, wrote to defendant, amongst other things, inquiring about insurance on the wood. Several days thereafter, the defendant replied by wire: "Letter received and have no insurance on wood." The same day, January 26th, the defendant company confirmed by letter the telegram and added:

"In regard to shipping hematine in your name, would advise that there is no danger of shipping any extract from your wood, as we think there is considerable quantity here yet in addition to yours. We will be careful about this."

The insurance was perfected and the correspondence continued; defendant again, in letter dated January 29th, addressed to plaintiff, stated:

"We will take up with Bothamley the matter you propose about shipment, although we have not yet reached any of your wood. No doubt they are very anxious to get it cleaned up."

March 8th, the plaintiff reimbursed defendant by check $6,016.57 for freight advanced by it on these shipments of the Bothamley Company, according to conference between Mr. Green and Mr. Peck upon the latter's visit to Mt. Union.

Considerable correspondence passed between the parties in the plaintiff's effort to have the wood turned into extract and shipped to plaintiff, without result. Finally on November 24, 1917, after Mr. Peck visited the yards of defendant with a prospective purchaser for the wood, the plaintiff wrote a letter to defendant, advising it that the wood had been sold to the man who visited the yards with Mr. Peck, and directed shipment of it to Marietta, Ohio. To this the defendant replied:

"This wood was sent to us without any notice whatever of any claim being upon it until after it had been in our yards, mixed up with a lot of other wood. It came to our yard in the usual course of business, and no notice was received by us that anybody had any claim upon this wood until long after it had been received. Some of it has been used and manufactured, and some of it may be still in the yard; it may all have been manufactured."

Finally, on account of the conflicting claims of other parties to the wood, the defendant stated, it was obliged to refuse permission to remove it.

No other conclusion can be fairly deduced from the evidence referring to the admission of the defendant preceding the payment of the freight charges by the plaintiff than that it retained possession of the wood now in dispute. That the president, being in charge of the business, could be so wide of the mark and so badly mistaken as is now argued by his counsel would be attributing to him a want of business grasp and attention, and such lacking of care in the use of assertions in letter writing, of which the court would hesitate to convict him. Surely it must be accepted that the wood was in defendant's yard, and all of it, when the defendant gave plaintiff the assurance that there was considerable there yet in addition to its wood, promising to be careful about the matter, and then afterwards repeating that none of defendant's wood had yet been reached. If, subsequently, this wood was used, or in any shape, as extract or wood, it was removed from the yard, the defendant cannot be heard to complain that it was indistinguishable from its own, having been responsible for its disposition. It follows, and the court so finds, that 515 tons delivered by the marshal to the plaintiff was wood belonging to the plaintiff. This was the weight of a quantity of wood after storing and drying in defendant's yard for a period of a year and over. What portion of the 761 tons, weighed when green and unseasoned, does this represent? The loss by seasoning has been variously estimated. The defendant and one of his witnesses have testified to an experiment made to ascertain this by weighing a number of sticks when green, or on receipt of same in the yard, and then again after thorough drying, resulting in loss of 30 per cent. Common experience teaches that this result is more reliable than the estimate of 6 per cent. loss as testified by plaintiff's witness as the basis for the calculation. Applying this to the tonnage in dry wood seized (515) produces approximately 670 tons, and being accepted on a calculation the 515 tons of seasoned wood represents approximately 670 tons of the 761 tons of wood in the green state, thus leaving 91 tons eloigned.

[4] Replevin is a mixed action, being both the demand for a thing and damages for the taking and detention. It is not only a proceeding in rem, but also a proceeding against the defendant in the writ personally with a summons to appear. This was so previous to the act of July 9, 1901 (P. L. 614), which recognizes merely the previous decisions of our courts, holding to this principle. Wetherill v. Gallagher, 211 Pa. 311, 60 Atl. 905, 107 Am. St. Rep. 575; Hoyt v. Carson, 60 Pa. Super. Ct. 175; Baldwin v. Cash, 7 Watts & S. (Pa.) 425; Bower v. Tallman, 5 Watts & S. (Pa.) 556. In the latter case, Justice Kennedy, speaking for the court, said:

"Thus it has been held, even in England, where the maintenance of the action of replevin is much more restricted than in Pennsylvania, the plaintiff may recover damages from the defendant equal to the value of the property, when taken by the latter tortiously or without authority, where he has put it out of the power of the sheriff or proper officer to execute the writ by replevy-

ing and delivering the property up to the plaintiff, or where, from other causes, it may have become impracticable for the officer to do so. As, for instance, where the cattle are eloigned by the defendant, the plaintiff may, instead of proceeding to obtain a writ of withernam, for the purpose of taking other cattle in lieu of those eloigned, proceed in the cause, if the cattle be withheld by the defendant, and recover damages to the full value of them, as well as damages for the detention."

The plaintiff, having fixed the price of wood at $29.50 per ton, cannot complain if this is accepted in estimating the damages at $2,684.50 for the wood eloigned and interest upon this amount from January 29, 1917, date of marshal's demand, for detention.

The court therefore finds in favor of plaintiff and against the defendant as and for damages in the sum of $2,810.72.

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## THE HOWARD.

(District Court, D. Maryland. June 10, 1916.)

1. COLLISION ⊂=61—STEAMER AND BARGE—FAULT OF OVERTAKING VESSEL.
An overtaking steamer, which, several miles off Point Judith, on a clear night, ran into a barge, with lights set, in tow of tug, *held* at fault; her navigator's attention having been fixed on another vessel, till too late to avoid the collision, and she having shortly before changed her course.

2. COLLISION ⊂=61—FAULT OF TUG WITH LONG HAWSER—EXERCISE OF JUDGMENT.
The rules allowing use, from Race Rock to Gay Head, of a hawser longer than 75 fathoms, when in the judgment of the tug's master, in view of wind and weather conditions, safety requires, he should not be held in fault, in an honest exercise of that judgment, relative to collision of steamer with one of barges in tow of tug.

3. COLLISION ⊂=58—TUG WITH LONG HAWSER—CARE REQUIRED.
Use by tug, with barges in tow, of hawsers longer than generally permitted by the rules, requires exercise by it of extreme care in navigation to avoid collision.

4. COLLISION ⊂=16, 61—VESSEL AT FAULT—OFFICER WITHOUT AUTHORITY.
No vessel, and least of all, one which, with tows, occupies half a mile of sea room, should be left in charge of an officer who is not allowed to exercise what skill and competency he has, and for such fault, if possibly contributing to a collision, she must be held in part responsible.

5. COLLISION ⊂=76—DUTY TO WARN—OVERTAKEN VESSEL.
A tug, with barges in tow, seeing that an overtaking steamer is likely to run into one of the barges, is not without duty to sound danger signals, merely because the steamer has not sounded passing signals.

6. COLLISION ⊂=58—DUTY OF OVERTAKEN TUG—PRESERVING COURSE AND SPEED.
The captain of a tug, with two barges in tow, the first of which was struck by an overtaking steamer, though supposing the steamer was likely to pass between the barges, was under the duty of the privileged vessel of preserving course and speed, and was in fault in slowing engines to let hawsers sink.

7. COLLISION ⊂=108—FAULT—EMERGENCY.
Act of captain of overtaken tug in slowing engines will not be excused, on ground of emergency, because he had just come from below, but will be judged as if he, or some one free to exercise a free and independent judgment, had been in charge of navigation when danger first appeared.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In Admiralty. Suits for collision by the Consolidation Coastwise Company and the Consolidation Coal Company against the steamship Howard, and by the Merchants' & Miners' Transportation Company against the Consolidation Coastwise Company. Damages divided.

Keech, Wright & Lord, J. Walter Lord, and Robert R. Carman, all of Baltimore, Md., for Consolidation Coastwise Co. and Consolidation Coal Co.

Daniel H. Hayne, of Baltimore, Md., for The Howard and Merchants' & Miners' Transp. Co.

ROSE, District Judge. A very few minutes after 4 o'clock on the morning of the 4th of February last the steamship Howard, when some 3½ miles southeast of Point Judith, was in collision with a barge known as No. 12. The barge sank almost immediately. It and its cargo of 1,447 tons of coal were lost. Of its crew of five, three were drowned.

[1] The Howard was one of the steamers of the Merchants' & Miners' Transportation Company, and at the time of the disaster was on one of its regular trips from Baltimore to Providence. The barge, together with another, No. 17, was in tow of the steamship Charles F. Mayer, and was bound from Hampton Roads to Boston and Portsmouth. The Mayer and both the barges belonged to the Consolidation Coastwise Company. All three were loaded with coal, which was the property of the Consolidation Coal Company. The barges were arranged in tandem fashion. The one which was sunk followed next after the Mayer, and barge No. 17 brought up the rear. Each barge had from 165 to 185 fathoms of hawser out. The Mayer was some 236 feet long; each of the barges, a trifle over 200 feet. There was therefore about half a mile between the stem of the Mayer and the stern of barge 17. The wind was from the northwest, the night was clear, and the required lights were burning on all the vessels concerned.

It is true that the Howard says that the white lights of the rear barge were not as bright as the law requires. The witness Hamilton was the first officer of the steamship Dimmick. It was west bound and passed the Mayer and her tow on an almost parallel course a few minutes before the collision. He says he remembers looking for the white lights of the rear barge, and that he did not see them until his steamer reached or passed barge 12. He thinks the Dimmick came within a few hundred feet of barge 17, but he frankly adds that it is hard to judge distances accurately, especially at night. If the Dimmick passed as close to the Point Judith gas buoy as he says she did, she could not have come within half a mile of the barge.

Another apparently disinterested witness was navigating the tug Western. It was following some three or four miles behind the Mayer and her barges. He had no difficulty in keeping the white lights of barge 17 steadily in view. There is no sufficient reason to believe that the lights on that barge were any less bright than they should have been.

At the time of the collision the Howard was the overtaking, and therefore the burdened, vessel, and, moreover, she changed her course

not very long before she struck the barge. With one possible exception, no one on the Howard saw before the collision any of the lights on any of the three vessels of the Mayer fleet. Indeed, until a collision had become inevitable, nobody on the Howard knew that the Mayer or the barges were anywhere in the neighborhood. It is impossible to believe that all the lights that should have been visible on the Mayer and its barges were obscured by sails. The only reason to suppose that any of them were is that perhaps no one on the Howard saw them.

The story told by witnesses for the latter deprives that circumstance of all probative force. Her watch changed at 4 o'clock. The collision, according to the clock in her pilot house, took place at 5 minutes after 4. The officer in charge came on duty a minute or so before 4. Quartermasters were changed somewhat later, the witnesses say, only a minute or so before the collision. It was after the new quartermaster had received the course from his predecessor that the navigating officer first noticed the lights of the Dimmick, which were never reported by the Howard's lookout, if indeed they were ever seen by him, although either her lights or those of the Mayer were noticed by the quartermaster who went off duty just before the collision. It is evident from the testimony of the Howard's officer that, when he first caught sight of the Dimmick's red light, he was startled by what appeared to him to be her dangerous proximity. He gave the order "hard aport," and watched her until he saw he was going to clear her safely. It was not until then that he saw the sails of the barge. He at once gave the order to slow engines, and instantly followed it by another order to put them at full speed astern. It was too late. The stem of the Howard cut into the barge from her forerigging to her boiler hatch.

It is not necessary to assume the precise accuracy of the estimates of time made by those in the pilot house of the Howard. It appears probable that the Howard was not quite as close to the Dimmick as the former's navigator thought, but it is quite clear that he was alarmed by the appearance of the Dimmick, and that he kept his attention riveted on her until it was too late to avoid striking the barge. The fault of the Howard is clear, and need not be further elaborated. It may be explained, but not justified, by the fact that the change of watch had just been made.

[2] Is the Mayer also to blame? The rules require that ordinarily there shall not be more than 75 fathoms of hawser out, but it is expressly provided that from Race Rock to Gay Head longer hawsers may be used, when in the judgment of the master, in view of the wind and weather conditions, safety requires. A great deal of testimony had been taken as to what those conditions were at the time of the collision and immediately preceding it. The weather records show that at Block Island the wind was then blowing from 26 to 27 miles an hour. The witnesses differ widely as to how strong the wind was in the neighborhood of the place of the collision. There are disinterested witnesses on both sides, and they differ as widely as do those more nearly involved in the controversy. Such as testify for the libelants vary from 20 to 35 miles an hour in their estimates of the wind's ve-

locity. The respondent's witnesses testify it did not exceed 15. The latter say that the sea was smooth.

There is no question that after the collision the Howard's lifeboats were lowered without difficulty and without bumping against the sides of the vessel. They found it both safe and easy to row about in search of the crew of the sunken barge. On the other hand, the libelants put on the stand a number of tugboat captains not in their employ. They all unite in testifying that weather conditions were such that it would not have been safe to tow on a short hawser. The rules impose upon the captain of a tug the duty of deciding whether weather conditions in this locality require at any particular time the use of a hawser exceeding 75 fathoms in length. That judgment must be exercised in good faith, but I see no reason to doubt that the captain of the Mayer did believe that under the weather conditions as he conceived them to be, a long hawser was required.

Now, it is true that tugboat captains assume that in these waters it is never safe to use a short hawser. It may be that that judgment is largely influenced by the fact that the use of a long hawser makes their work easier. Nevertheless, the rules leave to the determination of the captain of the tug the length of the hawser which safety requires. It is obviously unfair to hold him in fault for an honest exercise of that judgment. Moreover, in this case the length of the hawser is of little or no importance. If it had been 20 or 30 fathoms longer than it was, there would have been no collision. If it had been 40 or 50 fathoms shorter, the boats would equally have escaped coming together. Had it been half as long as it was, the Howard would have collided with barge 17, and not with barge 12. After all, that is merely another way of saying that, if the barge had not been precisely where it was when the Howard struck it, it would not have been hit.

[3] I do not for a moment wish to minimize the importance of strict adherence to the rules requiring the use of short hawsers. As already stated, there was half a mile between the bow of the Mayer and the stern of barge 17. Tows of such length are doubly dangerous. They close for the time being a great stretch of water to other vessels, and it is exceedingly difficult for a tug with such a tow so to maneuver as to do its part in escaping from dangerous situations, or from situations which may easily become dangerous. The exercise of extreme care is, under such circumstances, incumbent upon it. The Admiral Schley, 131 Fed. 433, 65 C. C. A. 417.

[4] It is charged that the navigation of the Mayer was not in competent hands. None of her officers, other than her master, were licensed pilots for the waters in which she was. All of them were apparently competent navigators, quite capable of handling the ship under any circumstances in which an accurate knowledge of local conditions was not required. It is equally true that such conditions had nothing to do with this collision. It was in another way that their lack of pilot qualifications embarrassed the navigation of the ship. Because their captain knew they were without pilot licenses, he prescribed the ship's course, and gave them instructions to call him if it became necessary

to change it, or to do anything at all out of the ordinary. Then he went to his room, largely undressed, went to bed, and perhaps to sleep. The third officer came on duty in the pilot house at the change of watch about 4 a. m. He noticed the alteration in the course of the Howard, and became fearful that she would collide with barge 17. He sounded no danger or other signals. Indeed, it is one of the peculiarities of this case that until after the collision no signals were sounded by any of the craft concerned. He did nothing but call the captain, telling him that a steamship was about to run into the stern barge. The captain emerged in his underclothing and saw the Howard showing a green light. He thought she was to the starboard of the stern barge and about abeam of her, and that she was swinging under her port helm. He put his own helm to starboard, so he could get off at an angle and better see what was going on behind him. It looked to him as if the Howard was about to pass between the two barges. He ordered his engines slowed, so that the hawser might sink and the Howard pass over it without parting it. It was not until after the Howard showed her red light, and appeared to be going off to the southward and eastward of his course, that he blew any signal, and that was not intended for the Howard, but was a direction to his own barges to pay attention and follow the lead of the Mayer. In point of fact the collision must have occurred before he saw the Howard's red light. That could not have been visible from the Mayer until the Howard, after striking barge 12, drew off from it.

It goes without saying that no vessel, and least of all none which with her tows occupies half a mile of sea room, should be left in charge of an officer who is not allowed to exercise whatever skill and competency he has. In this the Mayer was in fault, and, if it is possible that such fault contributed to the collision, she must be held in part responsible for it.

[5, 6] The Howard insists that the Mayer should have blown danger signals so soon as it appeared to those in the pilot house of the Mayer that there was any chance of a collision. The Mayer replies that the obligation to sound danger signals is by the rules imposed on the overtaken vessel only where the overtaking vessel has first sounded passing signals, and the overtaken vessel believes that the maneuver indicated will be dangerous. The Howard answers that the Mayer was expressly required not to ignore any precaution which might be required by the ordinary practice of the seamen, or by the special circumstances of the case. It says that it has always been the ordinary practice of seamen, and for that matter of everybody else, to do all in their power to warn one who appears about to run into them. The Mayer answers that at the earliest moment at which there was any reason to sound such signal it would have been too late to have prevented the collision. That may be true, and if the statements of those in the pilot house of the Howard as to the shortness of the time which elapsed between its helm being put hard aport, and the collision, are correct, it is true. On the other hand, according to the testimony from the Mayer's pilot house, the officer in charge saw the Howard getting into a dangerous position with reference to the rear barge. He

called the captain, who came out of his stateroom, looked back, formed an idea, correct or incorrect, as to the situation, threw the head of his vessel to port, and slowed down his engines, all before the collision took place.

Under these circumstances it is impossible to be certain that the prompt sounding by the officer in the pilot house of the Mayer of a danger signal might not have attracted the attention of the Howard in time to have prevented the collision. It was the obvious and natural thing to do, and doubtless would have been done, had not the third officer of the Mayer had his mind on calling his captain. But, if there could be any doubt as to whether the Mayer should be held liable for this act of omission, there would seem to be none that she is blameworthy for doing what the captain did. If, as he supposed, the Howard was likely to pass between the two barges, he took a great risk in slowing down. His was the privileged vessel, but it was under the corresponding duty of preserving its course and speed. It was far better to have a hawser cut than to have a barge sunk. As an experienced navigator he must have known that it was almost impossible for him, from his position, to determine accurately the relative positions and speed of the Howard and the barge. Instead of saving the hawser, what he did may have resulted in losing a barge, its contents, and three lives besides. It is true, as argued by the Mayer, that it may be the collision would have happened, had not the Mayer's engines been slowed down, but on such a question it is impossible to be certain.

[7] The captain of the Mayer did what he should not have done, and what he did may have contributed to the collision, and he must be held liable. It is said that, if he made a mistake, it was in extremis. He was attempting to escape from a danger which was not of his making. Had he, or some one else free to exercise a competent and independent judgment, been in charge of the navigation of the Mayer when danger first manifested itself, there would have been more time to think and to act wisely. He must be held responsible for what he did, precisely as if he had been in the pilot house all the time. If slowing the engines was ever a wise thing to do, it should have been done when it looked like the Howard was about to run into the rear barge; but in point of fact, under all the circumstances of this case, the obligation of the Mayer to maintain her speed was more than usually imperative. The Mayer must therefore be held also in fault. I am not prepared to hold, as the Howard asks, that the sunken barge was also blameworthy.

It follows that the damage done by the collision must be divided between the Howard and the Mayer. If the parties cannot agree as to the amounts, a reference will be ordered.

## In re TRI-STATE COAL & COKE CO. et al.

(District Court, W. D. Pennsylvania. March Term, 1918.)

No. 35.

1. SEARCHES AND SEIZURES ⊂⊃7—CONSTITUTION—SCOPE OF PROTECTION.
   Const. Amend. 4, guaranteeing against unreasonable searches and seizures, etc., embraces all persons, even those accused of crime, etc., although limitations on the scope of the protection, such as the right to search the person of an accused when legally arrested, etc., is also recognized.
2. SEARCHES AND SEIZURES ⊂⊃3—AFFIDAVITS—SUFFICIENCY.
   Affidavits for search warrants under Act June 15, 1917, c. 30, to seize books, etc., on the ground they were used to commit a felony, *held* insufficient, both under act and Const. Amend. 4, constituting mere conclusions as to the offense committed, and not sufficiently designating the books, etc., sought.
3. SEARCHES AND SEIZURES ⊂⊃7—ACQUIESCENCE—ACT OF AGENT.
   That an agent of petitioners, whose property had been seized under search warrants illegally issued, consented to execution of the warrants, *held* not an acquiescence which would deprive petitioners of their constitutional rights.

At Law. In the matter of the petition of the Tri-State Coal & Coke Company and others to have returned to them certain books, papers, and writings. Search warrants quashed, and books, etc., ordered restored.

E. Lowry Humes, U. S. Atty., of Pittsburgh, Pa., for the United States.

Nash Rockwood, of New York City, and Diamond & Zacharias, of Pittsburgh, Pa., for defendants.

THOMSON, District Judge. Three several petitions are presented to the court, one by the Tri-State Coal & Coke Company, one by the Pennsylvania Central Coal Company, and one by T. F. Barrett, praying for an order directing that all books, papers, writings, and other property of the several petitioners, alleged to have been illegally seized and taken by the United States marshal, be returned.

The property was seized on search warrants dated February 21, 1918, issued by the United States commissioner for this district, supported by affidavits of Edgar B. Spear, special agent of the Department of Justice. The deputy marshal serving the warrants made return in each case on February 23, 1918, setting forth in connection therewith a general schedule of the property seized on each writ.

A little later petitions were presented to Roger Knox, United States commissioner, who had issued the warrants alleging the illegality of the search warrants, and that the property was unlawfully seized, and praying that the property and papers be returned to the petitioners. A hearing was had before the commissioner, in which testimony on behalf of the petitioners and on behalf of the government was taken. Certain of the papers seized were returned and others were retained, and on hearing the commissioner refused the prayer of the petition.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The search warrants authorized the entry upon the premises in question "to search for, seize, and take away certain property, to wit, contracts, books of account, minute books, ledgers, journals, cash books, day books, memoranda, and order books, check books, receipt books, and other documents, which other documents were more particularly enumerated, described, and indexed by words, letters, and figures, as follows, to wit." But following this there is no description or designation whatever.

[1] The protection of the people of the United States against unreasonable searches and seizures has been guaranteed by the Fourth Amendment of the Constitution of the United States, in these words:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

The protecting scope of this constitutional provision, as well as its limitations, have been considered and enunciated in various decisions of the Supreme Court, among which may be cited Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877, Bram v. United States, 168 U. S. 532, 18 Sup. Ct. 183, 42 L. Ed. 568, Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652, Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and many others.

These cases all recognize, not only the binding force of this constitutional provision, but its high necessity to protect the sanctity of the home and the privacies of life; that this protection is so broad and ample that it embraces all persons, even those accused of crime; and that the duty of giving it full effect rests upon all intrusted under our federal system with the enforcement of the laws.

In Weeks v. United States, the following limitations are distinctly recognized: The right to search the person of the accused when legally arrested, to discover and seize the proofs of his crime; the right to seize the tools of the burglar, or other proofs of guilt found upon his arrest within the control of the accused; the right to offer during the course of a trial papers, though unlawfully seized, unless reasonable application for their return has been made to the court.

[2] The act of Congress of June 15, 1917 (40 Stat. 217, c. 30), under which the search warrants in this case were issued, very carefully guarded against any invasion of the constitutional provision. It clearly sets forth the three grounds upon which alone a search warrant may issue:

(1) When the property was stolen or embezzled, in violation of a law of the United States.

(2) When the property was used as a means of committing a felony.

(3) When the property, or any paper, is possessed, controlled, or used in violation of section 22 of this act.

By section 3, title 11, a search warrant cannot be issued but upon probable cause, supported by affidavit naming or describing the per-

son and particularly describing the property and the place to be searched.

Under section 5, title 11, the affidavits or depositions must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

The opinion in the very recent case of Veeder v. United States, 252 Fed. 414, —— C. C. A. ——, wherein the search warrant was quashed by the Circuit Court of Appeals of the Seventh Circuit, covers this case completely. There the affidavits and depositions in support of the warrant were much fuller and more specific than in the case at bar. The court held there that no search warrant shall issue unless the judge shall first be furnished with facts—not beliefs, or surmises, but facts—which, when the law is properly applied to them, shall tend to establish the necessary legal conclusions, or tend to establish probable cause for believing that the legal conclusion is right, and that the finding of a legal conclusion or a probable cause from the exhibited facts is a judicial function, and cannot be delegated by the judge to the accuser.

The search warrants here issued were totally and fatally defective. All that the affidavit sets forth is that the property referred to—

"has been used as the means of committing certain unlawful felonies; that is to say, the felony of knowingly and willfully, with knowledge that the price of bituminous coal has heretofore been fixed at $2.45 per ton, f. o. b. mines, in accordance with the regulations prescribed under and by virtue of the Food and Fuel Act of Congress approved August 10, 1917, to ask, demand and receive higher prices per ton for bituminous coal at the mine than the price theretofore prescribed by the said regulations under the said act of Congress, and the further felony of combining, conspiring, agreeing, and arranging with other persons to exact excessive prices for bituminous coal, said prices being higher prices per ton at the mine than the prices theretofore prescribed by the regulations prescribed under and by virtue of the Food and Fuel Act of Congress approved August 10, 1917, and the further felony of aiding and abetting the felony of making, demanding, and receiving higher prices per ton for bituminous coal at the mine than the price theretofore prescribed by the said regulations under the act of Congress of August 10, 1917."

These averments are mere conclusions, not facts. As said in the Veeder Case:

"There is nothing but the affiant's application of his own undisclosed notion of the law to an undisclosed state of facts; and under our system of government the accuser is not permitted to be also the judge."

The affidavit does not even set forth the person who committed the alleged felonies, does not sufficiently designate and describe the property to be seized, does not set forth how the books and papers were used as the means of committing a felony, and is otherwise defective.

The issuance of the search warrants, and the seizure of the petitioners' books, papers, and property thereunder, was a palpable and flagrant violation of their rights guaranteed by the Constitution. I have read carefully the testimony offered before the commissioner, and fail to find any such agreement as would make valid and justify the detention of the papers and property thus unlawfully seized and retained.

[3] Any acquiescence by some agent as to the seizure and detention of the books and papers was simply a choice of evils, when confronted by an officer of the United States armed with a warrant which he was determined to execute. By virtue of no such means can the high constitutional rights of a citizen be invaded or taken away.

I am authorized to state that the views expressed in this opinion are concurred in by Judge ORR.

PER CURIAM. And now, to wit, March 21, 1918, the search warrants in question are quashed, and it is ordered and directed that all books, papers, writings, and other property of the said several petitioners, so as aforesaid illegally taken, and now in the custody and control of the United States attorney for the Western district of Pennsylvania, or in the custody and control of the said Edgar B. Spear, special agent of the Department of Justice, be restored and returned to the respective petitioners from whom the same were taken, together with all copies, photographs, or memoranda thereof made since the same were taken.

At the request of the United States attorney, an exception is noted to the foregoing order of the court, and at his request a bill is sealed.

In the matter of the return of papers ordered by the court in connection with the search warrants issued against the Tri-State Coal Company, the Pennsylvania Central Coal Company, and T. F. Barrett, I now hand to the court the papers ordered returned, the defendants having declined to give us a receipt, in order that the court may have a record of the compliance with the order of court.

[Signed] E. Lowry Humes, United States Attorney.

THOMSON, District Judge. And now, this 21st day of March, A. D. 1918, the United States attorney having turned over to the clerk, in the presence of the court, the papers directed by order this day to be delivered to the respective parties from whom they were taken by virtue of the search warrants designated in the opinion this day filed, the same are directed by the court to be delivered to the counsel who are now present in court of the parties, respectively, to whom the said papers belong.

## COLLINS v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3156.

1. INDICTMENT AND INFORMATION ⟸121(1, 5)—BILL OF PARTICULARS—NATURE.
A bill of particulars can in no way aid an indictment fundamentally bad; the office of the bill, which is addressed to the discretion of the court, being to render the defendant more particular information as to matters essential to his defense.

2. INDICTMENT AND INFORMATION ⟸110(3)—SUFFICIENCY—WORDS OF STATUTE.
An indictment charging, in the words of the Espionage Act, that defendant did make and convey false reports, etc., with intent to interfere with military and naval operations, etc., *held* insufficient to charge any offense.

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

William M. Collins was convicted of violating the Espionage Act, and he brings error. Reversed and remanded.

This cause is here on writ of error at the instance of William M. Collins, defendant below, who was charged with a violation of the Espionage Act of Congress (Act June 15, 1917, c. 30, 40 Stat. 217). The indictment contains two counts. Count 1 charges that Collins, on or about December 16, 1917, at Montesano, Wash., "when the United States was at war with Germany, did willfully, knowingly, unlawfully, and feloniously make and convey false reports and false statements, with intent to interfere with the operation and success of the military forces of the United States, and to promote the success of its enemies." The second count is of like tenor, except that the charge is based upon the declaration of the act for causing and attempting to cause insubordination, disloyalty, mutiny, and refusal of duty in the military forces of the United States.

The indictment was returned January 9, 1918. The defendant was arraigned and entered a plea of not guilty January 14, and the cause was set for trial January 29, 1918. On January 28th, apparently without withdrawing his plea of not guilty, the defendant filed a demurrer to the indictment, assigning as reasons therefor that neither of the counts charged an offense against the laws of the United States, nor did they state facts sufficient to constitute a crime. After argument, the demurrer was overruled, and the court thereupon required the prosecuting attorney to file forthwith a bill of particulars of the offenses charged, which was done.

When the cause came on for trial before a jury duly impaneled, defendant's counsel objected to the court's receiving any evidence in support of the allegations of the indictment, and at the same time moved the court for an instructed verdict acquitting the defendant, upon the ground that the indictment does not state facts sufficient to constitute a crime. The objection was overruled, and the motion denied, and an exception was saved and allowed. The trial resulted in a conviction under count 1 and an acquittal under count 2. There was a motion at the conclusion of the testimony offered by the government for a directed verdict acquitting the defendant, but none at the close of the entire testimony. The motion was denied.

H. E. Foster, of Seattle, Wash., for plaintiff in error.

Clarence L. Reames, Sp. Asst. Atty. Gen., and Robert C. Saunders, U. S. Atty., of Seattle, Wash., for the United States.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WOLVERTON, District Judge (after stating the facts as above). Waiving any irregularity in filing and presenting the demurrer for consideration, the question presented for decision is whether the indictment is sufficient to support any evidence designed to secure a conviction.

[1] It should be premised that a bill of particulars can in no way aid or render sufficient an indictment fundamentally bad. The office of a bill of particulars, where the indictment is good, is to render the defendant more particular information as to matters essential to his defense. It is directed to the discretion of the court, and before compelling the defendant to go to trial. United States v. Bayaud (C. C.) 16 Fed. 376, 382; United States v. Tubbs (D. C.) 94 Fed. 356, 360; Rinker v. United States, 151 Fed. 755, 759, 81 C. C. A. 379; United States v. Rintelen (D. C.) 233 Fed. 793, 799. In the Rinker Case the court says:

"When an indictment sets forth the facts constituting the essential elements of the offense with such certainty that it cannot be pronounced ill upon motion to quash or demurrer, and yet is couched in such language that the accused is liable to be surprised by the production of evidence for which he is unprepared, he should, in advance of the trial, apply for a bill of the particulars; otherwise it may properly be assumed as against him that he is fully informed of the precise case which he must meet upon the trial."

The bill of particulars, therefore, filed by the prosecuting attorney, can in no way aid the sufficiency of the indictment.

[2] Now, as to the sufficiency of the indictment: Where a statute declares that certain or specific acts, or the doing of certain things, shall constitute an offense, it is always necessary to state what the accused did whereby he transgressed the law, in order that he may be advised of the specific charge made against him, to enable him to concert his defense, and to avail himself of his conviction or acquittal against further prosecution of the same cause, and, further, to advise the court of the facts relied on for conviction, so that it may determine whether they are sufficient in law to support the charge. It is not sufficient in such a case to state the supposed offense in the language of the statute. As an apt illustration, by the Criminal Code (Act March 4, 1909, c. 321, § 125, 35 Stat. 1111 [Comp. St. 1916, § 10295]), it is declared that:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, * * * shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury."

It can scarcely be contended that an indictment charging perjury simply in the language of the statute would be sufficient, without stating what the oath was that was taken, its falsity, the defendant's belief that it was false, before whom taken, and the other facts and circumstances, as to time, place, and subject-matter, sufficiently to apprise the accused of the specific charge made against him, and to inform the court of the substantive facts relied upon for conviction.

The Supreme Court has spoken on the subject in no uncertain language. In United States v. Carll, 105 U. S. 611, 26 L. Ed. 1135,

the defendant was indicted charged with uttering and substituting a falsely made, forged, counterfeited, and altered obligation and security of the United States, in the language of the statute, the obligation being set forth according to its tenor; but it was not alleged that the defendant knew the instrument to be false, forged, counterfeited, and altered. On a motion in arrest of judgment, after verdict of conviction, the question was certified to the Supreme Court whether the indictment was sufficient to sustain the verdict. The Supreme Court declared that it was not, and that the omission was matter of substance, and not a defect or imperfection in matter of form only. The court, speaking through Mr. Justice Gray, has this to say:

"In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense intended to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature, does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent."

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588, is a leading case. The statute under which the indictment was drawn made it an offense to conspire—

"to injure, oppress, threaten, or intimidate any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States." Act May 31, 1870, c. 114, § 6, 16 Stat. 141.

The counts in the indictment to which exceptions were taken charged an intent to hinder and prevent the free exercise and enjoyment of "every, each, all, and singular" the rights granted by the Constitution and laws of the United States. There was no specification of any particular right or privilege the free exercise and enjoyment of which was hindered or prevented. The sufficiency of the indictment was challenged on motion in arrest of judgment after verdict. The especial objection was that the indictment did not specify any particular right out of the several or numerous constitutional or legal rights to which the citizens whose rights were claimed to have been infringed were entitled. The question as entertained by the court was not whether it was enough in general to describe a statutory offense in the language of the statute, but whether the offense had been described at all. The court, in the course of the discussion, laid down this declaration:

"The object of the indictment is: First, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone. A crime is made up of acts and intent; and these must be set forth in the indictment, with reasonable particularity of time, place, and circumstances."

The court concludes as follows:

"Therefore the indictment should state the particulars, to inform the court as well as the accused. It must be made to appear—that is to say, appear

from the indictment, without going further—that the acts charged will, if proved, support a conviction for the offense alleged."

The subject was further elaborated in United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516, and a like conclusion reached. This latter case bears marked analogy on its facts to the one here presented. See, also, United States v. Simmons, 96 U. S. 360, 24 L. Ed. 819; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Batchelor v. United States, 156 U. S. 426, 15 Sup. Ct. 446, 39 L. Ed. 478; Cochran and Sayre v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

The question is pertinent here, as it was in the Cruikshank Case, to inquire whether the offense has been described at all. The indictment charges that the defendant did willfully make and convey false reports and false statements, with intent to interfere with the operation and success of the military forces of the United States. But neither the defendant nor the court is advised as to what the reports and statements were, and the allegation is the sheerest conclusion. How was the defendant expected to prepare for his defense, when he was left wholly in the dark as to what reports, or what statements, if any, he had made that the government relied upon for conviction? He may have made many reports and statements, some or all of which may have been consistent with truth, and without any intent to impinge upon the statute, depending on the particular circumstances under which they were made, and yet he is wholly deprived of the opportunity of concerting his defense until he is confronted with them at the trial. It would be as consistent to charge a man with larceny and attempt to convict him of stealing specific property, when none is described or alluded to in the indictment. The information afforded for advising him of the direct charge would not be more specific in the one case than in the other. On the other hand, the court is without any information whatever whereby it is enabled to say that a crime has been charged. So to say to defendant simply, "You have made false reports and statements with intent to interfere with the success of the military forces of the United States," is wholly insufficient to describe the offense sought to be charged as denounced by the statute.

It was error, therefore, not to have rejected the testimony offered in support of the indictment, which was in itself insufficient to support a verdict.

Reversed and remanded.

McILHENNY CO. v. GAIDRY.

GAIDRY v. McILHENNY CO.

(Circuit Court of Appeals, Fifth Circuit. July 29, 1918. Rehearing Denied October 7, 1918.)

No. 3157.

1. TRADE-MARKS AND TRADE-NAMES ⟸96—PRIOR DECISIONS—PERSONS CONCLUDED—MUTUALITY OF ESTOPPEL.
Judgments that defendant had no exclusive right to use the word "Tabasco" in connection with a pepper sauce were not conclusive against it in favor of plaintiff, who was not a party to the suits, nor in privity with either party thereto, and so not concluded thereby.

2. COURTS ⟸96(1), 372(1)—PRECEDENTS—FEDERAL AND STATE COURTS.
As precedents, judgments, one by a federal District Court, and the other by a state Supreme Court, that defendant had no exclusive right to use the word "Tabasco" in connection with pepper sauce, are not controlling in the federal Circuit Court of Appeals.

3. TRADE-MARKS AND TRADE-NAMES ⟸11—EXPIRATION OF PATENT—RIGHT TO USE NAME.
Ruling that, on expiration of patent, public may with patented article use name by which it was known, furnishes no support for proposition that on expiration of patent for process for making pepper sauce, and for sauce so made, public may, with a pepper sauce other than that patented, use the name which the patentee, abandoning the patented process, and otherwise making a sauce, gave to his product.

4. TRADE-MARKS AND TRADE-NAMES ⟸45½, New, vol. 7A Key-No. Series—REGISTRATION—EFFECT OF CANCELLATION.
A trade-mark, with its exclusive rights, if existing, existing independently of registration under Trade-Mark Act Feb. 20, 1905 (Comp. St. 1916, § 9485 et seq.), cancellation of registration does not extinguish a right which registration did not confer.

5. JUDGMENT ⟸675(2)—PRIOR DECISIONS—PERSONS CONCLUDED—FURNISHING PLEADING.
A person named as a defendant, but not served, and who did not appear in person or by attorney, is not bound by decree of exclusive right in complainant, merely because an attorney employed by him prepared and furnished an answer, which was filed by the attorney of the defendant served.

6. TRADE-MARKS AND TRADE-NAMES ⟸9—GEOGRAPHICAL NAMES.
Though, at the time of the first manufacture of a pepper sauce under the name "Tabasco," the word was the name of a state of Mexico, the maker was not precluded from acquiring a trade-mark therein, his manufactory being in Louisiana, where he raised the peppers, they not having that name before he used them; and there being no evidence that the first peppers obtained and planted by him came from a locality having that name.

7. LIBEL AND SLANDER ⟸131—SLANDER OF TITLE—MISTAKEN BELIEF.
One who, believing he has an exclusive right to use a word as a designation of his goods, in good faith warns dealers against invasion of his supposed right, though mistaken as to validity of his claim, is not liable for resulting interference with the products of another.

In Error and Cross-Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Lowell R. Gaidry against the McIlhenny Company. Judg-

ment for plaintiff, and each party brings error. Reversed, and rendered for defendant.

Philip H. Mentz, Louis H. Burns, and John C. Hollingsworth, all of New Orleans, La., for plaintiff.

Chas. Payne Fenner, of New Orleans, La., and Jos. Clark, of Philadelphia, Pa. (Edward S. Rogers, of Chicago, Ill., on the brief), for defendant.

Before PARDEE, WALKER, and BATTS, Circuit Judges.

WALKER, Circuit Judge. This was an action by Lowell R. Gaidry, a citizen of Louisiana and a manufacturer of a sauce called "Tabasco Pepper Sauce," against McIlhenny Company, a corporation organized under the laws of the state of Maine, to recover damages for alleged wrongful conduct of the defendant in interfering with the plaintiff's business, by falsely and in bad faith representing, by papers, circulars, and letters, to dealers throughout the country, including those who have handled the plaintiff's product, that the defendant has an exclusive trade-mark right in the name "Tabasco," and threatening legal proceedings, including injunctions, and demands for accounting for profits, against those who handle any sauce called "Tabasco" unless made by the defendant. The parties will be referred to as they were designated in the trial court. A jury was waived, and the court made special findings of fact, upon which was predicated its judgment in favor of the plaintiff, assessing damages at the sum of $1,000. Each of the parties sued out a writ of error to obtain a review of that judgment.

The plaintiff claims that he has the right to use the word "Tabasco" in the name of the sauce he produces and puts on the market, and that the defendant falsely and in bad faith pretends to believe that it has the exclusive right to use that word as the name of a sauce, and holds itself out to the trade as the owner of a trade-mark in that word as a name for a pepper sauce; the defendant well knowing that its claim that it has an exclusive right to use the name "Tabasco" as applied to a sauce is false and fraudulent, such claim being made solely to injure its competitors in business, and particularly the plaintiff. The claim of the defendant is that it has the exclusive right to use the word "Tabasco" in connection with pepper sauce, and that the plaintiff is not legally justified in complaining of the conduct of the defendant in asserting that right, claimed in good faith, and in undertaking to maintain it.

The plaintiff contends that certain incidents in the history of the defendant and of its predecessors in the sauce-making business have the effect of conclusively establishing the falsity of the defendant's claim that it has an exclusive right to the use of the name "Tabasco" in connection with a sauce, and of showing that the defendant's continued assertion of that claim is fraudulent and in bad faith, and is made solely for the wrongful purpose of injuring its competitors in business, including the plaintiff. The defendant, on the other hand, sets up the claim that the plaintiff was so connected with a suit brought by the defendant in the District Court of the United States for the

Southern District of New York as to be bound and concluded by the decree rendered in that suit, which adjudged that the defendant in this suit has the exclusive right to use the word "Tabasco" in connection with pepper sauce, though the plaintiff was not served with process in that suit and did not formally appear therein.

The incidents relied upon by the plaintiff to sustain its last-mentioned contention are: (1) The judgments rendered in certain suits between the defendant and third parties, with whom the plaintiff is not in privity, in which suits the defendant unsuccessfully asserted the claim that it had the exclusive right to use the word "Tabasco" in connection with pepper sauce; (2) the expiration of a United States patent, issued in 1870 to Edmund McIlhenny, through whom the defendant claims, for a method or process of making or compounding a sauce; and (3) the cancellation of a registration in the United States Patent Office, on the application of the defendant's predecessor, of the name "Tabasco" as a trade-mark.

[1, 2] As the plaintiff was not a party to either of the suits in which judgments adverse to the claim of the defendant were rendered, and was not in privity with either of the parties in whose favor such judgments were rendered, he was not bound thereby. To hold that those judgments were conclusive against the defendant in favor of the plaintiff, who was unaffected thereby, would be giving to them the effect of creating an estoppel which is not mutual. After the rendition of those judgments the successful parties thereto relinquished in favor of the defendant all rights conferred thereby upon the former. Such relinquishments conferred no right upon the defendant as against the plaintiff, who was a stranger to such judgments, for the same reason that the judgments themselves conferred no right upon the plaintiff as against the defendant. The rendition of those judgments did not have the effect of creating a legal obstacle to the assertion by the defendant against the plaintiff of the former's claim that it has the exclusive right to use the name "Tabasco" in connection with a pepper sauce. As precedents those judgments—one of which was rendered by the District Court of the United States for the Southern District of Texas and the other by the Supreme Court of Louisiana—are not controlling in this court.

[3] As above stated, the patent issued in 1870 to a predecessor of the defendant was for a method or process of making or compounding a pepper sauce. The following were the claims of the patent:

"1. The pepper sauce prepared of the ingredients herein set forth, substantially in the manner specified.

"2. The herein described process of preparing pepper sauce from the ingredients, in about the proportions set forth."

The following was a finding of the court:

"The process thus patented was abandoned by Edmund McIlhenny shortly after the patent was issued, and has not been used since by him, or his successors in title, and is not used by the plaintiff."

What was patented was the described process of preparing pepper sauce and the pepper sauce prepared in accordance with the patent-

ed process. There was no finding to the effect that during the life of the patent the word "Tabasco" came to be the identifying name of the thing patented, distinguishing it from other things, and the evidence was not such as to justify such a finding. On the contrary, the evidence without conflict showed that from the time of the abandonment by the patentee of the patented process the word "Tabasco" was continuously used by the patentee in the name of a sauce not made by the patented process. There was no finding that the patented process was used by any one after it was abandoned by the patentee, shortly after the patent was issued, and there was an absence of evidence to prove that after such abandonment the word "Tabasco" was in actual use to describe either the patented process or the sauce made according to that process.

The ruling in the case of Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, was to the effect that on the expiration of a patent the public has the right to make the patented article and to use the identifying name of it which, with the consent or acquiescence of the patentee, it came to be known by while the patent was in force and had at the time of the expiration of the patent. That ruling furnishes no support for the proposition that the expiration of a patent gives the public the right to use in the name of a thing other than the patented one a word which, during the life of the patent, came to be the identifying name of a product of the patentee which never had, and for which he never claimed, the protection of the patent. If Edmund McIlhenny, prior to the expiration of the patent to him, had acquired the exclusive right to use the word "Tabasco" with reference to a sauce not made by the patented process, that right was not extinguished by the expiration of the patent, as the patent had nothing to do with the acquisition of it. The expiration of the patent did not have the effect of conferring on the public, or the plaintiff as a part of it, any right with reference to the name of a thing which was not a subject of the patent. From the fact that the defendant has no exclusive right to use the patented process, it does not follow that it has not the exclusive right, the assertion of which by it is complained of by the plaintiff.

[4] The cancellation, on the opposition of a competitor, of the registration by the defendant's predecessor of the word Tabasco as a trade-mark under the federal Trade-Mark Act of February 20, 1905 (33 Stat. 724, c. 592 [9 U. S. Comp. Stat. Ann. 1916, § 9485 et seq.]), does not stand in the way of the assertion by the defendant that it has the exclusive right which it claims in this suit. That act, which made provision for the registration of trade-marks "used in commerce with foreign nations, or among the several states, or with Indian tribes," and which conferred certain benefits upon registrants thereunder, did not purport to make registration under it the prerequisite to the acquisition or continued existence of an exclusive right to use a word or symbol as a trade-mark. If the defendant's predecessor had the exclusive right which the defendant asserts in this suit, that right was not extinguished by the cancellation of the registration mentioned. If the trade-mark exists, it exists independently of the reg-

istration. The cancellation of a registration does not extinguish a right which the registration did not confer. Edison v. Thomas A. Edison, Jr., Chemical Co. (C. C.) 128 Fed. 1013; Capewell Horse Nail Co. v. Mooney, 172 Fed. 826, 97 C. C. A. 248. Neither of the incidents relied upon by the plaintiff is inconsistent with the assertion in good faith by the defendant that it has the exclusive right to use the word "Tabasco" in connection with pepper sauce.

[5] By a plea or exception the defendant set up as an adjudication binding on the plaintiff a decree rendered by the District Court of the United States for the Southern District of New York, enjoining Edward L. White "from using or offering to customers or otherwise dealing in or with a pepper sauce labeled 'Tabasco Pepper Sauce' manufactured by the defendant Lowell R. Gaidry, or any other pepper sauce in the name of which or in connection with which the word 'Tabasco' is used, excepting only the pepper sauce manufactured by the complainant." The defendant in the pending suit was the plaintiff in the suit in which the decree mentioned was rendered, and its bill of complaint in that suit named as defendants Edward L. White and Lowell R. Gaidry, the plaintiff in the pending suit; but the latter was not served with process in that suit and did not in person or by attorney appear therein. White was represented in that case by Theodore F. Kuper, a New York lawyer. Mr. Kuper was not employed by Gaidry, or authorized to act for him; but Gaidry did employ other attorneys in New York, who prepared an answer for White, which the latter's attorney filed in the suit. There were some negotiations looking to Gaidry paying Mr. Kuper a fee for making a defense for White in the suit, and also to arranging for Gaidry's attorneys appearing in the suit for White and defending it in his name; but these negotiations did not result either in Gaidry paying a fee to White's attorneys or in Gaidry's attorneys appearing in the case for either White or Gaidry. The decree rendered was the result of an agreement entered into between the attorney for the plaintiff in the case and White's attorney, after it had become apparent that Gaidry would not pay a fee to White's attorney and that his own attorneys would not appear in the case or participate in the conduct of it in court.

The preparation by Gaidry's attorneys of an answer for White, which was filed by the latter's attorney, and the negotiations with the result, or lack of result, above indicated, were not enough to make the decree rendered in the case binding upon the plaintiff in the pending case. One having an interest in defeating the relief sought in a suit may, by openly taking charge of and conducting the defense therein, become bound by the result of the suit, though he was not a party thereto on the record. But one who was not a party on the record, and who did not, in person or by an authorized representative, either appear in the case or participate in the control or conduct of it in court, is not bound by the result of it in consequence of an attorney employed by him preparing a pleading in the case and furnishing it to the attorney for a party on the record. Such defense as was made in the case in which the decree mentioned was rendered

was not conducted or participated in by Gaidry, or by any one appearing in court who was authorized to represent or act for him. Neither he nor his authorized representative openly took charge of the defense or participated in the conduct of it in court. He never became a party to the suit, either nominally or by participating in person or by attorney in the conduct of it in court. He had no such connection with the case as would have the effect of making him bound by the decree rendered in it. Bigelow v. Old Dominion Copper Co., 225 U. S. 111, 32 Sup. Ct. 641, 56 L. Ed. 1009, Ann. Cas. 1913E, 875; Rumford Chemical Works v. Hygienic Chemical Co., 215 U. S. 156, 30 Sup. Ct. 45, 54 L. Ed. 137; Hauke v. Cooper, 108 Fed. 922, 48 C. C. A. 144. The exception of res judicata was properly overruled. We do not think that it was made to appear that anything had happened that is entitled to be given the effect of estopping or precluding the parties, or either of them, in favor of his or its adversary, from making the opposing claims respectively relied on.

[6] There was uncontroverted evidence to the following effect:

Several years prior to 1868 a man who at the time had recently come from Mexico gave to Edmund McIlhenny some peppers having a peculiar and agreeable flavor and aroma, all or a part of which were planted by Mr. McIlhenny on his place on Avery Island, near New Iberia, La., and thereafter he continued to grow them there; he being the first person to grow those peppers in the United States. In 1868 he began the manufacture and sale of a table sauce made from that pepper, marketing it in a distinctive bottle bearing a distinctive label, conspicuous words on which were "Tabasco * * Pepper Sauce"; the word "Tabasco" being separated from the other two words by stars. The business so started was continuously conducted by its founder until his death in 1890, and thereafter by a firm composed of his widow and children, until the defendant corporation, controlled by the same family, was formed and succeeded to the business, which it still carries on. There was no name by which the kind of pepper mentioned was known when Mr. McIlhenny began to grow it, or when he started the manufacture and sale of the sauce made from it. Afterwards it came to be known as "Tabasco pepper," though it was and is also called "bird pepper." In the application made by Mr. McIlhenny in 1870 for the patent issued to him in that year it was referred to as "the pepper known in the market as Tabasco pepper." In 1887 it was listed as Tabasco pepper in the catalogue of a New Orleans seed dealer. In 1888 it was described by a botanist of Geneva, N. Y., as a new variety, and he named it "Tabasco pepper." This was the first time it was recognized botanically and under that name.

Edmund McIlhenny and the immediate successors to his business were the exclusive manufacturers of a sauce for the market made from that pepper, and in the name of which the word "Tabasco" was used, from 1868 until 1896. In the latter year a rival in Texas commenced the manufacture and sale of a sauce labeled "Tabasco Pepper Sauce." Thereafter others in different parts of the country did likewise. The defendant and its immediate predecessor, acting on the advice of reputable counsel who were fully apprised of the facts,

continuously and actively, by suits and otherwise, asserted the exclusive right to use the word "Tabasco" in connection with a pepper sauce. Some of its competitors desisted when informed of the defendant's claim and of the facts relied on to support it. Others, including the plaintiff, who first put his sauce on the market in 1911, persisted, denying the validity of the defendant's claim of exclusive right. The word "Tabasco" became so identified with the sauce made and sold by Edmund McIlhenny and his successors that, after as well as before other similar sauces were offered for sale by others, orders for Tabasco given to dealers in sauces were generally understood by both buyer and seller to call for the McIlhenny product, unless another make was specified, and in places where food is served—hotels, restaurants, or private residences—one desiring the hot sauce identified by the McIlhenny bottle and label usually could make the fact known by asking for "Tabasco" or "Tabasco sauce," without otherwise indicating what was wanted. It is quite obvious that hot pepper sauces, other than the defendant's, which are successfully marketed under the name "Tabasco," share in the benefits of the good will in part at least acquired by the defendant's product before there was any competition in the business.

The court made findings of fact which, with an exception to be stated, were such as the above stated evidence called for. Among the findings was the following:

"The defendant and its predecessors in title in good faith have claimed a common-law trade-mark in the word 'Tabasco,' and until the year 1896 had the exclusive use of the trade-mark, but since that time other manufacturers of pepper sauce have used the word 'Tabasco' in connection with their manufactured product. That the word 'Tabasco,' as applied to pepper sauce, is generic, and indicates quality, ingredients, and place of origin of the pepper from which it is made."

The court overruled motions made by the defendant that the concluding sentence of the above-quoted finding be canceled and eliminated, and that the following be incorporated among the court's findings of fact:

"That the word 'Tabasco,' as applied to pepper sauce, indicates origin of manufacture; that is to say, that the sauce to which the term is applied is the sauce made by E. McIlhenny of New Iberia, La., and his successors in title."

The rulings mentioned are duly presented for review. The ground urged in support of the motion to cancel and eliminate was that the finding at which that motion was aimed was unsupported by evidence. In support of the motion to incorporate the proposed finding above set out it was contended that the uncontroverted evidence justified such a finding. Another finding made by the court was the following:

"The plaintiff has suffered damage by the publication of the circulars and letters of defendant amounting to the sum of $1,000."

Before Edmund McIlhenny began the manufacture and sale of his sauce, the word "Tabasco" had an established meaning. It was and is the name of one of the states of Mexico. In a suit quite similar to the pending one, brought by a rival pepper sauce manufacturer against

the defendant's immediate predecessor in business, the Supreme Court of Louisiana decided that the plaintiff in that suit was entitled to recover damages resulting from conduct of the defendant's predecessor in claiming, by letters and circulars addressed to dealers in pepper sauce, that it had the exclusive right to use the word "Tabasco" as a designation of its product, and threatening with suits for infringement all persons who might buy, sell, or use the product manufactured by the plaintiff in the suit, with the object and purpose of frightening dealers and users of the product of the plaintiff in the suit from buying, selling, or using that product. That court, in deciding that case, following a ruling made by the Court of Appeals of the District of Columbia in the case involving the cancellation of the registration by the defendant's predecessor of the word "Tabasco" as a trade-mark, ruled that that word was not subject to exclusive appropriation, because it had a geographical meaning. New Iberia Extract Co. v. McIlhenny's Son, 132 La. 149, 61 South. 131.

We understand it to be a contention of the counsel for the plaintiff in the pending suit that the previous rendition of such decisions in litigated cases to which the defendant's predecessor was a party had the effect of conclusively showing that the defendant was lacking in good faith in persisting in the assertion of an exclusive right which had been so explicitly ruled against in the only cases in which the question had been contested on its merits to a final conclusion. Such conclusive effect in favor of the plaintiff cannot be accorded to decisions rendered in favor of parties with whom he is not in privity, especially when those decisions are not reconcilable with later rulings which are authoritative and controlling. In the case of Baglin v. Cusenier Co., 221 U. S. 580, 31 Sup. Ct. 669, 55 L. Ed. 863, it was decided that the fact that the primary meaning of the word "Chartreuse" was geographical, being the name of a locality and of a monastery in France, did not prevent the acquisition of the exclusive right to use it as the designation of a liqueur made by the monks of the monastery of La Grande Chartreuse. Speaking of the use of the word by the monks as a designation of their product, the court said:

"If it be assumed that the monks took their name from the region in France in which they settled in the eleventh century, it still remains true that it became peculiarly their designation; and the word 'Chartreuse,' as applied to the liqueur which for generations they made and sold, cannot be regarded in a proper sense as a geographical name. It had exclusive reference to the fact that it was the liqueur made by the Carthusian monks at their monastery. So far as it embraced the notion of place, the description was not of a district, but of the monastery of the order—the abode of the monks—and the term in its entirety pointed to production by the monks."

In the case of Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629, the right of a manufacturer to use the words "The American Girl" as a trade-mark for shoes made by it was sustained. It was said in the opinion rendered in that case:

"We do not regard the word 'The American Girl,' adopted and employed by complainant in connection with shoes of its manufacture, as being a geographical or descriptive term. It does not signify that the shoes are

manufactured in America, or intended to be sold or used in America, nor does it indicate the quality or characteristics of the shoes. Indeed, it does not, in its primary signification, indicate shoes at all. It is a fanciful designation, arbitrarily selected by complainant's predecessors to designate shoes of their manufacture. We are convinced that it was subject to appropriation for that purpose, and it abundantly appears to have been appropriated and used by complainant and those under whom it claims."

The rulings just referred to establish the proposition that the fact that a word or expression has a geographical meaning does not prevent its appropriation as a trade-mark, or as the designation of a manufacturer's or dealer's product, when it is so used as not to have a geographical or descriptive signification, nor make legally impossible the assertion in good faith of a claim of exclusive right to use such word or expression for a nongeographical and nondescriptive purpose, even though such use may result or have resulted in its acquiring a new meaning, or new meanings separate and distinct from the one it had before. Uncontradicted evidence in the pending case was to the effect that, when Edmund McIlhenny adopted the word "Tabasco" in the designation of the pepper sauce manufactured and sold by him, he did not use it as a geographical or descriptive term. It is obvious that it did not indicate the place of manufacture. It did not indicate the kind of pepper which was the principal ingredient of the sauce, as that pepper was not then known by that name; it having afterwards acquired the name of Tabasco pepper, apparently because it was the pepper from which Tabasco sauce was made.

Much testimony was adduced to prove that the kind of pepper used in making the defendant's sauce was, at the time the testimony was given and for many years before, known and dealt in as "Tabasco pepper." This was not controverted. But there was no evidence tending to prove that, when the defendant's first predecessor in business adopted the word "Tabasco" as the designation of his sauce, that pepper had ceased to be an unnamed variety. Nor was there any evidence to support the conclusion that the word indicated the place of origin of the pepper from which the sauce was made. There was no evidence tending to prove that the first of such peppers, which were obtained and planted by Edmund McIlhenny, came from the state of Tabasco or from a locality having that name. The word as it theretofore had been used was not indicative of the quality, characteristics, or ingredients of the sauce in connection with which the defendant's predecessor first made use of it. We think the uncontroverted evidence was such as to call for favorable action on the motions made by the defendant to the effect that an above-quoted finding by the court be canceled and eliminated, and that the following be incorporated among the court's findings of fact:

"That the word 'Tabasco,' as applied to pepper sauce, indicates origin of manufacture; that is to say, that the sauce to which the term is applied is the sauce made by E. McIlhenny, of New Iberia, La., and his successors in title."

It is not to be denied that the decisions in the two cases last cited constitute such authoritative recognition of the legal propositions relied on to support the claim of an exclusive right to use the word

"Tabasco" in connection with a pepper sauce, continuously and persistently made, in the circumstances disclosed by the evidence, by the defendant and its predecessors for many years, as to negative the absence of good faith on the defendant's part in its assertions of that claim which occasioned the institution of this suit.

[7] The findings of fact, including the one which it has been held the defendant was entitled to have made, did not constitute a proper predicate for the judgment rendered. The gist of the action was the alleged assertion in bad faith by the defendant of a claim of exclusive right to the use of the word "Tabasco" in connection with a pepper sauce. One of the court's findings was to the effect that the claim of the defendant and its predecessors was made in good faith, and there was evidence to support that finding. Where one, believing himself to have an exclusive right to use a word as a designation of his goods, in good faith warns dealers against invasion of his supposed right, a mistake on his part as to the validity of his claim does not render him liable to an action by another, the sale of whose products was interfered with by the giving of such notice and warning. John W. Lovell Co. v. Houghton, 116 N. Y. 520, 22 N. E. 1066, 6 L. R. A. 363; Hovey v. Rubber Tip Pencil Co., 57 N. Y. 119, 15 Am. Rep. 470; 25 Cyc. 562. It may be assumed, without being decided, that there was evidence to support the finding that—

"The plaintiff has suffered damage by the publication of the circulars and letters of the defendant amounting to the sum of $1,000."

That finding by itself is not enough to support the legal conclusion that the defendant was liable for the pecuniary loss sustained by the plaintiff. Findings of fact which were made negative the conclusion that the defendant was guilty of the alleged conduct which was made the basis of the plaintiff's demand. It follows that the judgment presented for review cannot be sustained. It is reversed, and a judgment in favor of the defendant will be here entered.

Reversed.

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PEDERSON et al. v. UNITED STATES, for the Use of WASHINGTON IRON WORKS, et al.

(Circuit Court of Appeals, Ninth Circuit. October 14, 1918.)

No. 3164.

1. APPEAL AND ERROR ⊜209(1)—REVIEW—ACTION TRIED TO COURT.
In an action tried to the court without a jury by stipulation, where the court is not asked to rule that there is no substantial evidence to justify judgment, the findings of fact must be accepted by the appellate court, and only rulings on matters of law, duly excepted to, are reviewable.

2. UNITED STATES ⊜67(2)—ACTION ON CONTRACTOR'S BOND—INTEREST.
Where the penalty of a government contractor's bond is sufficient to pay all the claims against the contractor, a claimant is entitled to recover interest from the time his demand became due.

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⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. UNITED STATES ⊜67(3)—CONTRACTOR'S BOND—ACTIONS BY SUBCONTRACTORS —LIMITATION.

Under Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. 1916, § 6923), permitting any person furnishing material to a government contractor to bring suit on his bond within one year after performance and final settlement of the contract, and permitting any other similar creditor to intervene "within one year from the completion of the work under said contract and not later," the time limit is the same in case of the original plaintiff and an intervener.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the United States, for the use and benefit of the Washington Iron Works against Hans Pederson, Marie Pederson, his wife, and the National Surety Company, with the Western Electric Company as intervener. Judgment for plaintiff and intervener, and defendants bring error. Affirmed.

See, also, 243 Fed. 260.

Pederson, to be called defendant, made a contract, dated September 8, 1914, with the United States through an engineer officer of the army to furnish and install valve and electrical equipment for the operation of locks of the canal at Ballard, Wash. The National Surety Company, also a defendant below, became bondsman for Pederson to secure payment by Pederson to those who supplied labor or material; the bond being such as is required by Act of Congress (Act Aug. 13, 1894, c. 280, 28 Stat. 278, and as amended by Act Feb. 24, 1905, 33 Stat. 811 [Comp. St. 1916, § 6923]), "An act for the protection of persons furnishing material and labor for the construction of public works," etc. After the making of the contract just referred to, Pederson sublet to the Washington Iron Works, also a plaintiff below, that part of the contract which provided for the furnishing of the valves and machinery, and to the Western Electric Company, a defendant below, the portion for furnishing the electrical equipment. Upon a settlement between the United States and Pederson, found by the District Court to have been on or after July 14, 1916, $5,411 was withheld from Pederson because of delay in completing the contract and on account of certain inspection charges.

In January, 1917, the Iron Works filed a suit in equity in the United States District Court in Washington against Pederson, contractor, and the National Surety Company, for $11,281.53 for material furnished under the contract with Pederson and for extras and interest. The defendants admitted furnishing valves and valve machinery, but denied that $11,281.53 was due. Pederson also pleaded the withholding of $5,411 for pumping and inspecting charges due to delay by the Iron Works, which sum he had held out from payments to the Iron Works, and he also claimed damages for negligence and delay and for moneys spent in correcting defects in work rejected by the United States engineer.

In July, 1917, the Western Electric Company (a defendant in error herein) intervened and sought to recover against Pederson for cer-

tain extras and balances alleged to have been left unpaid. Pederson and the Surety Company answered, denying the right of the Electric Company, upon the grounds that the complaint in intervention was not filed within one year after complete performance and settlement, denying that interest was recoverable, and pleading that for the extras no recovery could be had. It came about that before the action was brought to trial the Supreme Court, in Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, decided that an action under the act of Congress as amended, as hereinbefore cited, was not to be determined in equity, but is one at law, and the bill of exceptions herein shows that, when trial of the action was called, a jury was waived and the case was tried by the court, with the result that the Iron Works recovered a judgment against Pederson for $9,597.48 and against the Surety Company for $9,556.63, and the Western Electric Company recovered judgment for $1,934.80 against Pederson and for $1,724.71 against the Surety Company.

Writ of error was thereafter sued out by Pederson and wife and the Surety Company. The assignments are to the effect that the trial court erred: (1) In holding that there was a balance of $9,462.69 unpaid on the contract between Pederson and the Iron Works; (2) in denying the motion to dismiss the complaint of the Western Electric Company in intervention: (3) in holding that final payment was made by the United States to Pederson on July 14, 1916; (4) in sustaining claims of the Iron Works for extras; (5) in allowing interest; (6) in not holding the Iron Works liable to Pederson for $5,411.83, the sum deducted by the United States for inspection and pumping, and for damages.

Roberts, Wilson & Skeel and Lee Johnston, all of Seattle, Wash., for plaintiffs in error.

C. B. White, of Seattle, Wash., and H. W. Henderson, of New York City, for plaintiff in error National Surety Co.

R. A. Ballinger, Alfred Battle, R. A. Hulbert and Bruce C. Shorts, all of Seattle, Wash., for defendant in error Washington Iron Works.

Wright, Kelleher & Allen and George E. Wright, all of Seattle, Wash., for defendant in error Western Electric Co.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge (after stating the facts as above). The findings were made with great care and detailed reference to the evidence. In them reference is made to specific items in the specifications attached to the contract between Pederson and the Iron Works, and to the manner of payment by installments, as well as to the amounts payable under the contract. Various aggregate sums are set forth, and the balance on the contract unpaid by Pederson is found to be $9,462.69, together with $234.85 due for extras furnished. The court disallowed Pederson's claim of $5,411.83, offset, except in certain items, and found that Pederson broke his contract with respect to certain items. The court fixed July 14, 1916, or afterwards, as the time of the full completion of the work and final settlement therefor,

and found that no suit upon the contract was commenced by the United States, that action by defendant in error was begun within one year from the completion of the work and final settlement therefor, and that the intervener filed its complaint in due time as required by the act of Congress heretofore cited.

The claim of the intervener Electric Company was also carefully examined and included in the findings, and the court, after referring to the provisions of the contract between the company and Pederson, found that the company fully performed, and that under the contract interest from August 25, 1914, became due upon the purchase price of the materials furnished, and that certain extra material was furnished under an agreement that the purchase price therefor should bear interest from 30 days after the date of shipment.

[1, 2] From the foregoing history of the case it is apparent that, trial of the issues having been to the court without a jury, and no request having been made of the trial court for a ruling that there was no substantial evidence to justify judgment, the findings upon questions of fact should be accepted by this court, and therefore the only rulings for review are those made upon matters of law properly presented by bill of exceptions. Maryland Casualty Co. v. Orchard Land & Timber Co., 240 Fed. 364, 153 C. C. A. 290; Turner v. Schaeffer, 249 Fed. 654, —— C. C. A. ——. The evidence tends to support the ultimate findings and it is clear that the judgment was warranted by the findings. Interest was allowed as on a liability to pay money from the time the demand accrues, the amount being ascertainable by computation. Dickinson Fire, etc., v. Crowe & Co., 63 Wash. 550, 115 Pac. 1087; Fidelity & Deposit Co. v. United States, 229 Fed. 127, 143 C. C. A. 403.

Plaintiffs in error argue that under the specifications attached to the contract between Pederson and the United States the weights of certain material as made by the United States engineers should control, in instances where there was a variance in weight between the Iron Works and Pederson. But as the items furnished to Pederson by the Iron Works were weighed at the plant of the Iron Works, and the weights were certified to by a government inspector, the explanation concerning discrepancies (which amounted to $162.73) was found by the court to be in the likelihood that the weights of material delivered for which defendants would be liable might exceed the weight of material installed for which the government had agreed to pay. Testimony of who was responsible for delay and defects was considered by the District Court as matter of fact, and it does not appear that resolution in favor of defendant in error was erroneous. Fisher v. Edgefield & Nashville Mfg. Co. (Tenn. Ch. App.) 62 S. W. 27; Murphy v. No. 1 Wall Street Corp., 142 App. Div. 835, 127 N. Y. Supp. 735.

[3] Plaintiffs in error question the jurisdiction of the court to entertain the claim of the Western Electric Company upon the ground that the company failed to file its complaint within the one year allowed by law. The statute authorizes any person or corporation who has furnished labor or material used, and payment for which has not

been made, "to intervene and be made a party," and to have their rights and claims adjudicated in such action. If no suit is brought by the United States within six months "from the completion and final settlement" of the contract, suit may be brought in the name of the United States against the contractor and his sureties, provided—

"that where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract, and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract and not later: and provided further that where suit is so instituted by a creditor or creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later."

In our opinion the intent of the statute is that in the case of an intervener the time limit shall be the same as it is in the case of an original party complainant. In Bryant Co. v. N. Y. Steam Fitting Co., 235 U. S. 327, 35 Sup. Ct. 108, 59 L. Ed. 253, the court observed that an intervening creditor, as well as the instituting creditor, must file his claim within a year. Vermont Marble Co. v. National Surety Co., 213 Fed. 429, 130 C. C. A. 65. By the language of the statute the year begins to run against the instituting creditor from the time of complete performance of the contract and final settlement thereof, and although the final words of limitation with respect to a creditor who comes in as a party require that he file his claim within one year "from the completion of the work" under the contract, and not later, the intent of the whole statute, as analyzed by the Supreme Court, is to put original and intervening claimants upon an equality in the matter of time.

We therefore inquire what was the date from which the period of one year commenced to run. Here again we have an explicit finding of the court, fully sustained by evidence, respecting articles furnished to the contractor that the contract was not completely performed until within a year before the time when the complaint in intervention was filed. The final payment was July 14, 1916, and there is ample evidence that the War Department of the government treated that as the date of final settlement. In Am. Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300, the Court of Appeals of the Third Circuit took the very reasonable view that the date given by the department of the government which has to do with the work might ordinarily be safely accepted as fixing the time of final settlement.

Illinois Surety Co. v. Peeler, 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609, is cited by plaintiffs in error as authority for holding that the time from which the year shall run is the time of the final determination of the amount due, irrespective of the date of final payment. In reliance upon the application of this rule the plaintiffs in error lay stress upon an indorsement upon a carbon copy of a voucher for $21,541.96, dated June 28, 1916. The indorsement is a form of certificate whereby the officer certifies that the contract had been completed in accordance with the specifications, except as to time, and that material and work were accepted as satisfactory—

"in behalf of the United States. Lieut. Col. Corps Engineers, U. S. A. Authority for extension of time filed with voucher No. 178, December, 1914."

At the bottom of the voucher is a statement of payment for $19,541.96, signed by Colonel Cavanaugh, the contracting engineer officer. The certificate itself, however, was not dated, nor was it signed by Col. Cavanaugh in the space left vacant for signature above the words, "Lieut. Col. Corps of Engineers, U. S. A." The testimony was that the custom was to forward the original to Washington, D. C. However that may be, the original was not produced at the trial, and we cannot now hold that the District Court was in error in declining to treat the voucher as a certificate of acceptance and completion and as a determination of the amount due. The District Judge in his written opinion comments upon the absence of an original or certified copy of a certificate signed by Col. Cavanaugh, and points out that on July 6, 1916, Col. Cavanaugh called on Pederson for material yet to be furnished under the contract, and also that on July 11th Col. Cavanaugh made a payment to Pederson of $1,916.67 out of $2,000 retained to insure complete performance. Furthermore, there appear to have been offsets to be deducted, and prior to July 14, 1916, there was no determination of the amount which the government was finally bound to pay. The final settlement was had on that day, and it was so understood by the War Department.

Allowance of interest upon the claim of the intervener under the original contract and for extras furnished was proper. Upon the original contract matters interest became due by provision that payments provided for should bear interest, while as to moneys due for extras furnished the invoices provided they should bear interest.

We think that the principal points made by plaintiffs in error are sufficiently covered by what we have said. Upon the whole case the conclusions reached by the District Court appear to be right and to call for an affirmance of the judgment.

Affirmed.

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## THE HOQUIAM.

### BOWES et al. v. BAUMERT.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3155.

SEAMEN ⊂⊃29(3)—INJURY—FELLOW SERVANTS—LONGSHOREMAN—STATUTE—"THOSE."

Grammatically, as well as because the whole act relates to merchant seamen, "those," in Act March 4, 1915, § 20 (Comp. St. 1916, § 8337a), providing that, in any suit to recover for injury sustained on board a vessel, seamen having a command shall not be deemed to be fellow servants with "those" under their authority, refers, not to person injured, and so not to a longshoreman, employed by ship in loading, but to seamen.

Appeal from the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Libel by W. M. Baumert against the steamship Hoquiam; E. C. Bowes and another, claimants. Judgment for libelant, and claimants appeal. Reversed.

Huffer & Hayden, W. H. Hayden, and F. A. Huffer, all of Tacoma, Wash., Percy P. Brush, of Kelso, Wash., and Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellants.

Govnor Teats, Leo Teats, Ralph Teats, and Teats, Teats & Teats, all of Tacoma, Wash., for appellee.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

HUNT, Circuit Judge. Libel against the steamer Hoquiam to recover for injuries sustained while appellee, a longshoreman, was working in the hold of the ship, loading railroad ties, at Hoquiam, Wash. The District Court found that the injury occurred by reason of the negligence of the hatch tender, who was the second officer of the ship, and who was in authority over the appellee, who was employed by the ship and working in its service. From a decree against claimants, appeal was taken.

The findings having settled disputed questions of fact, the sole question presented and argued is whether or not the hatch tender, a seaman employed by the ship, and the longshoreman, employed from the land by the hour by the ship to assist in loading, were fellow servants.

It is assumed that, since the law was settled by the case of The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, a seaman is limited in his right of recovery to his cure and wages, where his injury is not the result of failure to care properly for the seaman or to provide a seaworthy ship. But the District Court held herein that a change was wrought by section 20 of the act of March 4, 1915 (38 Stat. 1185, c. 153 [Comp. St. 1916, § 8337a]), which reads as follows:

"That in any suit to recover damages for any injury sustained on board vessel, or in its service, seamen having command shall not be held to be fellow servants with those under their authority."

The view expressed was that, by using the words "in any suit" to recover for any injury, Congress meant to include more than seamen, and that the words "seamen having command," followed by "those," mean "those injured," and not those seamen. If this is a true construction, of course the judgment should be affirmed.

We find ourselves unable to agree with such a construction. The word "injured" is not in the section. It is a suit for damages for an "injury" sustained that the whole provision deals with. The two personal nouns which appear are "seamen" and "fellow servants," and by rules of ordinary construction the relative words are to be applied to the words or phrases immediately preceding, and are not to be construed as extending to or including others more remote, unless such extension is required by a consideration of the entire act. Cushing et al. v. Worrick, 9 Gray (Mass.) 382.

There are, however, broader rules which have greatly influenced us. We think that the context of the whole statute indicates that the lawmakers had in mind a particular class of persons for whose interests they were legislating. The act of which section 20 is a part is entitled one—

"to promote the welfare of American seamen in the merchant marine of the United States, to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto, and to promote safety at sea."

Section 1 amends section 4516 of the Revised Statutes (Comp. St. 1916, § 8306), under the title "Merchant Seamen—Shipment"; and section 4516 of the Revised Statute is found in the act of June 7, 1872, which is entitled:

"An act to authorize the appointment of shipping commissioners by the several Circuit Courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for further protection of seamen." 17 Stat. 262, c. 322.

Section 2 refers to the division of crews, to fire drills, and to the fixing of holidays. Section 3 amends section 4529 of the Revised Statutes (Comp. St. 1916, § 8320), under the title "Seamen—Wages and Effects." Section 4 amends section 4530 of the Revised Statutes (Comp. St. 1916, § 8322), under the title "Merchant Seamen—Wages and Effects." Section 5 amends section 4559 of the Revised Statutes (section 8348), under title of "Merchant Seamen—Protection and Relief." Section 6 amends section 2 of an act entitled "An act to amend laws relating to navigation," approved March 3, 1897. 29 Stat. 688, c. 389 (Comp. St. 1916, § 7734). Sections 7 and 8 amend sections 4596 and 4600, respectively, of the Revised Statutes (sections 8380, 8382), under title of "Merchant Seamen—Offenses and Punishments." Section 9 amends section 4611 of the Revised Statutes (section 8391), under Title of "Merchant Seamen—Offenses and Punishments." Sections 10 and 11 (sections 8392a, 8323) are amendatory of an act entitled "An act to amend the laws relating to American seamen, for the protection of such seamen and to promote commerce, approved December 21, 1898." Section 16 (section 8382a) abrogates treaties in so far as they provide for imprisonment and arrest of officers and seamen deserting, or charged with desertion from, merchant vessels of United States in foreign countries, and of seamen of foreign vessels in the United States. Section 19 (section 8372) amends section 16 of the act of December 21, 1898 (30 Stat. 759, c. 28) entitled "An act to amend the laws relating to American seamen and for the protection of such seamen and to promote commerce."

These several sections show that Congress was legislating with relation to American seamen. Longshoremen are not classified as seamen in the merchant marine. Treaties do not affect them, and legislation in relation to flogging or to safety at sea has no relation to them.

We are cited to Atlantic Transport Co. v. Imbrovek, 234 U. S. 61, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157, and Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L.

Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, as holding that a longshoreman working on a ship is of a class as clearly identified with maritime affairs as are the mariners. Conceding that there is such identity, and that a longshoreman is within the jurisdiction of the admiralty, it still does not answer the argument that the statute heretofore quoted, by the several rules of construction, includes only those persons mentioned in the act, seamen. In The Baron Napier, 249 Fed. 127, — C. C. A. —, a muleteer, hired by the master of the ship to care for mules, was injured while acting as a watchman at night, and in libel against the ship it was held that the seaman should have been furnished with a lantern, that section 20 abolished the fellow-servant doctrine, and that recovery was proper for personal injuries by reason of the negligence of the ship and failure to take proper care to furnish medical attention and to take steps to effect a cure. It is at least doubtful whether the court meant to announce more than the established rule that the ship was liable for no more than the furnishing of proper medical attention.

In Chelentis v. Luckenbach S. S. Co., 243 Fed. 536, 156 C. C. A. 234, the Supreme Court, 247 U. S. 372, 38 Sup. Ct. 502, 62 L. Ed. 1171, affirmed the view taken by the Court of Appeals of the Second Circuit, holding that section 20, supra, has not altered the situation in this respect; that whether or not the master and seamen are fellow servants is quite immaterial in a suit for injuries resulting from an improvident order of the master; that a seaman may not recover in a common-law action according to the full indemnity rule of the common law for personal injuries received in the performance of his duties at sea through such an order; and that the measure of his recovery is that of the maritime law—wages, maintenance, and cure. The Supreme Court said that the commands of section 20 should be given full effect whenever the relationship between "such parties" as the statute refers to becomes important, but that the maritime law imposes upon a shipowner liability to a member of the crew injured at sea by reason of another member's negligence, without regard to their relationship; hence that section 20 was irrelevant. Said the court:

> "The language of the section discloses no intention to impose upon shipowners the same measure of liability for injuries suffered by the crew while at sea as the common law prescribes for employers in respect of their employés on shore."

We cite this decision as illustrating the limitations of section 20, and as in harmony with our opinion that, when we consider that the only class of persons mentioned in the section are seamen, it is proper to read and understand the whole section by its ordinary grammatical sense. The great purpose, the special need for protection of seamen, was carried out by the statute; but we find no safe ground for extension of its provisions to others not seamen.

The judgment is reversed.

## LOUISVILLE BRIDGE CO. v. CHICAGO, I. & L. RY. CO.

(Circuit Court of Appeals, Seventh Circuit. August 1, 1918.)

No. 2251.

1. RECEIVERS ⟸160—CLAIMS—PRIORITY—UNSECURED CLAIMS.
Where a contract between a bridge company and a railroad company which used the bridge provided for termination in case of the railroad's default for 30 days in payment, the bridge company is not, as against mortgagees, entitled to priority out of surplus earnings during receivership on claims some of which were more than 6 years old when the receiver was appointed, and all of which arose more than 16 months prior thereto.

2. RECEIVERS ⟸158(4)—CLAIMS—PRIORITY—PURPOSE OF DEBT.
In receivership proceedings a bridge company was not entitled to priority against mortgagees of a railroad company for claims for use of its bridge by the railroad: it appearing that credit was extended upon the strength of the railroad company's general credit and that the debt was not a current income debt.

3. RAILROADS ⟸139—CONTRACT BETWEEN RAILROAD AND BRIDGE COMPANY.
A contract whereby a railroad company agreed to make certain payments to a bridge company for the use of a bridge, the payments being computed on the bridge company's capital and expenses, etc., *held* not to create any trust in favor of the bridge company in event of nonpayment by the railroad company, on the theory that the bridge company was entitled to share in the freight and passenger receipts of the railroad company, etc.

4. RECEIVERS ⟸158(4)—CLAIMS—PRIORITY—NET EARNINGS.
Where the claim of a bridge company against a railroad company for use of bridge was not entitled to priority, the bridge company is not entitled to net profits during receivership as against a mortgagee whose lien covered, not only the property of the railroad, but the rents and profits derived therefrom.

Appeal from the District Court of the United States for the District of Indiana.

Petition by the Louisville Bridge Company to intervene in a foreclosure suit against the Louisville, New Albany & Chicago Railway Company and have its claim allowed as a prior claim. The petition was opposed by the Chicago, Indianapolis & Louisville Railway Company, and petitioner appeals from a decree denying the petition. Affirmed.

The Louisville, New Albany & Chicago Railway Company, known as the Monon road, predecessor to appellee, executed five mortgages to secure bonds aggregating $14,100,000. The last three, being for $8,500,000, were foreclosed in this suit, although the proceedings leading to the appointment of the receiver were instituted by a judgment creditor, after a nulla bona return of the execution had been filed. The various foreclosure suits were merely consolidated with this judgment creditor proceeding and the receivership continued. The receiver operated the road from August 24, 1896, to June 30, 1897, when it was turned over to appellee, the purchaser on foreclosure suit, pursuant to a sale previously made and then confirmed; the selling price being far less than the face value of the three mortgages.

Appellant timely presented its claim for $187,354.38 and interest, and no question of amount or liability is raised. Appellant asserts and appellee denies priority of this claim over the lien of the mortgages and the rights of the purchaser on the foreclosure sale.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appellant owned and maintained a bridge across the Ohio river at Louisville, Ky., which is connected on the north by tracks of the main line of the railway company, and on the south with terminal tracks, freight depot, and yards of such company; the city of Louisville being the southern terminus of the line of the railway company. On June 5, 1872, an agreement was made between appellant and several railroads, which agreement provided for the use of the bridge and the compensation for such use. Another agreement made February 1, 1882, between appellant and appellee's predecessor, extended the terms of the agreement to appellee.

By this contract the railroad companies agreed to pay the bridge company for the use of the bridge a sum sufficient to produce in the aggregate an amount equal to the cost and expense of keeping in repair the said bridge, tracks, and other structures appurtenant thereto, and paying a dividend semi-annually of 4 per cent. on a capital stock of $1,500,000, and the interest upon bonds, as the same matured, and a sinking fund sufficient to pay off bonds to the amount of $800,000 at maturity; all charges were to be the same to all carriers for like service. The accounts for all expenditures, tolls, and charges were to be carefully kept, a statement rendered each month succeeding the date the items accrued and the same were to be paid within 30 days from the date of the rendition of such monthly account. If any difference arose between the parties it was to be submitted to arbitration.

It was expressly provided: "But it is distinctly agreed and understood that if the railroad company shall at any time be in default in the payment of any of the sums of money herein by it stipulated to be paid, or in the performance of any of the obligations herein by it stipulated to be performed, then at the option of the party in respect to whom such default occurs, but not otherwise, and upon 30 days' notice in writing, all the rights and privileges herein conferred upon the third party shall cease and determine, and this agreement cease to be of any force or effect whatever."

It was expressly agreed that the consideration passing to the bridge company for this agreement was the promise on the part of the railroad company to pass all its freight, passengers, mails, express matter and other goods carried by it over the bridge of the appellant to and from Louisville. The railroad company agreed that it would "pay punctually * * * the tolls and charges herein provided for the use by the railroad company of said bridge, etc."

Appellant's claim arose out of the failure of the railway company to pay the various amounts thus provided for by this agreement. The statement of appellant's account is as follows:

| | | |
|---|---|---|
| April 1, 1895. Due as per agreed statement of account, and Blodgett award, excluding Monon share of contested taxes and its share of L. & N. surplus subsequently recovered by L. & N. | | $ 97,358.58 |
| Monon's share of above taxes | | 25,887.32 |
| Monon's share of above L. & N. surplus for the years 1888, 1889, 1890, 1891 | $33,457.91 | |
| For the years 1892, 1893, 1894, 1895 | 38,325.00 | 71,782.91 |
| | | $195,028.81 |
| Deduct payments made by Monon and its share of surplus April 1, 1895, to August 24, 1896, in excess of amounts payable by it for same period | | 7,674.43 |
| | | $187,354.38 |

The receiver made a final report, which was duly approved by the court, and which contained the following:

| | |
|---|---|
| Gross earnings | $2,527,160.12 |
| Operating expenses and taxes | 1,728,756.98 |
| Leaving net earnings | $ 798,403.14 |

This balance of "net earnings" was attacked by appellee as being incorrect, and the master, to whom all issues were referred found: "There was no surplus of earnings during the receivership. * * * There was a diver-

sion of the earnings during the receivership to the prejudice of the intervener. * * * There is no special equity in the intervener's favor that entitled the intervener to preferential payment out of the proceeds of the foreclosure sale."

The master's report was approved and the petition dismissed. Appellant assigns error for thus dismissing its petition and asserts that its claim was entitled to priority over the claims of mortgagees and those claiming under them in and to the net earnings of the company during receivership; that there was in fact a net profit earned during the receivership, and that such net profit should be devoted to the payment of its claim, or if that be now impossible, that it have a lien for such amount upon the road prior to the equity of the appellee.

Lawrence Maxwell, of Cincinnati, Ohio, for appellant.

Ferdinand Winter and William L. Taylor, both of Indianapolis, Ind., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). Two questions are presented for our consideration: (a) Was appellant's claim entitled to priority over the lien of the mortgages? (b) Were there any net earnings during the receivership? It is conceded that the appellee stands in no better position than the last three mortgagees, whose mortgages were foreclosed by this suit.

Appellee contends that the indebtedness of the Monon road to appellant was not for "current expenses" and such indebtedness was, therefore, not entitled to priority over the lien of the mortgagees. It further contends that even though the consideration for this claim would otherwise have entitled appellant to priority, such priority must be denied because the claim arose more than 6 months prior to the appointment of the receiver.

Appellant, on the other hand, contends that as the holder of a claim for current expenses it is entitled to priority over the lien of the mortgagees so far as the net profits of the company earned during the receivership in suit are concerned; that the 6 months period fixed in some jurisdictions and in some instances, is not an absolute or arbitrary period but must give way to facts showing reasons for its nonapplicability, that such reasons exist in the present case. Appellant also insists that in the present case the Monon road was a trustee holding amounts collected from passengers and shippers in trust for appellant, the cestui que trust.

Questions of asserted priority of claims such as here considered, over liens of mortgages, have frequently been before the courts for determination. It has been uniformly held that not only must the claim be for "current expenses" but the claims must not be stale. In many jurisdictions a time limit of 6 months next preceding the appointment of a receiver is fixed as the period during which the claim must have arisen to entitle it to consideration. Turner v. Indianapolis, B. & W. Ry., Fed. Cas. No. 14,258, 8 Biss. 315; Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., 137 Fed. 26, 71 C. C. A. 1; Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171; Carbon Fuel Co. v. C., C. & L. R. Co., 202 Fed. 172, 120 C. C. A. 460; C. & A. Ry. v. Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64; Texas Co. v. International & G. N. R. Co., 237 Fed. 921, 150 C. C. A. 571; Crane Co.

v. Fidelity Trust Co., 238 Fed. 693, 151 C. C. A. 543; Roebling Sons Co. v. Idaho Ry., L. & P. Co., 243 Fed. 527, 156 C. C. A. 225; Gregg v. Metropolitan Trust Co., 197 U. S. 196, 25 Sup. Ct. 415, 49 L. Ed. 717. Other courts reject the 6 months period as arbitrary and unjustifiable. Northern Pacific Ry. v. Lamont, 69 Fed. 23, 16 C. C. A. 364; Blair v. St. L., H. & K. R. Co. (C. C.) 22 Fed. 471; Wood v. N. Y. & N. E. R. Co. (C. C.) 70 Fed. 741; Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419; Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596; Beach on Receivers, p. 414.

[1] It is not necessary in this case to adopt any hard and fast period of limitation to dispose of the claims here under consideration; for if we adopt the rule announced by the last above cited cases, we are still unable to bring the appellant's claims within such a period as will permit of their allowance in advance of the lien of the mortgages. Some of these claims were 6 years old at the time the receiver was appointed, and all of the claims arose more than 16 months prior to such appointment. The presence of the provision in the agreement which gave to the bridge company at any time the right to terminate the contract upon 30 days' notice for failure of the railroad company to pay the amounts due, affords ample support for this conclusion. As against the mortgagees it would be unjust and inequitable to give petitioner priority of lien when it is apparent that claimant had at all times an effective weapon for the collection of its account.

[2] We are also convinced that upon all the facts and circumstances in this case, appellant does not bring its claim within the rule entitling it to priority over the lien of the mortgages, even though the question of time be waived. The fact that the bridge company reserved the express right to terminate the contract upon failure of the railroad company to promptly pay its indebtedness is equally significant on this phase of the case. Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663. In that case the court said:

"Such provision shows that the car company was aware of the existence of the outstanding bonds, and protected itself by other methods than relying upon the possible order of a court which might appoint a receiver."

The contract made by the parties in this case was one of mutual benefit. The bridge company owned a bridge, the value of which in part depended upon the extent of the use to which it was put. The carrier was obviously benefited in that it was not required to construct a bridge itself. In order to secure all the business of the railroad company and to make more certain its fixed income, this agreement was made, the duration of which was in part dependent upon the action of appellant. It extended the time of payment from month to month upon the strength of the credit of the railroad company.

The acts and conduct of the parties add strength to this conclusion. The president of the bridge company testified:

"The railroad companies using the bridge simply paid on account from time to time according to their convenience."

As stated in Southern Railway v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458:

"Whether the debt was contracted upon the personal credit of the company, without any reference to its receipts, is to be determined in each case by the amount of the debt, the time and terms of payment, and all other circumstances attending the transaction."

We conclude the credit was extended upon the strength of the railroad company's general credit and that the debt was not a "current income debt."

[3] Appellant also contends that it should be entitled to priority because the railroad company held the money received by it from passenger or shipper as a trust fund and the amounts thus collected to the extent of this indebtedness in equity belong to the bridge company, citing Terre Haute & Indianapolis Ry. Co. v. Cox, 102 Fed. 825, 42 C. C. A. 654. The facts in that case are distinguishable from those in the present case. In that case the court said:

"The 30 per centum embraced in the order of the court, though mingled with the funds of the Indianapolis Company, never belonged equitably to that company, either in its own right, or in the right of its bondholders. In equity the moneys were always, notwithstanding the intermingling, the moneys of the Peoria Company. In view of these facts, the court clearly had the power, after the appointment of the receivers, to recognize the provisions of the lease, to the extent of restoring these moneys; and, in our opinion, it was the duty of the court to go at least to that extent."

The agreement expressly provided for a division of the earnings. It is clearly distinguishable from a case covering an agreement calling for a payment as rent of a sum equal to a certain per cent. of the earnings.

In the present case, we conclude that the contract was one calling for the payment of rent and that the amount of the rent was measured in a somewhat unusual manner. The agreement did not, however, have the effect of giving to the bridge company a right to any specific money received by its lessee.

[4] In view of this determination of the first question submitted, it becomes unnecessary for us to consider the second question, for unless the appellant's claim was entitled to priority over the lien of the outstanding mortgages, no right to the net profits accrued in its favor, as against a mortgagee whose lien covered not only the property but the rents and profits derived therefrom.

The decree is affirmed.

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GREAT LAKES TOWING CO. v. ST. JOSEPH-CHICAGO S. S. CO.

(Circuit Court of Appeals, Seventh Circuit. August 22, 1918. Rehearing Denied October 14, 1918.)

No. 2465.

1. ADMIRALTY ⇐103—APPEAL—FINAL DECREE—WHAT CONSTITUTES.

Where the owner of a vessel, which had capsized and sunk after contracting with appellant to raise the same, filed a petition for limitation of liability, and appellant's petition therein for a preferred lien was denied, *held*, that the decree was final as to appellant, and appealable.

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. SALVAGE ⟸11—SALVAGE SERVICE—WHAT CONSTITUTES.
The raising of a sunken vessel, which lay at the bottom of a narrow and much-traveled and navigable stream, was a salvage service, entitling the salvor to a prior lien, enforceable in rem, whether it was rendered under contract or not, or the vessel was in danger, etc.

3. SALVAGE ⟸40—LIEN—PRIORITY.
Maritime liens arise from many kinds of acts, and priority is determined by the rank of benefits conferred; so one who raised the sunken vessel is entitled to priority over other claimants and the owner.

4. SALVAGE ⟸11—LIEN—CONTRACTS.
Where a towing company undertook to raise and deliver a sunken steamer for $34,500, "no cure, no pay," and there was no showing of fraud in the contract, or that the personal credit of the owner was relied on, etc., the towing company is entitled to a lien for the contract price.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Libel and petition by the St. Joseph-Chicago Steamship Company for limitation of liability, in which the Great Lakes Towing Company and others file claims. From a decree denying the motion of the Great Lakes Towing Company that its claim be decreed a preferred and first lien, it appeals. Reversed.

Harvey D. Goulder and Thomas H. Garry, both of Cleveland, Ohio, for appellant.

Harry W. Standidge and Charles E. Kremer, both of Chicago, Ill., for appellees.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

BAKER, Circuit Judge. On July 24, 1915, the steamship Eastland, owned by the St. Joseph-Chicago Steamship Company, of St. Joseph, Mich., and chartered to and operated by the Indiana Transportation Company, capsized and sank in the Chicago river. Many passengers were drowned and others injured.

Three days later the Great Lakes Towing Company, appellant, contracted with the steamship company "to raise and deliver said steamer, righted and pumped out, to a dock in the vicinity of where she now lies, for $34,500; no cure, no pay." Appellant's undertaking was fully performed.

This cause was begun in the District Court by the steamship company's filing of a libel and petition for limitation of liability. A trustee was appointed and took possession of the steamer; an order was entered, restraining the prosecution of claims, except in the limitation proceedings; and a monition was issued, citing all claimants to appear. Appellees, other than the steamship company, are tort and supply claimants.

Appellant filed an answer denying the steamship company's right of limitation, and also a petition asking that appellant's claim for services in raising the steamer be declared and enforced as a "preferred, paramount, and first lien." It was stipulated that there were no other claims of that class.

Afterwards the court sold the steamer for a sum which would go but a little way toward satisfying all the claims. Thereupon appellant filed a motion that it be first paid out of the proceeds. Tort and supply claimants resisted appellant's petition and motion, and a hearing resulted in a decree:

"That said Great Lakes Towing Company is not entitled to the relief prayed for by it in its said petition and motion to have its said claim decreed a preferred, paramount, and first lien on said steamer or the proceeds thereof, and it is ordered that said prayer of said petition be and the same is hereby denied."

Hence this appeal.

[1] 1. Motion to dismiss: Appellees contend that the decree is merely interlocutory, because appellant's petition was not in terms finally dismissed, and because appellant may hereafter be granted an allowance for its services as an unsecured claim or on an equal footing with appellees. But the only relief sought by appellant's petition was the enforcement of an asserted prior lien. By the limitation proceedings appellant was forbidden to file an independent libel, and was constrained to intervene in this case. The San Pedro, 223 U. S. 365, 32 Sup. Ct. 275, 56 L. Ed. 473. Appellant's intervening petition was in its essence an independent libel to declare and enforce a paramount maritime lien; and though the controversies between the steamship company and the tort and supply claimants were left pending, and though appellant's right to allowance of an unsecured claim, if appellant should care to present such a claim, was not cut off, nevertheless the decree denying the only relief sought by the intervening petition was in its effect upon the asserted lien the same as a formal and final decree dismissing an independent libel. Gumbel v. Pitkin, 113 U. S. 545, 5 Sup. Ct. 616, 28 L. Ed. 1128; Potter v. Beal, 50 Fed. 860, 2 C. C. A. 60; Sanders v. Bluefield Water Works, 106 Fed. 587, 45 C. C. A. 475; The Attualita, 238 Fed. 909, 152 C. C. A. 43. Motion to dismiss is overruled.

[2] 2. Has appellant a paramount lien?

Appellees contend that appellant rendered no salvage service. Confessedly appellant did not go out in a tempest, at great risk to its own vessels and crews, in a voluntary effort to save the Eastland from imminent perils of the sea. What appellant did was to raise and pump out the sunken steamer under a "no cure—no pay" contract with the owner. Work of this character, appellees insist, is not salvage service. From the syllabus of Merritt & Chapman Derrick & Wrecking Co. v. Morris & Cummings Dredging Co., 137 Fed. 780, 70 C. C. A. 356, they quote:

"The raising of a dredge sunk in shallow water, where there is no danger involved, nor any extraordinary means required or employed, is not a salvage service."

And additionally they cite The Paul L. Bleakley (D. C.) 146 Fed. 570; The S. C. Schenk, 158 Fed. 54, 85 C. C. A. 384; The New Haven (D. C.) 159 Fed. 798.

Whether service is rendered voluntarily or under contract does not affect the character of the service. The Elfrida, 172 U. S. 186, 19

Sup. Ct. 146, 43 L. Ed. 413. That the expression "perils of the sea" must not be taken literally is illustrated in The Jefferson, 215 U. S. 130, 30 Sup. Ct. 54, 54 L. Ed. 125, 17 Ann. Cas. 907, wherein service in protecting a vessel undergoing repairs in a dry dock from a fire on the shore was held to be salvage. Cases of The Tornado, 109 U. S. 110, 3 Sup. Ct. 78, 27 L. Ed. 874, The Elfrida, supra, The Stanley H. Miner (D. C.) 172 Fed. 486, and Barnett & Record Co. v. Wineman, 202 Fed. 110, 122 C. C. A. 222, indicate that service in raising, pumping out, and restoring to commerce stranded and sunken vessels, in no immediate peril of destruction, and without the employment of means or the incurring of hazards beyond those necessary to the undertaking is salvage; and we think it must necessarily be so. In the present case the Eastland lay at the bottom of a navigable river, narrow and much traveled. She was an obstruction to navigation, a danger to herself and all passing vessels. Our judgment is that appellant's service in raising and restoring her to use was salvage, creating a property right, enforceable by process in rem.

[3] But, after all, it is unnecessary that appellant's service be defined as salvage. Maritime liens arise from many kinds of acts and services, and priority is determined by rank of benefits conferred. The John G. Stevens, 170 U. S. 113, 18 Sup. Ct. 544, 42 L. Ed. 969. Appellees' liens, if any they have, attached to the Eastland as she lay on the bottom of the river at the end of her voyage. Appellees, as well as the owner, were benefited by appellant's service, and their claims are therefore subordinate.

[4] Nothing in evidence tends to show collusion, fraud, or duress in the execution of the "no cure—no pay" contract, or that appellant accepted the personal credit of the owner in lieu of its right to an interest in the vessel. Though some of the appellees in their pleadings challenged the amount of the consideration, they offered no evidence to prove that it was unfair. Recovery must therefore be for the contract price. The Elfrida, supra.

Since it affirmatively appears that appellant's claim is the only one of the preferred class, there is no reason for delaying payment.

The decree is reversed, with direction to allow appellant's claim, with interest and costs.

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## CITY OF AMARILLO et al. v. SOUTHWESTERN TELEGRAPH & TELEPHONE CO.

(Circuit Court of Appeals, Fifth Circuit. November 12, 1918. Rehearing Denied December 19, 1918.)

No. 3271.

1. APPEAL AND ERROR ⟸954(1)—TEMPORARY INJUNCTION—DISCRETION OF TRIAL COURT.

Discretion of court in granting temporary injunction pending final hearing will not be reviewed, unless abuse is shown.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. INJUNCTION ⊂⊃136(2), 149—TEMPORARY INJUNCTION—PROPRIETY—DEPOSIT IN COURT.

The granting of a temporary injunction restraining a municipality from enforcing against a telephone company an ordinance prohibiting the collection of increased rates until underground installation of wires *held* proper, though company should be required to make deposit instead of giving bond, to secure patrons in case restitution of increase should be ordered.

Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

Bill by the Southwestern Telegraph & Telephone Company against the City of Amarillo and others. From an interlocutory order directing the issue of an injunction pendente lite, defendants appeal. Modified, and, as modified, affirmed.

W. H. Kimbrough, R. E. Underwood, and M. J. R. Jackson, all of Amarillo, Tex., for appellants.

S. P. English, of Dallas, Tex., for appellee.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. This is an appeal by the defendant in the District Court (appellant here) from an interlocutory order of that court directing the issue of an injunction pendente lite, restraining the defendant from the enforcement of a municipal ordinance against the plaintiff (appellee) which prohibited the plaintiff from collecting increased rates for service, fixed by it, until it had installed its wires underground within the fire limits of the city of Amarillo. The motion for a temporary injunction was heard upon bill, answer, affidavits, and counter affidavits.

The plaintiff claimed the right to put in and maintain the increased rates by virtue of the ordinance granting its predecessor the franchise to maintain and operate its telephone system in the streets of the city. The defendant contended that the plaintiff was in default of a stipulation in the ordinance that it was to install its wires underground within the city's fire limits, which it was conceded it had not done, and that it could not resort to a court of equity to enforce the ordinance, as a contract, in its favor, while in default of performance of the conditions required of it. The plaintiff also claimed that the rates in force before increased were confiscatory, and that, regardless of the ordinance contract, it could enjoin the inhibitory ordinance upon the ground that it deprived plaintiff of its property without due process. The defendant denied that the old rates were confiscatory, and denied plaintiff's right to resort to equity, while in default under the contract ordinance, though they were confiscatory.

The District Judge did not undertake to determine, on the hearing of the motion, any issue of fact or law, except the default of the plaintiff as to the underground installation; but in view of the serious and doubtful questions presented by the motion, and the impossibility of reaching a proper conclusion on a preliminary hearing, and in view

of the fact that the subscribers, represented by the defendant, could be amply protected, if the temporary injunction issued, by a deposit in the registry of the court for their reimbursement in the event the increased rates were held to be illegally put into effect on the final hearing, while the plaintiff, if the temporary injunction was denied, would irreparably lose the benefit of the increased rates until final hearing, even if the increased rates were then sustained and the inhibitory ordinance permanently enjoined, decided to grant the motion, conditioned upon the plaintiff depositing in the registry of the court an amount adequate for the reimbursement of the subscribers.

[1] The rule is settled that the granting of a temporary injunction, pending final hearing, is within the sound discretion of the trial court, and that the granting of a temporary injunction will be reviewed on appeal only if the lower court has abused its discretion or improvidently granted the writ. Texas Traction Co. v. Barron G. Collier, Inc., 195 Fed. 65, 115 C. C. A. 82; Southern Pacific Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185; Kankakee v. American Water Supply Co., 199 Fed. 757, 118 C. C. A. 195. Especially will the granting of the temporary writ be upheld, when the balance of injury as between the parties favors its issuance. Memphis Gas & Light Co. v. Memphis (C. C.) 72 Fed. 952; Southern Railway Co. v. McNeill (C. C.) 155 Fed. 756.

[2] In view of the doubt attending the questions involved, and the difficulty of properly solving them on a preliminary hearing upon affidavits, and the fact that the loss the appellee will suffer from the enforcement of the ordinance pending final hearing will be irreparable, and the possibility of so molding the order as to protect the subscribers if the defendant should succeed upon final hearing, we are not disposed to hold that the District Judge abused his discretion in granting the writ, or ordered its issue improvidently.

The opinion of the District Judge recited the offer by the plaintiff to make a deposit or execute a bond to protect the subscribers, and directed the clerk of the court to ascertain what would be a proper amount to deposit with the court for their protection, and that, upon such deposit being made, the writ should issue. The order of the District Court, however, provides that, upon the filing by plaintiff of a bond in the sum of $30,000, the writ should issue. Upon the hearing in this court, the appellant's counsel complained of the substitution of the bond for the deposit, and counsel for appellee renewed its offer to make the deposit in addition to the bond.

We are of the opinion that the subscribers will be more amply protected by a deposit. The order appealed from should be modified, so as to provide for the continuance in force of the writ, upon the plaintiff's making with the clerk of the District Court a deposit in an amount to be determined by him to be sufficient to repay to those having, or that may hereafter have, contracts with the plaintiff for telephone service in the city of Amarillo, the difference between the charges at the increased rates and at the rates which had theretofore obtained, during the period the writ is in force, within five days after being notified of such determination of the clerk, and such additional

deposits, if any, as may in the opinion of the District Court become at any time or times hereafter necessary for that purpose and be ordered by it, and stipulating of record to submit itself to the jurisdiction of the District Court in the matter of the determination of the claims of such persons for reimbursement from such deposit or deposits.

The cause is remanded to the District Court for the modification of the order appealed from in conformity with this opinion, and, as so modified, the order will be affirmed.

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## VON BANK v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5156.

1. ARMY AND NAVY ⟸40—ESPIONAGE ACT—CONSTRUCTION—"WILLFULLY."
In Espionage Act June 15, 1917, tit. 1, § 3, making it an offense to "willfully cause or attempt to cause insubordination, disloyalty, mutiny or refusal of duty in the military or naval forces of the United States," the word "willfully" means "intentionally" or "with the purpose of."
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willfully.]

2. ARMY AND NAVY ⟸40—ESPIONAGE ACT—ATTEMPT TO CAUSE INSUBORDINATION, ETC.
A statement by an officer of a school district, that he "would rather see a pair of old trousers hanging over the schoolhouse than the United States flag," *held*, under the circumstances in which it was made, not an offense under the Espionage Act, as a willful attempt to cause insubordination, etc., in the military or naval forces.

In Error to the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Criminal prosecution by the United States against Henry Von Bank. Judgment of conviction, and defendant brings error. Reversed.

A. W. Fowler, of Fargo, N. D., for plaintiff in error.

Melvin A. Hildreth, U. S. Atty., of Fargo, N. D. (John Carmody, Asst. U. S. Atty., of Fargo, N. D., on the brief), for the United States.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. Von Bank was convicted and sentenced for a violation of section 3, title 1, Act of Congress approved June 15, 1917, c. 30, 40 Stat. 217. The charge against him was that on December 15, 1917, at or near Buffalo, in the county of Cass, district of North Dakota, he had willfully caused and attempted to cause, insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, the United States then being at war with the Imperial German Government, by refusing as president of the school board of district No. 79, to put the flag of the United States upon the schoolhouse in said district, and stating that he would just as soon see a pair of old trousers hanging over the schoolhouse

as the United States flag. At the close of all the evidence, counsel for the defendant moved for a directed verdict in his favor, which was denied. This ruling is assigned as error.

There was evidence tending to show that the defendant was a naturalized citizen of the United States, having been born in the Grand Duchy of Luxemburg; that he was a farmer living in the county of Cass, North Dakota, and at the time of the commission of the alleged offense was president of the district school board, and said board had neglected or refused to purchase a flag of the United States and display the same in seasonable weather upon the district schoolhouse or upon a flagstaff upon the school grounds during school hours of each day's session of school as the law provided. At the county teachers' institute it appeared that the schoolhouse of district No. 79 had no flag. Knowledge that there was criticism for the failure to provide a flag came to the defendant, and on the date mentioned in the indictment he visited the schoolhouse while school was in session, and in a conversation had in the entry of the schoolhouse, at which the defendant and the school-teacher were alone present, the defendant stated "he would rather see a pair of old trousers hanging over the schoolhouse than the United States flag." Later, when asked by the county superintendent, Mr. Riley, as to whether he had used this language, he replied, "Yes; I said so, and why not?"

At the time the defendant admitted that he had used the words set forth in the indictment, Mr. W. A. Landblom, assistant superintendent of public instruction, was present and was a member of class 4 of the selective draft. There was no evidence that the defendant spoke the language quoted for the purpose of causing or attempting to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, except the language itself. The law in express terms confines the organizations to be acted upon to the military or naval forces of the United States, and the effect of the acts or declarations of any person upon such organization is termed insubordination, disloyalty, mutiny, or refusal of duty, terms which, with the exception of disloyalty, are applicable to persons subject to the command of superior authority in an organized service.

[1] The word "willfully" has been given different shades of meaning in different statutes. In the law under consideration we think it means "intentionally," or "with the purpose of." The fact that no flag had been displayed upon the schoolhouse can have very little influence in the present controversy, as that condition had existed for years before June 15, 1917, and it was the district board's duty to display the flag, and not particularly that of the defendant. It is contended by counsel for the government that the jury had a right to find or infer from the language used that the defendant intended to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States, upon the well-known principle that every man is presumed to intend the necessary and legitimate consequence of what he knowingly does or says. The jury, however, had no right to find a criminal intent,

unless such intent was the necessary and legitimate consequence of the words spoken. A jury has no more right to draw an inference from facts that do not necessarily and legitimately authorize such inference than to find any other fact without evidence.

[2] The question now presented is: Would the words spoken, under the circumstances attending their utterance, necessarily and legitimately cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States? Assuming the military or naval forces to be constituted of patriotic citizens, which of course is a legitimate assumption, we think the language used by the defendant with reference to the flag, when heard by them, would cause the flame of patriotism to burn the brighter in indignant protest, rather than cause insubordination, disloyalty, mutiny, or refusal of duty.

It is not the language of the wily agitator or propagandist. The language used by the defendant is unpatriotic and offensive to any one who appreciates what the flag has always and still stands for; but if this be a government of laws, and not of men, the defendant should stand unprejudiced by the passions of the times when charged with the commission of crime. It would seem that Congress passed the law of May 16, 1918 (chapter 75), for the purpose of punishing the use of unpatriotic language, as the passage thereof would not have been necessary if it was the opinion of Congress that the present law included merely scurrilous language with reference to the flag. We are of the opinion, therefore, that there was no evidence from which the jury had the right to find or infer that the defendant used the language quoted above with the intent to cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States. So far as the attack upon the indictment is concerned, we think that, as the words spoken are alleged to have been uttered willfully, the indictment is sufficient; the proof to sustain the fact that the words were spoken willfully for the purpose alleged to be supplied at the trial.

For the error in refusing to direct a verdict, the judgment below is reversed, and a new trial ordered.

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## RAGANSKY v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 13, 1918.)

No. 2605.

1. HOMICIDE ⊂⊃92—THREATS AGAINST LIFE OF PRESIDENT—DEFENSE—JOKE.
   It is no defense to prosecution, under Act Feb. 14, 1917 for threatening to take the life of the President, that the language was used as a joke; it not being claimed that those present so understood, or were intended to so understand.
2. HOMICIDE ⊂⊃92—THREATS AGAINST LIFE OF PRESIDENT—"KNOWINGLY"—"WILLFULLY."
   Within Act Feb. 14, 1917, denouncing the offense of knowingly and willfully threatening to take the life of the President, a threat is "knowingly"

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

made, if the maker comprehends the meaning of the words used, and "willfully" made, if, in addition to comprehending their meaning, he voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution; a bad purpose is not necessary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Knowingly; Willfully.]

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Walter Ragansky was convicted of threatening the life of the President, and brings error. Affirmed.

Seymour Stedman, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne and Robert T. Neill, both of Chicago, Ill., for the United States.

Before MACK and EVANS, Circuit Judges.

MACK, Circuit Judge. The sole question for consideration on this writ of error to reverse a judgment based upon a verdict of guilty under all three counts of an indictment for knowingly and willfully making threats to take the life of the President of the United States is the construction of the Act of February 14, 1917 (39 Stat. 919, c. 64) copied in the margin.[1]

Concededly, the language charged to have been used by defendant in and of itself constituted such a threat; that specified in the first count was "I can make bombs and I will make bombs and blow up the President"; in the second, "We ought to make the biggest bomb in the world and take it down to the White House and put it on the dome and blow up President Wilson and all the rest of the crooks, and get President Wilson and all of the rest of the crooks and blow it up;" in the third, "I would like to make a bomb big enough to blow up the Capitol and President and all the Senators and everybody in it." The demurrer and motion to quash, not shown in the record, as well as the motion in arrest of judgment, were therefore properly overruled.

[1] While the testimony is not preserved, it appears, from the statement of the judge in overruling a motion for a new trial, that "there was a claim by this defendant and testimony in corroboration of his claim that he was joking, that he was not in earnest, that he did not intend to kill him."

The court instructed the jury that "the claim that the language was used as a joke, in fun," is not a defense. It was not claimed that every one present understood that he was joking, or that he intended them so to understand; the claim appears to have been that defendant

[1] "Any person who knowingly and willfully deposits or causes to be deposited for conveyance in the mail or for delivery from any postoffice or by any letter carrier any letter, paper, writing, print, missive, or document containing any threat to take the life of or to inflict bodily harm upon the President of the United States, or who knowingly and willfully otherwise makes any such threat against the President, shall upon conviction be fined not exceeding $1,000 or imprisoned not exceeding five years, or both."

had no intention to carry out his threat, and that, therefore, it was a joke; the instruction read in the light of the entire charge must be so construed, and in our judgment it was correct.

[2] A threat is knowingly made, if the maker of it comprehends the meaning of the words uttered by him; a foreigner, ignorant of the English language, repeating these same words without knowledge of their meaning, may not knowingly have made a threat.

And a threat is willfully made, if in addition to comprehending the meaning of his words, the maker voluntarily and intentionally utters them as the declaration of an apparent determination to carry them into execution.

Defendant, while conceding that an intention actually to carry out the threat or the President's knowledge of the threat is not essential, contends that the language must be used with an evil or malicious intent to express a sentiment to be impressed upon the minds of persons through which it might create a sentiment of hostility to the security of the President, "that willfully implies an evil purpose—legal malice."

Waiving defendant's failure properly to except to the charges (his exception was general to the court's construction of the act), his present contention cannot be sustained, if by evil purpose or legal malice, more is meant than an intention to give utterance to words which, to defendant's knowledge, were in form and would naturally be understood by the hearers as being a threat; that is, the expression of a determination, whether actual or only pretended, to menace the President's safety.

While under some circumstances, the word "willfully" in penal statutes means not merely voluntarily, but with a bad purpose (Spurr v. United States, 174 U. S. 728, 19 Sup. Ct. 812, 43 L. Ed. 1150; Potter v. United States, 155 U. S. 446, 15 Sup. Ct. 144, 39 L. Ed. 214), nothing in the text, context, or history of this legislation indicates the materiality of the hidden intent or purpose of one who, in the presence of others, voluntarily uses language known by him to be in form such a threat, and who thus, to some extent endangers the President's life (United States v. Stickrath [D. C.] 242 Fed. 151; United States v. Clark, 250 Fed. 449, —— C. C. A. —— [April 1, 1918, C. C. A. 5th Circuit]).

Judge KOHLSAAT concurred in these conclusions, but died before the opinion was written.

Judgment affirmed.

## DOLL v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5089.

ARMY AND NAVY ⊂=40—ESPIONAGE ACT—VIOLATION.

Where accused indulged in profane and coarse outburst to forest officers concerning grievance over timber right in forest reservation, and there was nothing said against enlistment, and accused did not know the officers were engaged in recruiting, *held*, under the circumstances, that there was no violation of Espionage Act June 15, 1917, tit. 1, § 3.

In Error to the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Charles Doll was convicted of willfully obstructing the recruiting service, etc., in violation of Espionage Act June 15, 1917, tit. 1, § 3, and he brings error. Reversed and remanded.

Robert C. Hayes, of Deadwood, S. D. (J. D. Wear, of Omaha, Neb., and John T. Heffron, of Deadwood, S. D., on the brief), for plaintiff in error.

Robert P. Stewart, U. S. Atty., of Deadwood, S. D. (Edmund W. Fiske, Asst. U. S. Atty., of Sioux Falls, S. D., and George Philip, Asst. U. S. Atty., of Rapid City, S. D., on the brief), for defendant in error.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. Charles Doll was convicted of willfully obstructing the recruiting and enlistment service of the United States, and of willfully causing and attempting to cause disloyalty, insubordination, and mutiny in the military forces of the United States, in violation of section 3, title 1, of the Espionage Act of June 15, 1917 (40 Stat. 219, c. 30).

The crimes were charged to have been committed June 20, 1917, by the use of language which is too profane and obscene to be set forth in this opinion. It was quite clearly shown at the trial that the accused was under the influence of liquor, and had or thought he had a grievance against the government over a right to timber from a forest reservation. The language was used in a conversation with two forest officers, to whom he made his complaints. It appeared that, at the time, the officers were also engaged in recruiting for the engineer military service; but that fact was not told the accused, nor did he know it. The military service was not the subject of the conversation, and he said nothing by way of persuasion, advice, or otherwise against enlistment or the draft. What he said was but a coarse, indecent outburst, because of a fancied grievance in a matter wholly unrelated to those subjects. Where words only are relied on as obstructing the service, or as causing or constituting an attempt to cause disloyalty, etc., contrary to the clauses of the Espionage Act above cited,

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

much depends on the circumstances, and they should be closely regarded. We think there was nothing in this case fairly indicating that the accused intended the results which are essential elements of the offenses, or that such results in fact followed, or would naturally follow, what he said. His request for a directed verdict should therefore have been granted. It should be noted that this case arose before Act May 16, 1918, c. 75, which is much broader than the original statute.

The sentence is reversed, and the cause is remanded for a new trial.

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## OSHKOSH MFG. CO. v. KOEHRING MACH. CO.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918. Rehearing Denied November 19, 1918.)

No. 2547.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—CONCRETE MIXER.
Patent No. 899,414, for combinations in a concrete mixer, in view of the Mik German patent, No. 36,807, for lime-slacking apparatus, the arts being analogous, *held*, if valid, limited to a machine as specifically described, and not infringed.

2. PATENTS ⟸328—ANTICIPATION—CONCRETE DISTRIBUTOR.
Reissue patent No. 13,617, for concrete distributor, *held* anticipated by machines on sale more than two years before filing of application for original patent.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Bill by the Koehring Machine Company against the Oshkosh Manufacturing Company for infringement of patents. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions.

Stephen J. Cox, of New York City, and Arthur L. Morsell and Louis O. French, both of Milwaukee, Wis., for appellant.

John F. Robb, of Cleveland, Ohio, for appellee.

Before BAKER and MACK, Circuit Judges.

MACK, Circuit Judge. Two patents are involved in this appeal—the one, No. 899,414, for improvements in concrete mixer; the other, reissue No. 13,617, for improvements in concrete distributors. The machine in controversy is a combined concrete mixing and paving machine, called a paver; the alleged infringements result from the form of appellant's mixer and from the construction of the distributing attachment thereto. The two patents will be considered separately; the questions arising as to each of them are different.

### The Concrete Mixer.

[1] The two claims of the patent, both of which were held valid and infringed, are as follows:

1. In a concrete mixer, the combination of a revoluble drum having separate receiving and discharge openings at its respective ends, a stationary hopper

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

having its discharge end within one of the openings of said drum, arms connected with the drum supporting frame and projecting into the drum at its discharge end, a reversely inclinable trough pivoted to the inner ends of said arms, and means for manually changing the inclination of said trough upon its pivotal support.

2. In a concrete mixer, the combination of a revoluble drum having separate receiving and discharge openings at its respective ends, a stationary hopper, having its discharge end within one of the openings of said drum, a stationary trough supported from the exterior near the opposite end of said drums, arms connected with the drum supporting frame and projecting into the drum at its discharge end only, and a reversely inclinable trough pivoted to the inner ends of said arms and adapted to contact with said stationary trough.

The following statement from appellee's brief suggests the issue:

"Discharge chutes, operating practically outside of the drum, but adapted to be swung into the drum in order to perform their discharge function, were quite old in the art. At any rate, the patentee of patent No. 899,414 evolved the conception that a simple mounting of the chute further within the drum of a batch mixer type machine and using it in its idle position to shoot or cataract the materials back from the discharge end to (not merely toward) the inlet end, would create an active function for the chute as a mixing element when it was not needed for discharge purposes. In other words, appellee's discharge chute never has an idle position when the mixer is in use. The appellee recognizes that, while the patentee achieved a broadly new result in designing his double functioning chute, such result was derived from what might be characterized as a rather narrow structural change, namely, the shifting inwards of the pivotal support of the chute and reshaping and formation of the latter to accommodate for its new double action. In fact, throughout the procurement of his patent the patentee fully appreciated that, while the structural changes made by him over prior art devices were quite narrow ones, nevertheless, the accomplishment was maintained as wholly novel and an important advance in the art. His chief difficulty was to couch in proper terms claims which avoided many and various prior patents, and yet actually covered the real inventive idea developed by him."

Concededly, defendant's reversibly inclinable trough, though performing both the functions of discharging from and of aiding in the mixing of the materials within the drum, is not pivoted to the inner ends of the arms, and the arms do not project into the drum. Therefore, if the patent claims are to be literally interpreted, there is no infringement.

In view of our conclusions as to the Mik German patent, No. 36,807, we do not pass upon appellant's strong and earnest contention that the successively narrowing amendments of the claims, made to meet the examiner's references to earlier patents, not including, however, Mik, compel such an interpretation; for the conception, if novel, of utilizing the reverse discharge chute in co-operation with the elevating buckets to aid the mixing within the drum, might, nevertheless, justify an interpretation of the claims broad enough to cover defendant's structure. Despite the change in the location of the pivoted support from within the drum to the opening thereof, defendant's reversed discharge chute does function as a mixing element, even though other advantages alleged to result from the location within the drum are thereby lost.

Is, then, this conception novel? In its application to concrete mixers, yes; to other apparatus in a strictly analogous art, no. For, in

our judgment, Mik in his patent for lime-slaking apparatus clearly shows the same double function of a discharge chute.

It is immaterial that concrete could not be mixed in Mik's machine, or that the primary function of his discharge chute, when in reversed position, is to aid in separating the stony impurities from the lime. This separation is but a step in the more thorough mixing of the quicklime and the water which have been fed into the drum.

Both patents are classified in the Patent Office as mortar mixers; in both machines, thorough agitation of the materials is essential; in both, the mixture is lifted upwards by the buckets or straining basket, and on reaching its highest point is dropped into the reversed chute, whence it is cataracted back. In the concrete mixture, the aim is thoroughly to mix all of the material; none of it runs off after it is mixed; the whole mass is discharged through the chute. In the lime-slaking apparatus, the object is thoroughly to saturate the quicklime, producing slaked lime, which is strained through and flows out of the drum beneath the reversed chute. After these stony substances have been mixed as thoroughly as possible with the liquid into which they drop from the reversed chute, and thereby to a very large extent have cast off the lime surrounding them, they are discharged as waste material through the discharge chute; as some lime, however, still adheres to them, they drop into a receptacle having a straining bottom, so that any lime passing out with the stones may be caught and mixed with the slaked lime. The arts are clearly analogous.

The patent in suit, therefore, if valid, must be limited to a machine as specifically described in the claims; so limited, it is not infringed.

## The Concrete Distributor.

[2] As stated in the specifications, the object of the invention was—

"to provide a device to be used in laying walks and street pavements in connection with a concrete mixer for receiving the mixed concrete as it is discharged from the mixing drum and conveying it to the place of deposit in the walk or pavement which is being laid."

Claim 1 reads as follows:

"1. In a device of the described class, the combination of a vertical frame, a boom pivotally supported near one end from said frame, manually actuated means for revolving said boom a partial revolution about its pivotal support, a track carried by the boom, a carriage mounted upon said track, a cable operating along said boom and connected with the carriage, a receptacle suspended from said carriage, means for communicating a forward and backward movement to said carriage, and means carried by the boom for raising and lowering the same."

This claim corrects obvious errors in the corresponding ones of the original patent by substituting "boom" for "crane" and in stating that the "manually actuated means" are to revolve the boom, not the frame.

The other claims in issue, 3 to 6, had no corresponding ones in the original patent; they differ from claim 1 as follows: In each of them, the means for revolving the boom are not limited to those manually actuated; in claims 4 and 6 the means for raising and lowering the boom are not limited by locating them on the boom; in claim 5 this ele-

ment is omitted altogether; and in claim 6, these means are stated to be operatively connected with the outer end of the boom. Furthermore, in claim 4 the cable is omitted and the shape of the carriage is specifically described; in claim 5 a new element, drums on the upper and lower portions of the frame, is added; in claim 6, in addition to these drums, there is also added pulleys at the inner and outer ends of the boom, to carry the cables.

Plaintiff was no pioneer. Such distributing machines were old in the art. He introduced no new elements. Without discussing the details of the prior art, it is apparent therefrom that plaintiff's claims are to be given no wide range of equivalency. We pass, however, the question of infringement.

We pass, too, appellant's contentions as to the validity of the reissue, as well as to the limitation of the claims to the specific structure, based upon the proceedings in the Patent Office. We note, too, that any defense of prior public use was waived by objection to the relevancy of plaintiff's offer to carry his invention back of such use. But there was no waiver of the separate defense that such machines were on sale more than two years before application for the original patent was filed. Two such actual sales were clearly proven; contemporaneous records substantiate the oral testimony. It is immaterial whether or when these machines were put into actual public use; that they were so used more than two years prior to the original application seems, however, equally clear.

If defendant's machine should be deemed to infringe, then these machines so sold must be held to anticipate.

The decree will be reversed, and the cause remanded, with directions to dismiss the bill.

NOTE.—Judge KOHLSAAT concurred in the decision, but died before the opinion was prepared.

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F. W. RAUSKOLB CO. v. ANTHONY MFG. CO.

(Circuit Court of Appeals, First Circuit. November 8, 1918.)

No. 1340.

1. APPEAL AND ERROR ⊂=877(1)—REVIEW—QUESTIONS PRESENTED.
Where plaintiff appealed from a decree of noninfringement, and not from the part of the decree sustaining the validity of the patent, *held*, that the question of infringement was the only one presented.

2. PATENTS ⊂=174—IMPROVEMENT PATENTS—CONSTRUCTION.
Doubtless an improvement patent may be relieved in a measure from the operation of the rule of limited construction, if the merit of the invention warrants it; but the merit is not ordinarily accepted as sufficient when the invention only slightly advances the art.

3. PATENTS ⊂=328—CONSTRUCTION—INFRINGEMENT.
The Rauskolb patents, Nos. 1,072,992, and 1,103,222, for a method of gold leaf mounting, *held* limited to the use of pressure, and not infringed by the attachment of metal leaf by adhesive in accordance with the Davis and Schumacher patent, No. 1,124,114.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Appeal from the District Court of the United States for the District of Massachusetts; Frederic Dodge, Judge.

Suit by the F. W. Rauskolb Company against the Anthony Manufacturing Company. From a decree for defendant, plaintiff appeals. Affirmed.

Frederick P. Fish, of Boston, Mass. (J. L. Stackpole, of Boston, Mass., on the brief), for appellant.

Odin Roberts, of Boston, Mass., and Hubert Howson, of New York City, for appellee.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

ALDRICH, District Judge. The two patents upon which the plaintiff relies are for improvements in the art of metal leaf mountings, and it is apparent that the leading object was to provide improved means for mounting gold leaf upon leather, cloth and other surfaces.

In the court below the defense was noninvention and noninfringement, with the result that that court accepted the patents as valid and, under the rule of limited or narrow construction, found no infringement.

[1] There being no appeal from that part of the decision which gives to the patents the status of invention, there is nothing before us as to their validity. It is true that assignments of error 1 and 2 set out that the court erred in not holding the patents good and valid, but counsel in their brief say that the assignments of error are, in substance, that the court erred in not holding the patents infringed. Under the circumstances; there is no occasion for an examination of any questions other than those which relate to the District Court's interpretation of the claims and the finding of no infringement under their scope as limited by the rules of narrow construction.

[2] Doubtless an improvement patent may be relieved, in a measure, from the operation of the rule of limited or strict construction if the merit of the invention is such as to warrant it (Whitin Machine Works v. Houghton, 178 Fed. 444, 445, 101 C. C. A. 344), but the merit is not ordinarily accepted as sufficient to warrant it when the invention only slightly advances the art, thus carrying the claims only a little into the field of invention. Under such view, and dealing with the question of merit as a question of fact, as we must, no reason can be seen for invoking the theory of liberal construction in order to carry protection to the plaintiff beyond the particular means which he described and relied upon in claiming his invention.

[3] The leading argument which the appellant directs against the reasoning and findings of the District Court is that there was no warrant for the position of that court that the Rauskolb patents contemplated the use of substantial pressure in applying gold leaf, and that the defendant's mounting was made without the use of substantial pressure. This argument cannot be accepted as sound, under the claims of the Rauskolb patents, as explained by their specifications and under the claims and specification of the Davis and Schumacher patent under

which the defendant's mounting was made. This is so because the leading idea in the Rauskolb patents is to securely attach metal leaf under nonadhesive conditions in respect to the paper on the side to which it is applied, and that such attachment is to be secured through pressure as the only means for uniting the leaf; while the leading idea of Davis and Schumacher was to attach the metal leaf to paper, not under substantial pressure, but through the medium of an adhesive or sticky substance, and the alleged infringing article was made in accordance with that idea.

Rauskolb, in the specification of his article patent, of July 14, 1914, emphasized the idea of pressure by describing his article of manufacture as one "consisting of a sheet of gold leaf with a backing of nonadhesive paper applied thereto by pressure and provided on the opposite face thereof with a fine coating of adhesive sizing."

It would thus seem that pressure was the only means which Rauskolb had in mind for securing the attachment of the gold leaf to the nonadhesive side of the paper. He apparently had no thought of securing such attachment through the medium of adhesive substances. Indeed, there would seem to be ground for suggestion that his idea was to exclude adhesive materials as a means of attachment, because, in the specification of his article patent, he points out objections to sized materials as used in the older art. According to his specifications, Rauskolb apparently relied upon pressure, applied to his three sheets, as the sole agency for causing the delicate sheet, or metal foil, to adhere firmly to the sheet of paper which was to become its backing. The method for arranging the three sheets for his contemplated and necessary pressure was described by Mr. Rauskolb, who testified before Judge Dodge, and the contemplated pressure was described as that of hydraulics, and of the measure in round figures of one hundred tons to the square inch.

On the other hand, as has been already said, the process contemplated by the Davis and Schumacher patent was secured by attachment through the instrumentality of a wax containing a sticky substance. In each of the seven claims of this patent the idea is expressed that the attachment of the metallic leaf ribbon, comprising a carrier strip having a film of gold, shall be secured through the medium of a sticky substance, because, in speaking of the two elements of the combination of the leaf ribbon, the claims say "secured thereto" by a wax containing a sticky substance, sometimes describing the adhesive substance, as that of wax, containing a small amount of sticky substance, and sometimes as a film of yellow beeswax. So far as concerns the security of such attachment, it cannot reasonably be said that pressure was a substantial element of its security, because the word "pressure" does not appear in any of the claims, and because pressure cannot be accepted as an intended substantial element of the proposed attachment.

The slight pressure of the heated die spoken of in the specification of the Davis and Schumacher patent we think was something quite independent of the original and supposed inventive attachment of their metal film, and was something having reference to ornamentations of

the front surface, at a stage of the process subsequent to the attachment of the film to the carrier strip of which we have been speaking. And the same is true of the Rauskolb patents, whose specifications speak of ornamenting the surface of the metal leaf with suitable characters through the instrumentality of the heat and pressure of the impression portion of a heated die applied to the rear face of the sheet of paraffin paper; but this, we think, is an after feature, and something quite independent of Rauskolb's high pressure attachment of the gold foil to the other face of its backing under nonadhesive material conditions, or in other words, as Rauskolb says in his specifications, under conditions where there is no "necessity of applying sizing to the leather or other material to which the leaf is to be affixed."

In short, we think the method of the process of Rauskolb, and that of Davis and Schumacher, not only differ in detail and in mode of operation, but that they are substantially different in principle.

In view of the prior art and the prominence which the inventor gave to the element of pressure in the Patent Office proceeding, and under the repeated iterations of his specifications as to pressure under nonadhesive conditions, it is difficult to resist the conclusion that the patent was based upon the conception of the supposed inventive idea, and the description of means of uniting metal foil, without the aid of adhesive substance, to a paper backing to be treated with a coating of adhesive sizing on its opposite face; thus, according to Rauskolb's suggestion in his specifications, doing away with the necessary sizing between the layer of metal leaf and the material, of the older methods which, according to Rauskolb's idea, as he points out in his specification, was an objectionable feature, because it disfigured and caused loss of metal leaf, which, when gold, has a considerable value; while Davis and Schumacher hold to a method of adhesive attachment between the foil and the carrier strip, without substantial pressure, thus clearly and at once substantially differentiating their method from the pressure method of Rauskolb, where the idea of pressure and uniting without adhesive material embodies the substantial, if not the whole, merit of the invention. Under such circumstances, we cannot see that the Davis and Schumacher process was in any substantial sense the equivalent of that of Rauskolb. It results, therefore, that the finding of no infringement must be sustained.

Upon the arguments no suggestions were made upon the question of costs raised by the assignment of errors.

The decree of the District Court is affirmed, with costs.

## BUTLER BROS. v. PRATT.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5104.

1. PATENTS ⟸328—VALIDITY—INVENTION.
The Pratt patent, No. 1,166,629, for an improvement in bracelets, consisting of a series of curved links with a slot at each end, adapted so the same could be worn on a flexible band or united by metal connections, *held* invalid as not showing invention, but only a mechanical improvement over the prior art, etc.

2. PATENTS ⟸22—INVENTION—SUBSTITUTION.
It is not invention to substitute for one element in an article of manufacture another which performs the same functions in substantially the same way, and accomplishes substantially the same effect.

3. PATENTS ⟸32, 112(3)—VALIDITY—PRESUMPTIONS.
The presumptions from the issuance of a patent and the commercial success of the patented article cannot sustain the patent, where there was manifest equivalency of functions, and the commercial success was directly attributable to the unique advertising of the article.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by Henry B. Pratt against Butler Bros. From a decree for complainant, defendant appeals. Reversed, with directions to dismiss the bill.

A. C. Paul, of Minneapolis, Minn. (Lancaster, Simpson & Purdy, of Minneapolis, Minn., on the brief), for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. This was a suit for infringement of letters patent No. 1,166,629, issued to Henry B. Pratt, January 4, 1916, for improvements in bracelets. The appeal is from a decree sustaining the patent and awarding an accounting.

[1] There are five claims in the patent. The first and fourth claims, which may be regarded as typical, are as follows:

"(1) In a bracelet, a series of oblong metal plates, each plate being formed with a transverse rectilinear slot at each end thereof, and a band passing through all of said slots for uniting said plates."

"(4) In a bracelet, a plurality of oblong metal plates, each plate being curved longitudinally and perforated at its ends, and a flat flexible band passing through said perforations and extending along the inner or concave sides of the plates."

The objects of the patentee are stated in his specifications as follows:

"My invention relates to improvements in bracelets. Its object is to provide an easily assembled and attractive ornament of this kind, having a series of metal links united by a flexible band, which lines said links and overlaps their ends.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"A further object is to provide in a device of this kind a series of links, each of which is shaped to substantially conform to the curvature of the wrist and provided with a panel adapted to display a monogram, initials, or other ornamentation on the outer or convex side thereof.

"This bracelet is peculiarly fitted for use as a 'friendship' or keepsake bracelet, in which the several links or plates are donated or inscribed by sundry friends and thereafter assembled as a complete bracelet."

The character of the band used to unite the links is referred to in claim numbered 2 as "a flat band" and in claims numbered 3 and 5 as a "flexible band."

The patentee entered into a license agreement with a manufacturing company that did an extensive business in making and selling jewelry and a novel and successful advertising campaign began. An appeal was made by illustrated advertisements in prominent magazines and periodicals, and by circulars, addressed especially to young women and girls, showing the adaptability of the links as gifts, engraved with the name or initials of the donor, and the feasibility of adding links together, thus inscribed, until enough would be gathered to make a complete bracelet. In many cases dealers made presents to prospective customers of a single link, perhaps engraved with the name of the donee, and mounted upon a band of velvet ribbon. There was a very considerable sale of these links; the licensee having sold over 2,000,000 of them up to the time of the trial of this suit. The defendants sold bracelet links that were essentially the same as the plaintiffs. They were not sold with a ribbon or other band to pass through the slots in the links, but they were furnished to dealers for display mounted on portions of advertising cards, which were cut into strips or tabs colored and shaped to resemble a black ribbon, passing through the slots in the links and suggesting the use of them on a flexible band, when used as a bracelet, or as a part of a bracelet. Although the use of metal connections between the links of a completed bracelet was urged, the sale of separate links for temporary use upon a band of ribbon, until enough had been accumulated to form the complete bracelet, was obviously a part of the defendant's purposes.

The joining together in a bracelet of separate links, so as to conform the bracelet to the shape of the wrist, has been the subject of many patents antedating plaintiff's. The use of links having the same mechanical structure as those of plaintiff is conceded to be old. The use of flexible bands to unite the links is also conceded to be old. The claims of plaintiff relate to a combination of links, each of which has a slot or perforation at each end and a band that passes through all of the slots or perforations, uniting the links. In the ordinary practical use of the combination, the band has been a ribbon, usually of velvet, that extends along the inner sides of the links, but passing through the transverse rectilinear slots, so as to leave exposed the outer portion of the links between the slots. The plaintiff concedes that many of the features of construction and design adopted by him are not necessary to the mechanical or functional operation of the bracelet, but are adapted merely to give to it a distinct, characteristic, and unique appearance. He regards as among the nonessen-

tial features the links' dimensions and the rectangular shapes of the face of the link, the central panel and the slots. The plaintiff does not claim a patent for the design.

Patent No. 149,879, issued to Murphy and Poolman, August 22, 1873, discloses a bracelet composed of separate links, each of which has passing through it longitudinally a rectangular aperture for the reception of a broad elastic band for the purpose of uniting the links. The function of the band in the Murphy and Poolman patent, as in the bracelet of plaintiff, is obviously, and as is stated in the specifications of the former patent, to connect together, by means of the flat band, the separate members of the bracelet, so as to give more strength than is given by the use of round cords, and to hold the links firmly together along the adjacent ends of the separate links. The arrangement of plaintiff's links, so that the band shall pass beneath the greater portion of a link and then be carried through a transverse slot at the end of the link to the adjoining link, and thence downward through a similar slot in the adjoining link, and so on to the end of the bracelet, while a new arrangement, is only a change of form—an equivalent, so far as functions are concerned—of the connecting band shown in the Murphy and Poolman patent.

[2] As settled by many cases, it is not invention to substitute for one element in an article of manufacture another, which performs the same functions in substantially the same way and accomplishes substantially the same effect. Railroad Supply Co. v. Elyria Iron & Steel Co., 244 U. S. 285, 37 Sup. Ct. 502, 61 L. Ed. 1136; Smith v. Nichols, 21 Wall. 112, 22 L. Ed. 566; Reckendorfer v. Faber, 92 U. S. 347, 23 L. Ed. 719; Van Epps v. United Box Board & Paper Co., 143 Fed. 869, 75 C. C. A. 77; Walker on Patents (5th Ed.) § 36.

[3] The presumptions from the issuance of the patent and from the commercial success in the sale of plaintiff's bracelet links are not sufficient to overbear the manifest equivalency of functions between the two patents, and the extent of sales is more directly traceable to the unique advertising the article has received (see Eisenstadt Mfg. Co. v. J. M. Fisher Co., 241 Fed. 241, 154 C. C. A. 161) than to any patentable novelty. This conclusion announced makes unnecessary the determination of other questions presented.

The decree of the lower court will be reversed, with costs, and with directions to dismiss the bill.

## WEBER ELECTRIC CO. v. E. H. FREEMAN ELECTRIC CO.

(District Court, D. New Jersey. November 6, 1918.)

1. PATENTS ⇐328—VALIDITY—INFRINGEMENT—"TELESCOPE."
The Weber patent, No. 743,206, claims 1 and 4, for an incandescent electric lamp socket, consisting of the combination of a pair of members comprising a sleeve, etc., and a cap adapted to telescopically receive the end of the sleeve, etc., *held* valid, and infringed by defendant's device, which provided for rotation; for the word "telescope" means to drive together, so one slides into another like a spyglass, and often rotative movements are necessary to close a spyglass.

2. PATENTS ⇐328—VALIDITY—INFRINGEMENT.
The Weber patent, No. 743,206, claims 2 and 3, for an incandescent electric lamp socket, *held* invalid and anticipated, and hence not infringed.

In Equity. Suit for infringement of patent for improvement in incandescent electric lamp sockets by the Weber Electric Company against the E. H. Freeman Electric Company. Decree for complainant.

Frank C. Curtis, of Troy, N. Y., for complainant.

Robert H. Parkinson, of Chicago, Ill. (David P. Wolhaupter, of Washington, D. C., of counsel), for defendant.

DAVIS, District Judge. [1] This suit was instituted for the infringement of United States patent No. 743,206, issued to August Weber, Sr., November 3, 1903, and by him assigned to the complainant. The patent has five claims, the first four only of which are alleged to have been infringed by the defendant, and are as follows:

"1. In a device of the class described, the combination with a pair of members comprising a sheet-metal sleeve having a slotted end and introverted tongues, and a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve, of an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, substantially as described.

"2. In a device of the class described, the combination with a base of insulating material having a peripheral recess, and an incandescent lamp support mounted thereon, of an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said base recess, substantially as described.

"3. In a device of the class described, the combination with a base of insulating material having a peripheral recess, and a screw socket fixedly mounted thereon, of an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said base recess, and prevent a relative rotative movement between said sleeve, base, and socket, substantially as described.

"4. In a device of the class described, and in combination a pair of members comprising a sheet-metal sleeve having a slotted end, and a sheet-metal cap adapted to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located transverse slit, and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each

other, and to be released by manual compression of said slotted sleeve, substantially as described."

As Judge Ray, in the case of Weber Electric Co. v. National Gas & Electric Fixture Co. (D. C.) 204 Fed. 79, said:

"Claim 1 calls for a pair of members comprising (1) a sheet-metal sleeve having a slotted end and introverted tongues and (2) a cap adapted to telescopically receive the slotted end of said sleeve, said members having interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said sleeve; also in combination an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues, all substantially as described.

"Claim 2 calls for (1) a base of insulating material having a peripheral recess; (2) an incandescent lamp support mounted thereon; and (3) an inclosing case therefor comprising, in part, a sheet-metal sleeve having a portion of its wall introverted to occupy said base recess, all substantially as described.

"Claim 3 calls for (1) the same base as claim 1; (2) a screw socket fixedly mounted thereon; and (3) an inclosing case therefor comprising in part a sheet-metal sleeve having a portion of its wall introverted to occupy said peripheral recess of the base and prevent a relative rotative movement between said sleeve, base, and socket, all substantially as described.

"Claim 4 calls for a pair of members comprising a sheet-metal sleeve having a slotted end and a sheet-metal cap to telescopically receive the slotted end of said sleeve, one of said members being provided with a recess, and the other having a correspondingly located transverse slit and the wall on one side thereof displaced to form a projection beveled or inclined toward said recessed member and terminating abruptly at said slit, whereby said members are adapted to automatically interlock with a snap action when telescopically applied to each other and to be released by manual compression of said slotted sleeve, all substantially as described."

The patent in question has been decreed to be valid in the Southern district of New York, in the case of Weber Electric Co. v. National Gas & Electric Fixture Co., supra, and affirmed by the Circuit Court of Appeals of the Second Circuit in 212 Fed. 948, 129 C. C. A. 468; in the district of Massachusetts in the case of Weber Electric Co. v. Wirt Manufacturing Co., 226 Fed. 481; and in the district of New Jersey, in the case of Weber Electric Co. v. Union Electric Co., 226 Fed. 482.

Judge Ray, in the Southern district of New York, fully considered the Fowler patent, the Bray patent, the Oetting patent, the Kenney patents, and the Paiste patent, cited here against the validity of the Weber patent, and found the Weber patent to be valid. Judge Rellstab, of this court, re-examined the said patents, together with the Wirt patent, and reached the same conclusion. In addition to these patents, the defendant here relies upon the Benjamin patent, the Mix and Genest patent, the Knowles patent, the Edison & Swan patent, and the Gover patent. I find myself absolutely in accord with Judges Rellstab, Ray, and Dodge as to the validity of the Weber patent as affected by the prior art in the patents cited and considered by them; and in the patents cited in this case, which were not cited and were not considered in the previous cases, there is nothing, in my opinion, which affects their decision as to the validity of claims 1 and 4.

The essence and genius of the Weber patent consist in certain de-

vices, interengaging parts, on the case members which automatically interlock with a snap action when the said case members are telescopically assembled. Weber in the specification says:

"The principal object of my invention is to provide a simple and effective automatically locking connection between the sleeve and cap of an incandescent electric lamp socket.

"My invention is applicable to various telescopically connecting members, but is especially adapted for use in the telescopically connecting cap and sleeve members of incandescent electric lamp sockets.

"In carrying out the principal feature of the invention, the inner telescoping member is made compressible, and the telescopically connecting members are provided, in the manner hereinafter described, with interengaging parts adapted to automatically interlock with a snap action when telescopically applied to each other, and to be released by compression of said inner member."

The immediate use and success of the patent embracing these principal objects are evidence of its invention, and of its superiority over anything in the prior art at that time. As Judge Rellstab said:

"Weber's structure did not enter an art already well filled with devices accomplishing like results. His conception carried him well in advance of any competitor in that field at the date of his invention, and the mechanism embodying his conception has largely displaced other makes of electric lamp socket casings."

Judge Ray said in the National Gas Case, supra:

"It cannot, under the evidence in these cases, be successfully disputed that these structures have largely displaced those of the prior art. They present new and novel features in this art, have proved a commercial success, and are less expensive in construction and also safer. They are easier of assembling. Substantially all the sockets now on the market have a snap-shell construction, and the evidence establishes that at least 85 per cent. of such sockets are made by the Webers and their licensees."

Defendant's keyless socket, as does the Weber keyless socket under claim 1, calls for a pair of members comprising (1) a sheet-metal sleeve having a slotted end and introverted tongues and (2) a cap adapted to telescopically receive the slotted end of said sleeve; said members having interengaging parts adapted to automatically interlock with a snap action when applied to each other, and to be released by compression of said sleeve; also in combination an insulating base for electrical fittings loosely inclosed within said sleeve in engagement with said tongues. Defendant's key socket is like the keyless in all respects, except the key renders an introverted tongue unnecessary. There is no doubt that in these respects the sockets of the defendant conform to the requirements of claim 1 of Weber.

The defendant's sockets, both the key and keyless, have a pair of members comprising a sheet-metal sleeve having a slotted end and a sheet-metal cap to telescopically receive the slotted end of said sleeve; one of said members, the sleeve, being provided with recesses, and the other, the cap, with corresponding projections or studs, which are mechanical equivalents of the projections in the Weber, whereby said members are adapted to automatically interlock when applied to each other telescopically with a slight rotative movement, and to be released by manual compression of said slotted sleeve. The bevel is

not on the projection, as in Weber, but is on the corner, or right angle, formed by the periphery and slot of the sleeve adjacent to the recess or hole adapted to receive one of the studs, its interengaging part, of the cap. The studs are mechanical equivalents of the projections and the hole and slots of the recesses in the Weber patent. There are four studs on the inner side of the cap in the defendant's socket. There are also four recesses into which these projections enter; one of them is the hole already referred to; the other three are open-end slots which receive the corresponding studs upon the cap, and which automatically interlock with a snap action when the two are applied to each other telescopically with a slight rotative movement. It makes no difference, as Judge Ray pointed out, whether these corresponding interengaging parts, projections and recesses, are upon the sleeve member or the cap member of the casing.

Defendant, however, contends that it does not infringe, because claims 1 and 4 of Weber provide that these interengaging parts automatically interlock with a snap action when the case members are telescopically applied to each other, whereas the defendant's sockets require a rotary motion, in addition to the telescopic, in order to interlock. This, it is claimed, distinguishes the operation of the defendant's sockets from the provisions of the Weber patent. This distinction is justified, the defendant contends, by the statement of Judge Rellstab in the Union Electric Co. Case, supra, that:

"In Kenney (U. S.), the shell was provided with open-end slots and slots adjacent thereto. Radial inwardly projecting studs on the cap were adapted to enter these open-end slots in the shell, and then by a rotary movement, after the telescopic application was completed, to spring into the adjacent slots. In combination with these slots and studs, the shell was provided with bayonet slots, intermediate of the others referred to, and the cap was provided with additional radial projections, intermediate of the studs referred to, which entered recesses within the periphery of the socket base or insulator block to lock the same in position. No interlocking of the Kenney members could be effected automatically by telescopic pressure. A rotary movement of the members against each other was absolutely necessary to put the radial projections and the intermediate lugs into position to effect a locking engagement."

Judge Rellstab, in the above quotation, was describing the Kenney patent, and particularly its method of operation. Whether or not under the particular facts of this case this additional rotary movement, or the telescopic movement with a rotary component, would be sufficient to differentiate the patents, so that the defendant may escape the charge of infringement, is another matter, and is not justified as a conclusion from Judge Rellstab's description of the Kenney patent. There were other essential differences distinguishing the Weber patent from the Kenney, one of which was the abruptness of the termination of the projections which make the interlocking firm and secure as compared with the abruptness of Kenney's studs *G*, and which have no abrupt termination, but which abruptness the interengaging parts on defendant's sockets have. Weber, however, did not specifically confine his claim to a construction the parts of which must be assembled by a straight, direct, telescopic movement. In fact, in his patent No. 743,206, without the guard or guide contained in later patents, it is dif-

ficult to bring together the case members with such accuracy as to make a slight rotative movement unnecessary before the interlocking takes place. In order to sustain the contention of the defendant, a telescopic application of the case members to each other must be made with such accuracy as to prevent the slightest rotative movement before the interlocking of the interengaging parts. While Weber did not in terms thus limit the movement, yet the defendant contends that the use of the words "telescopically applied to each other" necessarily imposes such limitation and excludes the slightest rotative movement before interlocking is effected. The verb "telescope," according to the Standard Dictionary, means:

"To drive together, so that one slides into another like the sections of a spyglass or small telescope; to crush by driving together into or upon; to move like the sliding portions of a spyglass in closing."

Often slight rotative movements are necessarily employed in bringing together sections of a spyglass. The limitation here contended for, therefore, is not necessarily imposed or implied in the words used by Weber, nor by experience in actually doing the thing, and Weber did not in terms so limit the movement. In any case, the term "telescopically" should not be so limited, for by so doing justice would seem to be defeated.

The defendant has appropriated all the elements of claims 1 and 4 of the Weber patent, enjoyed the fruits thereof, and seeks to escape the consequences of such appropriation by the single studied distinction of a slight rotative movement in bringing together the cap and sleeve. This, in my opinion, cannot be done, and the defendant is guilty of infringement of said two claims.

[2] If claims 2 and 3 are valid, defendant has likewise infringed these claims. Their validity seems to me to depend upon whether or not the introverted portion of the wall of the sheet-metal sleeve is limited to a cut edge tongue as exhibited in *15* of Figure 2 of the Weber patent. If so limited, claims 2 and 3 are valid and are infringed. If not so limited, and if an indentation in the wall portion of the sleeve accomplishes the same thing as the introverted tongue called for by claim 1, preventing the rotation between the insulating base and the sleeve, then such indentations are mechanical equivalents of introverted tongues.

The evident purpose of the introverted tongues mentioned in claim 1 and introverted portions of the wall of the sleeve mentioned in claims 2 and 3 is to prevent rotation between the insulating base and the sleeve. The introverted tongues and the introverted portions of the wall of the sleeve are different things; but they accomplish the same thing in the same way, and are mechanical equivalents. The introverted tongue *15* in Fig. 2 of Weber is the tongue referred to in claim 1. The change of language in claims 2 and 3, from "introverted tongues" to "a portion of its wall introverted," was doubtless made to cover any indentation of the wall of the sleeve adapted to enter the recess in the insulating base to prevent rotation between it and the sleeve. It seems to me, therefore, that the introverted portion of the wall cannot be limited to sharp edge, cut-metal introverted tongues called for by claim 1.

In the Benjamin patent, No. 575,322, January 19, 1897, we have a base of insulating material having a peripheral recess, etc. In fact, we admittedly have every requirement of claims 2 and 3, except the introverted portions of the wall of the sleeve, and as to these the patent describes them thus:

"Upon the interior of the shell or casing $e$ two lugs or projections $e^2$ $e^2$ are provided, which engage corresponding recesses $a^9$ $a^9$ in the base $a$ to prevent rotation of the base relatively to the casing."

In the Benjamin patent, however, the indentations or inward projections are on the cap, and not on the sleeve, as in Weber. It makes no difference on which of the case members the lug or projection is located, for the purpose and effect is identical, whether in one member of the casing or the other. The introversion of the casing into engagement with a recess in the base has no different function, mode of operation, or effect in the Weber socket than in the Benjamin socket and the defendant's sockets.

In the Edison & Swan patent of May 4, 1895:

"The base $A$ is grooved along each side, and the casing $C$ which holds it has its two opposite sides indented as shown at $H$, so that the base $A$ and the parts fixed on it are made to occupy the proper position relatively to the bayonet catch slot $K$ by which the lamp base is held in the socket."

These indentations in the casing, which project into recesses in the base $A$, are shown by top view in Fig. 2, where they are marked $H$ and accomplish the same thing in the same way as the introverted portions of the wall of the sleeve in the Weber patent.

The Gover patent, 1897, shows and describes indentations in the wall of the casing engaging with corresponding grooves in the periphery of the insulating base, to prevent rotation between it and the casing. "The two sides of the socket are indented so as to form internal protuberances $p$, engaging in the grooves $i$ of the insulator to prevent it from turning." This serves the same purpose as the introverted portions of the wall of the casing in the Weber patent.

These patents admittedly conform to claims 2 and 3 of Weber in all essential respects, except the introverted portions of the wall of the casing, and if it is true, as I hold, that that is not limited to a cut-metal edge tongue, they substantially agree in this respect.

I have not considered the Epstein patent, the Mix and Genest patent, the Perkins patent, and the Marshall patents, because they are all subsequent to the date of the invention of Weber, as found by Judge Ray, with whose conclusions I agree.

It follows that claims 2 and 3 are invalid and not infringed, and that claims 1 and 4 of Weber are valid and infringed, and on those two claims, 1 and 4, the plaintiff is entitled to an injunction and damages and profits.

## In re CUNNINGHAM.

(District Court, N. D. New York. October 28, 1918.)

1. BANKRUPTCY ⊂=315(1)—CLAIMS—"NEGLIGENCE"—"WILLFUL NEGLIGENCE"—AVERMENT.

A judgment based on a complaint merely alleging "negligence" cannot be construed as one for willful or malicious injuries, for simple negligence is opposed to the idea of malice or willfulness, which presupposes a conscious purpose to injure.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence; Willful Negligence.]

2. BANKRUPTCY ⊂=315(1)—"PROVABLE DEBT"—WHAT IS.

Under Bankruptcy Act, § 63 (Comp. St. 1916, § 9647), a judgment against the bankrupt, based on negligent injuries to the judgment creditor's property, is a "provable debt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Provable Debt.]

3. BANKRUPTCY ⊂=424—DISCHARGE—JUDGMENTS DISCHARGED.

The debt evidenced by a judgment against a bankrupt based on negligent injuries to the property of the judgment creditor is dischargeable in bankruptcy, not falling within the exception of Bankruptcy Act, § 17 (Comp. St. 1916, § 9601), because not a liability for willful and malicious injuries to person or property.

4. BANKRUPTCY ⊂=217(3)—STAY OF PROCEEDINGS IN STATE COURT ON JUDGMENT—DISCHARGE.

Bankruptcy court will stay further proceedings in state court on judgment against bankrupt based on simple negligence, where such judgment was provable and debt evinced by it would be barred by discharge.

In Bankruptcy. In the matter of the bankruptcy of John R. Cunningham. On order to show cause, granted by the referee, to stay Virgil D. Selleck from taking further proceedings on a judgment obtained against the bankrupt, except to prove same. Injunction granted.

This matter is before me on an order to show cause, granted by a referee in bankruptcy, for the purpose of staying the plaintiff in a judgment for damages for the negligence of said bankrupt, obtained by him against the bankrupt prior to the filing of the petition in bankruptcy, from taking further proceedings on said judgment, except to prove same as a claim against the bankrupt estate. The bankrupt is threatened with arrest on an execution against the person issued at the instance of the plaintiff on such judgment.

Chambers & Finn, of Glens Falls, N. Y., for bankrupt.
H. Prior King, of Glens Falls, N. Y., for judgment creditor.

RAY, District Judge. John R. Cunningham was adjudicated a voluntary bankrupt on the 28th day of September, 1918.

June 17, 1918, Virgil D. Selleck obtained a judgment against the now bankrupt John R. Cunningham for $97.50 damages and $79.40 costs on a cause of action against him for the act of negligence of one Robert Cunningham, son of the now bankrupt, who was driving his automobile truck and acting as chauffeur for the now bankrupt. The pertinent allegations of the complaint on which the judgment was obtained are as follows:

"That on the 19th day of November, 1917, at about 11 o'clock in the forenoon, he was driving a Saxon automobile, then owned by him and used in conducting his professional business, and was duly licensed to run his said automobile, and was driving the same upon and along Bacon street, in said city of Glens Falls, N. Y., in an easterly direction, and was approaching Glen street in said city, under control and traveling not to exceed five miles per hour, which streets intersect at about right angles. That both Bacon and Glen streets are public streets of said city and much traveled by pedestrians and vehicles of all kinds. That upon approaching Glen street, upon the right-hand side of Bacon street, he sounded his horn and made the turn into Glen street as near to the right-hand curb as practicable, having the right of way of all motor vehicles going south along Glen street.

"That the plaintiff had just completed the turn into Glen street, when his automobile, without warning, was hit from behind and on the left-hand side by an automobile truck owned by the defendant and driven by Robert Cunningham, his chauffeur, who was driving said car without a license, coming in a southerly direction along Glen street, and plaintiff's automobile was pushed and forced over and upon the curb and sidewalk by said auto truck, and the front wheels and gearing were smashed and destroyed, and many other parts of the plaintiff's automobile were injured, damaged, and destroyed.

"That the plaintiff's said automobile was damaged by the collision, and was hit with the defendant's automobile truck, by and through the carelessness and negligence of the driver of said truck, not having a license, and by reason of his not giving to the plaintiff and his automobile the right of way in turning into Glen street, and by running into the plaintiff's automobile without warning.

"That the plaintiff's automobile was so damaged, and so many parts destroyed and broken, that it was totally useless to him, and he was prevented from using the same in his business for a long time thereafter.

"That the plaintiff has been damaged in the sum of $500 for the costs and expenses of procuring parts and repairing the said automobile and by being deprived of the use thereof in his business.

"That the plaintiff was free from contributory or any negligence whatever, and the whole damage to the said automobile was caused wholly by the carelessness and negligence of the defendant's said chauffeur as hereinbefore stated."

It is seen there is no allegation that there was any willfulness or malice, or that defendant's son intentionally or knowingly or willfully ran into or against the plaintiff's automobile. If defendant's son ran into Mr. Selleck's automobile knowingly, when he could have prevented it by due care, and did not exercise such care, or if he intended to do what he did do, there being no compelling necessity, then the act was willful and malicious within the meaning of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 545). But this was not alleged, and we may assume was not proved, as it was unnecessary to a cause of action for negligence. There is no claim that proof of such acts was given on the trial. We may assume that defendant's son was driving this automobile truck; that he was driving it negligently, and negligently allowed it to run into or against the plaintiff's automobile, not—

"giving to the plaintiff and his automobile the right of way on turning into Glen street, and by running into the plaintiff's automobile without warning."

It seems that the defendant's son was driving the auto truck south along Glen street; that plaintiff, coming along Bacon street, which intersects that street at right angles, sounded his horn and turned into

Glen street ahead of defendant's truck, and kept his car in the proper position as near the right-hand side of Glen street as he could, and proceeded southerly; and that defendant's son carelessly and negligently allowed the truck he was driving to run into the plaintiff's car from the rear. It *might* have been done purposely and it *may* have been done purposely, and, if so, maliciously; but there is no allegation of purpose so to do, or of malice in so doing. There is no allegation defendant's son *believed* he would run into the plaintiff's car, or had reason to think he would. He was running the truck too rapidly, surely, for he overtook the plaintiff's automobile and ran into and damaged it. Careless driving, without malice and purpose or intent to do injury, or run into another car, would accomplish all this. Wanton and reckless conduct—that is, acts done with an utter disregard of the rights and safety of another or of his property—may constitute willful and malicious injury to the person or property of another. But we have no such allegation here, and no facts are stated in the complaint showing such conduct.

[1] 1. Negligent acts may do injury to the person or property of another. There are different degrees of negligence, and at least two kinds of negligence—mere negligence, for the consequence of which the negligent person is responsible, and for the consequence of which he must respond in damages; and "willful neglect," or "willful negligence," for the consequences of which the guilty person is responsible, and for the consequences of which he must respond in damages. But a charge of negligence merely does not imply or impart malice, or willfulness, or conscious *purpose* to do injury, or that there was "willful neglect," as defined in the law. A charge of willfulness is not maintained by proof of mere negligence. Girard Coal Co. v. Wiggins, 52 Ill. App. 69, 74. A person doing an affirmative act is usually conscious of the fact that he is doing the act, and if he omits to do an act which it is his duty to perform he is usually conscious of the omission; but this is far from showing knowledge that the act done or act omitted would result in damages or injury to another, and is far from showing conscious purpose or intent to do injury to the person or property of another. In 40 Cyc. 947, 948, the law is thus stated, citing numerous cases:

"Willfulness and negligence are, it has been said, the opposites of each other; the one signifying the presence of purpose, the other its absence. Nevertheless the term 'willful negligence,' or 'neglect,' has come to have a settled signification in the law, and has been defined as that degree of neglect arising where there is a reckless indifference to the safety of human life, or an intentional failure to perform a manifest duty to the public, in the performance of which the public and the party injured had an interest. To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as to evince a reckless disregard for the safety of others, and a willingness to inflict the injury complained of."

In 40 Cyc. 947, "willfulness," in its application to negligence, is defined as:

"An entire absence of care for the life, the person, or the property of others, such as exhibits a *conscious* indifference to consequences."

Numerous cases are cited.

[2] 2. This judgment against Cunningham, the bankrupt, was a provable debt. Section 63 of Bankruptcy Act (Comp. St. 1916, § 9647), says:

"Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him."

This was a fixed liability, and evidenced by the judgment referred to, and was absolutely owing at the time the petition was filed.

[3, 4] 3. The bankrupt will be released from this debt evidenced by this judgment, if he is discharged in bankruptcy, as it is not within the exception of section 17 of the Bankruptcy Act (Comp. St. 1916, § 9601), not being a liability "for willful and malicious injuries to the person or property of another," viz. Selleck, and therefore this court may enjoin the judgment creditor from enforcing it against the bankrupt or his estate, except in the usual way, by proving and filing his claim; that is, may enjoin the plaintiff in that judgment and the sheriff from enforcing a body execution until the question of discharge is determined. We have already discussed the nature and character of the judgment and of the claim on which founded, and have arrived at the conclusion that the claim or liability was for simple negligence, and not "willful negligence," and not a liability for willful and malicious injuries to the property or person of Mr. Selleck, the judgment creditor.

This conclusion is also sustained by the following authorities:

In Matter of Grout, 33 Am. Bankr. Rep. 789, 88 Vt. 318, 92 Atl. 646, Ann. Cas. 1917A, 210, judgment by default was entered on a complaint charging that the defendant assaulted the plaintiff's wife by recklessly, carelessly, and negligently running into her and knocking her down; but there was no allegation that the act was intentional, willful, or malicious, and it was held that the claim on the judgment was barred by the discharge in bankruptcy. The allegation of the complaint was that, while the plaintiff's wife—

"was walking with due care and prudence on a sidewalk in a public street, the defendant recklessly, carelessly, and negligently ran into the said Lilla M. Nason and knocked her down."

The court said:

"These declarations allege that the defendant recklessly, carelessly and negligently ran into the plaintiff wife and knocked her down. There is no allegation that this was done intentionally, willfully, or maliciously. There is nothing in the nature of the violence alleged that indicates intention or malice. There is no allegation of accompanying language characterizing the act as malicious. The addition of the word 'recklessly' to the terms more commonly used does not change the nature of the allegation. The characterization of the defendant's acts is doubtless intensified, but it still remains a charge of negligence. In suffering a default, the defendant conceded nothing beyond this, and nothing more can be implied from the judgment.

"One can be liable in a civil action for direct violence to the person of another, without there having been malice, or intention to injure, or an intention to do the act which caused the injury. Judd v. Ballard, 66 Vt. 668, 30 Atl. 96."

In Matter of Madigan, 41 Am. Bankr. Rep. 770, 254 Fed. 221, it is held:

"A judgment of a state court for negligence due to the reckless driving of an automobile is a debt dischargeable in bankruptcy."

In Jefferson Transfer Co. v. Hull, 40 Am. Bankr. Rep. 844, 847, 166 Wis. 438, 442, 166 N. W. 1, 2, a judgment was obtained for damages—

"upon a cause of action for [defendant's] negligently running his automobile on the highway, so that it collided with and seriously injured a taxicab belonging to the plaintiff."

The defendant was subsequently discharged in bankruptcy, and it was held by the Supreme Court of the state of Wisconsin that the claim on the judgment was dischargeable and discharged. The court said:

"The plaintiff's claim, having been reduced to judgment prior to the commencement of the bankruptcy proceedings, was a provable debt under section 63 of the Bankruptcy Act, although it was a judgment for a tort; it is a fixed liability, evidenced by a judgment absolutely owing at the time of the filing of the petition, and hence answers the calls of the first subdivision of the section last cited. 1 Remington on Bankruptcy, § 680, and cases cited; 7 C. J. p. 299, § 480.

"IV. Being a provable debt, it is dischargeable unless it comes within the exceptions named in section 17 of the Bankruptcy Act, subd. 2, which excepts from the operation of a discharge liabilities for obtaining money under false pretenses or false representations, or willful and malicious injuries to the persons or property of another. The judgment in question was simply a judgment for damages resulting from a negligent act. It is not claimed or shown that the act was willful or malicious; hence the debt will be discharged if the bankrupt be granted a discharge. 7 C. J. p. 398, § 708; 3 Remington on Bankruptcy, § 2740, and cases cited."

So far as the Supreme Court of the United States has spoken on the subject, it leads to the conclusion that the act must be one which necessarily causes injury, and must be done intentionally, and done with a willful disregard of what the person doing the act knows to be his duty. Thus in Tinker v. Colwell, 193 U. S. 473, 487, 24 Sup. Ct. 505, 509 (48 L. Ed. 754), the court said:

"In United States v. Reed [C. C.], 86 Fed. Rep. 308, it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences; and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception."

This was quoted and approved by the Supreme Court in McIntyre v. Kavanaugh, 242 U. S. 138, 141, 37 Sup. Ct. 38, 61 L. Ed. 205. The one case was dealing with criminal conversation with another man's wife, and the other with conversion of property. In Tinker v. Colwell, 193 U. S. at page 489, 24 Sup. Ct. 510 (48 L. Ed. 754), the court, speaking of negligent acts, said:

"It is not necessary, in the construction we give to the language of the exception in the statute, to hold that every willful act which is wrong implies

malice. One who negligently drives through a crowded thoroughfare, and negligently runs over an individual, would not, as we suppose, be within the exception. True, he drives negligently, and that is a wrongful act; but he does not intentionally drive over the individual. If he intentionally did drive over him, it would certainly be malicious."

This language plainly indicates the opinion of the Supreme Court on a state of facts such as we have here. In the instant case the defendant's son drove the auto truck negligently; but there is nothing to show that he drove it into Mr. Selleck's car intentionally, or that he purposed or intended to strike it at all, or was conscious in advance that he would run into it. This cannot be presumed, and there is nothing in the complaint in that action or in this record which would justify the inference, or a holding that the son of this bankrupt, in driving the car negligently, drove it against Mr. Selleck's car intentionally, or was conscious in advance of hitting it that the truck would collide therewith.

I think it clear that the judgment of Mr. Selleck against the bankrupt is a provable claim, and one from which a discharge in bankruptcy will be a release. Therefore the plaintiff should be enjoined from issuing or enforcing an execution against the person or property of the bankrupt pending his application for a discharge and until the determination of that question. If a discharge is applied for and granted, and Mr. Selleck is made a party to the bankruptcy proceedings, that is, if his judgment is duly scheduled by the bankrupt, whether Mr. Selleck proves his claim or not, and he is duly notified of all proceedings, and thereafter attempts to enforce his said judgment, the discharge can be set up and pleaded as a bar. It should be added that the allegation that Cunningham's son was driving the truck without a license was not an issue on the trial of the case, as it was withdrawn from the consideration of the jury, and a written stipulation to that effect has been filed in this court.

There will be an order for an injunction accordingly.

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In re GRAFTON GAS & ELECTRIC LIGHT CO. In re GRAFTON TRACTION CO. In re GRAFTON LIGHT & POWER CO.

(District Court, N. D. West Virginia. November 16, 1918.)

No. 594.

1. BANKRUPTCY ⊂=43—VOLUNTARY BANKRUPTS—ELECTRIC COMPANIES.
A corporation operating a plant to generate and sell electricity is not within the exception to Bankruptcy Act, § 4a (Comp. St. 1916, § 9588), declaring any person, excepting certain corporations, entitled to the benefits of the act as a voluntary bankrupt.

2. BANKRUPTCY ⊂=43—VOLUNTARY BANKRUPTS—STREET RAILWAYS—"RAILROAD."
Ordinarily at least an electric street railway is not a "railroad," within Bankruptcy Act, § 4a (Comp. St. 1916, § 9588), excepting railroad corporations from those which may become voluntary bankrupts.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Railroad.]

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. BANKRUPTCY ⊂=217½—STAYING SUITS IN STATE COURTS.
Order in bankruptcy court, staying creditors from prosecuting their suits in state courts against bankrupt to ascertain and enforce liens on bankrupt's property, are authorized by Bankruptcy Act, § 11 (Comp. St. 1916, § 9595).

4. BANKRUPTCY ⊂=20(1)—EXCLUSIVE JURISDICTION.
The bankruptcy court's jurisdiction in administration of the estates of bankrupts is essentially exclusive.

5. BANKRUPTCY ⊂=20(2)—VOLUNTARY PROCEEDINGS—EXCLUSIVE JURISDICTION —RECEIVER IN STATE COURT.
The bankruptcy court's exclusive jurisdiction is not affected in case of voluntary bankruptcy by the fact that more than four months before institution of the proceedings a receiver was appointed in a suit against a bankrupt in a state court.

6. BANKRUPTCY ⊂=20(1)—LIENS—CONFLICTING JURISDICTION.
The bankruptcy court should not remit to the state court the right to administer, where there is reasonable ground to believe there will be a surplus for unsecured creditors, or where division between lien creditors as to method of administration is inevitable.

In Bankruptcy. In the matters of the Grafton Gas & Electric Light Company, bankrupt, the Grafton Traction Company, bankrupt, and the Grafton Light & Power Company, bankrupt. Heard on motions of state court receivers and others to vacate injunction and appointment of trustee. Motions overruled, stay of trustee vacated, and trustee and referee directed to proceed.

T. S. Riley and John J. Coniff, both of Wheeling, W. Va., and Warder & Robinson, of Grafton, W. Va., for bankrupts.

G. W. Ford and A. W. Burdett, both of Grafton, W. Va., and Geo. W. McClintic, of Charleston, W. Va., for opposing creditors.

DAYTON, District Judge. These three local corporations have each filed petitions and been adjudicated voluntary bankrupts.

The first named was incorporated for the purpose of manufacturing and supplying electricity for light, heat, and power; the second for the purpose of operating a city street railway; and the third to (1) acquire, lease, own, maintain, build, and operate lines of street and interurban railways; (2) acquire water, coal, oil, gas, electric, steam, and other light, heat, water, and power plants; (3) acquire, own, and operate telephone and telegraph lines and exchanges; (4) acquire coal, oil, gas, and other mineral lands, and manufacture, ship, and sell their products; (5) produce light, water, steam, heat, electricity, oil, gas, and power of all kinds, and sell the same; (6) lease and purchase easements over streets, etc., lay and erect poles, lines, and pipes to transport light, heat, oil, etc., and to operate telephone and telegraph lines, and street and interurban railways for transportation of passengers, mail, freight, and express matter; and (7) to acquire, lease, and own property, real, personal, and mixed.

This latter company by deeds has taken over and into its possession the property of the first two named companies. Its principal stockholder assumed payment of their debts, but has not paid them.

Judgments have been rendered against the first named for an aggregate of more than $27,000, and it acknowledges itself to owe unsecured debts aggregating more than $116,000; against the second named company judgments have been rendered aggregating more than $71,000, and unsecured debts are outstanding against it of over $173,000; while against the third judgments have been rendered for an aggregate of over $21,000, a bond issue of $300,000 is outstanding, and over $17,000 of unsecured debts. In addition to all this an unsecured debt of over $3,000 exists against the three companies jointly and over $2,300 of taxes are in arrear upon the properties. These facts are disclosed by the schedules filed, which state the assets of the first and second companies to be nothing, by reason of their conveyances of February 28, 1914, to the third, and those of the third to be $400,000, consisting of its electric plant, something over six miles of electric street railway in the city of Grafton, its equipment, etc., and of certain real estate in that city.

The Allis-Chalmers Manufacturing Company, a judgment creditor in a sum of over $900, has instituted its equity suit to enforce its lien against the property of the first company (the Gas & Electric), conveyed by it to the third, and the city of Grafton, a judgment creditor in a sum in excess of $4,000, the Citizens' National Bank of Charleston, a judgment creditor in a sum in excess of $11,000, and the Ferris Bridge Company, whose interest is not disclosed by the petitions and schedules, have instituted like suits against the second company (the Traction). These four suits have been consolidated, are pending in the circuit court of Taylor county, and receivers have been appointed therein, and placed in possession of the properties now vested in the third company since the conveyance of February 28, 1914. The order of adjudication entered in the third named cause enjoined these creditors from the prosecution of their suits until this court's further order, and the referee to whom the causes were referred has appointed a trustee to take charge of the properties from the custody of the state court receivers. To vacate the injunction granted by the court, and the appointment of the trustee by the referee, petitions have been filed and motions made by the state court receivers, the Citizens' National Bank of Charleston, and the city of Grafton.

These petitions have given rise to questions which I have studied long and earnestly, and which have perplexed me greatly. In the conclusion I have reached I desire frankly to say that I still entertain grave doubt, and regret we have no provision of federal law whereby such questions could be certified direct to the appellate court for its authoritative determination. I desire to express my appreciation of the labor and industry incurred by counsel on both sides in the preparation and presentation of the very admirable briefs filed by them to aid me in the decision.

[1, 2] The first question that arises is: Did I err in adjudicating these companies, either one of them, and especially the last one, bankrupt? The Bankruptcy Act (Act July 1, 1898, c. 541, § 4a, 30 Stat. 547 [Comp. St. 1916, § 9588]) provides:

"Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this Act as a voluntary bankrupt."

The business of the first company was unquestionably that of operating a plant to generate and sell electricity; that of the second, to construct and operate a street railway; that of the third, to combine and operate both. In addition to the above provision of the Bankruptcy Act, and before its amendment in 1910, it had been held that in involuntary proceedings an electric light corporation could be adjudged bankrupt. In re Charles Town Light & Power Co. (D. C.) 183 Fed. 160, affirmed by the Circuit Court of Appeals for this circuit in Charles Town Light & Power Co. v. Delone, 184 Fed. 986, 106 C. C. A. 488. There can be no question, therefore, that the first company was properly adjudicated.

As to the second, the trouble comes here: Is a "street railway" operated by electricity within the meaning and intent of the word "railroad" used by the Bankruptcy Act? If so, then it is clear the second named company was improperly adjudicated. Finally, if a company manufacturing and selling electricity can be adjudicated, while a company operating a street railway by electricity cannot, what is to be done with a company like the third here, which is doing both? I can find no answer to these questions in any adjudicated case construing this particular section of the Bankruptcy Act. As to the question whether the word "railroad," by legal construction generally applied, shall include street railways, the authorities, state and federal, are in hopeless confusion. I am therefore left, so far as I can see, to construe the meaning of this word "railroad," as used in this section, as a question of first impression. Doing so, I hold it does not include electric street railways.

I am led to this conclusion (a) because I believe Congress, by the amendment of this section in 1910 (Act June 25, 1910, c. 412, 36 Stat. 839), in clause "b," whereby it cut out the words "corporation engaged principally in manufacturing, trading, printing, publishing, mining or mercantile pursuits" (Act Feb. 5, 1903, c. 487, § 3, 32 Stat. 797), allowing such to be adjudicated involuntary bankrupts, and substituting the words "moneyed, business or commercial corporation except a municipal railroad, insurance or banking corporation," and by its amendment of clause "a" of this section, whereby it removed the inhibition of any corporation to be adjudged voluntary bankrupt, and provided, instead, that all could be "except municipal, railroad, insurance or banking" ones, had two purposes in view: First, to obliterate all distinctions between voluntary and involuntary proceedings in their relation to the liability of corporations, other than the ones excepted, to be declared bankrupt; second, to broaden out and more clearly define the application of the Bankruptcy Act, so as to include all corporations, as to which there were no special reasons for exception. Special reasons why municipal, insurance, and banking ones should be so excepted are obvious. So, too, such reasons can easily be conceived why the ordinary railroad transportation lines should also be excepted. They, as said by Justice Lamar in Omaha Street Ry. v. Int. Com. Comm., 230 U. S. 336, 33 Sup. Ct.

891, 57 L. Ed. 1501, 46 L. R. A. (N. S.) 385, "are constructed on the companies' own property. The tracks extend from town to town and are usually connected with other railroads, which themselves are further connected with others, so that freight may be shipped, without breaking bulk, across the continent. Such railroads are channels of interstate commerce."

These special reasons for exception do not ordinarily exist in the case of street railways. The vast majority of them are purely local institutions, like the one here, not in any way concerned with interstate commerce. Such are, again quoting Justice Lamar, "laid in streets as aid to street traffic, and for the use of a single community, even though that community be divided by state lines, or under different municipal control. When these street railroads carry passengers across a state line, they are, of course, engaged in interstate commerce, but not the commerce which Congress had in mind when legislating in 1887. Street railroads transport passengers from street to street, from ward to ward, from city to suburbs; but the commerce to which Congress referred was that carried on by railroads engaged in hauling passengers or freight 'between states,' 'between states and territories,' 'between the United States and foreign countries.'"

In so holding such purely local street railway corporations to be liable to bankrupt adjudication, I freely admit we are embarrassed by the fact that a modern tendency is to extend these electric lines for long distances through different towns and communities, and it may be through different states, which long lines, when operating in the several towns through which they pass, do so like the small local street ones, but in operating from town to town do so upon the methods of the regular steam railroads. It may be such corporations, operating these longer lines, should be excepted from bankruptcy jurisdiction for the same reasons that steam railroads are; but I am not called on here to pass upon that question and express no opinion as to it. The corporation here is purely local, operating a short line over the streets of a single town or community. In short, my study of the Supreme Court's rule of construction, enunciated in the Omaha Case, above cited, constrains me to the conclusion that a clear distinction ordinarily exists between "railroads" and "street railways"; that, ordinarily, the latter are subject to bankruptcy jurisdiction, subject, however, to possible exceptions growing out of exceptional existing conditions.

[3-6] Having concluded that all three of these companies were properly adjudicated bankrupt, a second question arises, which, although not new, in this case to me is particularly perplexing. How far should this court go toward assuming exclusive jurisdiction in the administration of these three estates; or, stated conversely, how far is it justified in either allowing or calling upon the state court to ascertain the liens existing against them and to enforce payment thereof out of such assets?

That the order staying the prosecution of these suits was justified seems apparent, and was based upon section 11 of the Bankruptcy Act (Comp. St. 1916, § 9595). Under it a stay of at least 12 months

after adjudication is provided for. In these cases it is admitted that many months ago the four suits were instituted in the state court, that they have been there consolidated, receivers therein appointed who have taken possession of the properties, reference to a master to ascertain liens has been had, and much cost incurred.

Prior to the amendment of 1903 of the Bankruptcy Act, the cases of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, and Pickens v. Roy, 187 U. S. 177, 23 Sup. Ct. 78, 47 L. Ed. 128, clearly applied the general rule applicable in other cases of conflicting jurisdiction, that the court first assuming jurisdiction, and taking possession of the assets, should retain it. These cases were decided December 1, 1902. On February 5, 1903, Congress amended the Bankruptcy Act by providing that acts of bankruptcy would exist if a person, "being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States" (Comp. St. 1916, § 9587). In May following the Supreme Court handed down its decision in Re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, in which, construing the effect of this amendment, it holds:

"1. The jurisdiction of the courts in bankruptcy in the administration of the affairs of insolvent persons and corporations is essentially exclusive.

"2. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent by the receiver of another court appointed in a subsequent suit, and although that rule has only a qualified application when winding up proceedings in a state court are superseded by proceedings in bankruptcy, it obtains as a rule of comity, and its considerate observance is adequate to avert collisions between federal and state courts."

This ruling, that the bankruptcy court's jurisdiction is essentially exclusive, has been since reiterated in many cases. Roger v. Levert Co., 237 Fed. 737, 150 C. C. A. 491; In re Mullings Clothing Co., 238 Fed. 58, 151 C. C. A. 134, L. R. A. 1918A, 539; Orinoco Iron Co. v. Metzel, 230 Fed. 40, 144 C. C. A. 338; Commercial Trust & Savings Bank v. Busch-Grace Produce Co., 228 Fed. 300, 142 C. C. A. 592; State of Missouri v. Angle, 236 Fed. 644, 149 C. C. A. 640; Pollack v. Meyer Bros. Drug Co., 233 Fed. 861, 147 C. C. A. 535; In re Louis Neuburger, Inc., 240 Fed. 947, 153 C. C. A. 633. The Supreme Court, in United States Fidelity & Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055, has confirmed this ruling in its Watts Case in fuller and more specific terms. It there says:

"A distinct purpose of the Bankruptcy Act is to subject the administration of estates of bankrupts to the control of tribunals having authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are bankruptcy courts. Under the Bankruptcy Act, the jurisdiction of the bankruptcy court in all proceedings in bankruptcy is intended to be exclusive of all other courts; such proceedings include matters of administration, such as allowance and rejection of claims, reduction of the estate to money and its distribution, preferences and priorities to be accorded to claims and supervision and control of the trustee."

Under the authorities cited, and especially this last Supreme Court one, it is difficult to perceive where much opportunity or right to ex-

ercise comity toward state court jurisdiction longer exists in the administration of the estates of bankrupts.

Turning to the decisions of the Circuit Court of Appeals for this circuit, we find that court in the case of New River Coal Land Co. v. Ruffner Bros., 165 Fed. 881, 91 C. C. A. 559, held (a) the jurisdiction of the bankruptcy court, if appealed to within four months, to be exclusive, and (b) that it was a question of sound discretion for it to determine whether the state court would be stayed or permitted to administer. In Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505, it was held that the exclusive jurisdiction of the bankruptcy court could be assumed more than four months after the institution of the state court cause, upon certain then existing conditions. Bank of Dillon v. Murcheson, 213 Fed. 147, 129 C. C. A. 499, affirmed the exclusive jurisdiction and the discretionary right to allow the state court to administer in the exercise of comity, but discouraged the exercise of it.

In Graham v. Davy-Pocahontas Co., 238 Fed. 488, 151 C. C. A. 424, it was held that the bankruptcy court is not deprived of its exclusive jurisdiction, although the sole act of insolvency charged is the appointment of a receiver by a state court in a suit more than four months old; the appointment of the receiver by it having been made within four months of the institution of the bankruptcy proceeding. This case, it seems to me, is important, because of its bearing upon the constantly assumed position taken by counsel interested in maintaining the state court jurisdiction in this class of cases, that the four months period is controlling and if the state suit has been pending and a receiver has been appointed more than that length of time the bankruptcy court should not take over the estate and administer it, but allow the state court to do so. In this Graham Case it is held, if I interpret aright, immaterial how long the state court suit has been pending, but in the exceptional case where one is sought to be forced into involuntary bankruptcy alone on the ground of the appointment of a receiver such appointment must have been within four months, because the act requires some act of bankruptcy to have been committed within four months before involuntary proceedings can be maintained at all. No such condition can ever arise in a voluntary proceeding; therefore, in such cases, I am constrained to believe the "four months period" has no relevancy whatever.

Finally, in Union Electric Co. v. Hubbard, 242 Fed. 248, 155 C. C. A. 88, it was held substantially to be an abuse of sound discretion for the bankruptcy court to remit to the state court the right to administer (a) when there exists any reasonable ground to believe there will be a surplus after payment of liens, or (b) where there is any division of agreement among lienholders as to the method or tribunal of administration. I decided this Union Electric Co. Case, and also the U. S. Fidelity & Guaranty Co. v. Bray Case, supra, in the court below. They are two examples of where I undertook to extend comity in bankruptcy administration and was held not warranted in doing so. I frankly say the clear reasonings of Judge Boyd, speaking for the Circuit Court of Appeals in the Bray Case, of Justice Van De-

vanter, speaking for the Supreme Court in the same case, and Judge Smith, speaking for the Circuit Court of Appeals in the Hubbard Case, have fully convinced me that I was not so warranted, and further have led me to the conclusion that this extension of comity should be sparingly exercised.

Applying the rule laid down in the Hubbard Case by Judge Smith to the facts here, I am not prepared to hold that there exists no reasonable ground to believe that the unsecured creditors can realize nothing from the assets of these companies. It is strongly insisted that such is the case, and it may be so. Yet the properties are valuable. Leaving out the general bond mortgage, the extent and validity of which as a lien is not disclosed fully, the secured debts or liens aggregate somewhat more than $119,000, while the unsecured debts aggregate more than $306,000. I do not feel myself justified in saying the holders of this large amount of unsecured indebtedness will be unable to realize anything. It is to be borne in mind that the state court has jurisdiction only to ascertain and decree liens, as I understand the bills filed therein are only brought to enforce liens, not to dissolve the corporations, which can be done in West Virginia only under certain conditions provided for by special legislative acts. Further, it is to be remembered that the pendency of the bankruptcy proceedings, and they cannot be dismissed against protest of creditors, renders inoperative any effort on the part of these unsecured creditors to secure liens by judgment or otherwise that would be provable as such in the state court proceedings; and it is also to be borne in mind that the Circuit Court of Appeals has held in the Hubbard Case that—

"The action of judicial tribunals of competent jurisdiction cannot be indicated or required in advance. If the property in question should properly be turned over to the state court, it should be turned over without reservation or condition as to the after judicial action of that court."

But, aside from this, Judge Smith lays down in the Hubbard Case another limitation upon the exercise of this right to extend comity, to wit, where "there is any division or agreement among the lien creditors entitled as to the method or tribunal of administration." Enough has been disclosed to show that "division as to method of administration" between these lien creditors is inevitable. The segregation of the property of these individual companies, now held as a whole by the third, and the fixing of the liens thereon will inevitably create bitter contest.

All these things considered, much as I would welcome a release for this court from the labor involved in the administration of these involved estates, I am constrained to conclude that it cannot refuse the assumption of it. The motions made to dissolve the injunction, and to discharge the trustee, must be overruled, the order staying the trustee appointed by the referee from taking possession of the properties must be vacated, the order of the referee directing him to take such possession must be enforced, and the referee be directed in due course to proceed with the administration of these estates.

## COCKER v. NEW YORK, O. & W. RY. CO.

(District Court, S. D. New York. June 15, 1918.)

1. COURTS ⟸274—DISTRICT OF SUIT—CARRIERS UNDER FEDERAL CONTROL.
Suit against carrier while under federal control, brought, after promulgation of and contrary to General Orders Nos. 18 and 18a of the Director General of Railroads, in a county or district other than where the cause of action arose, or where plaintiff resided when it accrued, will be dismissed.

2. ACTION ⟸68—STAY OF TRIAL—CARRIER UNDER FEDERAL CONTROL.
Under General Order No. 26 of Director General of Railroads, as to staying trial, on showing that just interests of government will be prejudiced by present trial of action against carrier under federal control pending in a county or district other than where the cause of action arose or plaintiff then resided, but allowing a new action in the other county or district, stay depends on the circumstances of each case; the primary consideration being the situation of the government relative to railroad witnesses leaving their work.

3. ACTION ⟸68—STAY OF TRIAL—CARRIER UNDER FEDERAL CONTROL.
Under circumstances of case, *held*, trial of action against railroad, brought in New York, for injury, at Scranton, Pa., of a boy then residing there, should be stayed, under General Order No. 26 of the Director General of Railroads.

Action by Charles Cocker, Jr., an infant under the age of 14 years, by Charles Cocker, his guardian ad litem, against the New York, Ontario & Western Railway Company. On motion to stay trial. Motion granted.

Watts, Oakes & Bright, of Middletown, N. Y., for the motion.
William L. Schneider, of New York City (Edward J. McCrossin, of New York City, of counsel), opposed.

MAYER, District Judge. This is a motion by the defendant to stay the trial of this action during the continuance of federal control over the defendant Railway Company. The motion is made in view of General Order No. 26, issued by the United States Railroad Administration, acting by the Director General of Railroads.

Several motions coming under General Orders 18, 18a, and 26 have been disposed of by me from the bench without a written opinion, but I have stated orally my reasons for granting or denying motions, as the case may be.

In this memorandum, for the information of the bar, I shall deal, not only with the facts particularly applicable to this case, but shall restate what I have already endeavored to make clear in oral statements from the bench.

It is unnecessary to review the legislation which created the United States Railroad Administration and the office of Director General. Under the act certain authority was conferred upon the Director General, and I shall assume that he had the power to make General Orders 18, 18a, and 26, and in such circumstances such General Orders, when and if lawfully made, have the force and effect of law. Gen-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

eral Orders 18 and 18a are prospective, and deal with actions thereafter begun. These orders are as follows:

"United States Railroad Administration.

"Office of the Director General, Washington.

"April 9, 1918.

"General Order No. 18.

"Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal control,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such federal control'; and

"Whereas, it appears that suits against the carriers for personal injuries, freight and damage claims, are being brought in states and jurisdictions far remote from the place where plaintiffs reside or where the cause of action arose, the effect thereof being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of the railroads, and the practice of suing in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"It is therefore ordered, that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resides, or in the county or district where the cause of action arose.

"W. G. McAdoo, Director General of Railroads."

"United States Railroad Administration.

"Office of the Director General, Washington.

"April 18, 1918.

"General Order No. 18a.

"General Order No. 18, issued April 9, 1918, is hereby amended to read as follows:

"'It is therefore ordered that all suits against carriers while under federal control must be brought in the county or district where the plaintiff resided at the time of the accrual of the cause of action or in the county or district where the cause of action arose.'

"W. G. McAdoo, Director General of Railroads."

[1] It will be seen from the foregoing that this court will dismiss any case brought after a promulgation of the foregoing orders in a county or district elsewhere than where the plaintiff resided at the time of the accrual of the cause of action or where the cause of action arose. There is no difficulty in construing General Order No. 18 as amended by General Order No. 18a. General Order 26 is as follows:

"United States Railroad Administration.

"Office of the Director General, Washington, D. C.

"May 23, 1918.

"General Order No. 26.

"Whereas, the act of Congress approved March 21, 1918, entitled 'An act to provide for the operation of transportation systems while under federal con-

trol,' provides (section 10) 'that carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act * * * or with any order of the President. * * * But no process, mesne or final, shall be levied against any property under such federal control,' and authorizes the President to exercise any of the powers by said act or theretofore granted him with relation to federal control through such agencies as he might determine; and

"Whereas, by a proclamation dated March 29, 1918, the President, acting under the Federal Control Act and all other powers him thereto enabling, authorized the Director General, either personally or through such divisions, agencies, or persons, or in the name of the President, to issue any and all orders which may in any way be found necessary and expedient in connection with the federal control of systems of transportation, railroads, and inland waterways as fully in all respects as the President is authorized to do, and generally to do and perform all and singular acts and things and to exercise all and singular the powers and duties which in and by the said act, or any other act in relation to the subject hereof, the President is authorized to do and perform; and

"Whereas, it appears that there are now pending against carriers under federal control a great many suits for personal injury, freight and damage claims, and that the same are being pressed for trial by the plaintiffs in states and jurisdictions far removed from the place where the persons alleged to have been injured or damaged resided at the time of such injury or damage, or far remote from the place where the causes of action arose, the effect of such trials being that men operating the trains engaged in hauling war materials, troops, munitions, or supplies are required to leave their trains and attend court as witnesses, and travel sometimes for hundreds of miles from their work, necessitating absence from their trains for days and sometimes for a week or more, which practice is highly prejudicial to the just interests of the government and seriously interferes with the physical operation of railroads, and the practice of trying such cases during federal control in remote jurisdictions is not necessary for the protection of the rights or the just interests of plaintiffs:

"It is therefore ordered that upon a showing by the defendant carrier that the just interests of the government would be prejudiced by a present trial of any suit against any carrier under federal control, which suit is not covered by General Order No. 18, and which is now pending in any county or district other than where the cause of action arose or other than in which the person alleged to have been injured or damaged at that time resided, the suit shall not be tried during the period of federal control: Provided, if no suit on the same cause of action is now pending in the county or district where the cause of action arose, or where the person injured or damaged at that time resided, a new suit may, upon proper service, be instituted therein; and if such suit is now barred by the statute of limitations, or will be barred before October 1, 1918, then the stay directed by this order shall not apply unless the defendant carrier shall stipulate in open court to waive the defense of the statute of limitations in any such suit which may be brought before October 1, 1918.

"This order is declared to be necessary in the present war emergency. In the event of unnecessary hardship in any case, either party may apply to the Director General for relief, and he will make such order therein as the circumstances may require consistent with the public interest.

"This order is not intended in any way to impair or affect General Order No. 18, as amended by General Order No. 18a.

"W. G. McAdoo, Director General of Railroads."

It will be noted that in both General Order 18 and General Order 26 the preambles call attention to the fact that actions have been brought at places far remote from where plaintiffs reside or where the cause of action arose, with the result that necessary railroad men are required to travel "sometimes hundreds of miles," necessitating

absence from their trains "for days and sometimes for a week or more." It is also stated that the practice of trying such cases during federal control "in remote jurisdictions" is not necessary for the protection of the rights or the just interests of plaintiffs.

[2] General Order No. 26 clearly indicates that the court is not expected to act automatically, even if there were power to compel it so to do, which, of course, would not be suggested, but that in each case, upon the facts shown, the court is to determine whether "the just interests of the government would be prejudiced by a present trial" of the suit.

It clearly was not the intention of the United States Railroad Administration to deprive those having claims against railroads of their day in court, nor to prevent, wherever possible, a speedy disposition of pending actions. Practically no case against a defendant railroad, whether in tort or in contract, can be satisfactorily tried without the presence in the courtroom, and consequently the absence from the railroad, of some one or more witnesses. The requirements of the railroad, in so far as it is concerned with the movement of war materials and supplies, or any other part of its operation or administration deemed important by the government, can easily be met by the trial judge so arranging and conducting his calendar as to necessitate a minimum period of absence of railroad employés from railroad work. If, for instance, an accident occurred at the terminal of a railroad in New York City, whether the case was brought in the United States District Court or in a state court, the railroad witnesses would necessarily be absent for such period of time as their presence would be necessary in the courtroom. To hold, under such circumstances, that the case should be stayed until after the expiration of federal control, would be, in effect, to deprive the plaintiff of his day in court.

Similarly, in view of the quick communication between, for instance, Jersey City and the courthouse of this court, the trial of a case requiring the bringing over of witnesses from Jersey City would occupy very little more time, if any, of the railroad witnesses, than that which would be occupied if the witnesses were brought from the New York terminals of the Pennsylvania, New York Central, or other railroads. The point is that in such cases it would be manifestly against the purpose and spirit of the order to stay trials of pending actions until the expiration of federal control, although as to trial on a particular date it may be well assumed that the trial judge will accommodate his calendar to the legitimate requirements and necessities of the railroad.

To illustrate with two cases which require different treatment, the following examples, which were before me for consideration, may be noted: In one case the accident happened near Pittsburg, the plaintiff resided in or near Pittsburg, the railroad men were engaged in important railroad service having to do with the movement of war materials and troops, and obviously it would be prejudicial to the best interests of the government that the railroad should be required to bring these men to New York, when a trial could be had in the appropriate forum in Pennsylvania. In another case the accident hap-

pened at Perth Amboy, N. J., and the railroad witnesses were some three, four, or possibly five men employed at Perth Amboy, and whether the case was tried in Newark or New York would make very little difference in time. In this case plaintiff was a railroad employé, and had suffered shocking injuries, which it is claimed fully incapacitated him, and the case was well up on the calendar. To require such a plaintiff to start all over again and bring his action in New Jersey, delaying him perhaps for many months, would be the kind of result which I am confident General Order No. 26 never contemplated. In cases of grave injury, speedy trials are important, to prevent the injured person from becoming a public charge, a result which imposes an additional burden upon the other members of the community.

Counsel for the railroad company in many instances have deemed it necessary to produce in court all of the members of the train crew, even though many of them know nothing concerning the accident; but this has doubtless been a necessary precaution to counteract any reference by attorneys for plaintiff as to the absence of some members of the crew. In every case where I have denied the motion for a stay, the attorney for plaintiff has stipulated that no reference will be made to the absence of any witness who, according to the statement of counsel for the railroad company, knows nothing about the accident. It is impossible to lay down a general rule in this regard, but on the facts of each case as presented motions in proper cases can be denied upon appropriate conditions, and in dealing with the subject sensibly and practically there should be no real difficulty in making such disposition in each case upon its own facts as may seem just and proper.

The questions here involved, in any event, are confined only to pending actions, and from my point of view many elements must be taken into consideration. Primarily there must be, of course, the situation of the government, which at this time requires first consideration, and to whose necessities private rights must yield; but, in addition, the position of the case on the calendar, the physical and financial condition of plaintiff, the number of witnesses for the railroad, the character of the work in which they are employed, the probable length of the trial, and the distance from the place of employment of the railroad employés to the court house, are all matters which will have a bearing on the question as to whether or not the action shall be stayed.

In the foregoing I have not attempted to outline all the possibilities which may arise, or all of the considerations which may be relevant; but I have merely attempted to sketch certain broad considerations for the guidance of those concerned with this subject-matter.

Coming, now, to the case at bar, it appears that the plaintiff is an infant about 14 years of age, now suing by his guardian for an injury which occurred at Scranton, Pa., on August 9, 1916. Plaintiff and his guardian then resided and now reside in Scranton, Pa. Four witnesses of the railroad are actively employed by it in its freight service, and are at present engaged in moving coal, freight, munitions, and other war materials at and in the vicinity of Mayfield Yard, in Pennsylvania. The most important branch of the defendant railroad at

this time is the one running from Cardozia, N. Y., to Scranton, Pa., over which are hauled many carloads of coal from the mines in Pennsylvania, and in which freight service the railroad witnesses are engaged. The showing is well made that the absence of these employés at this time would be serious, because defendant is shorthanded, owing to the large number of employés who have gone into the military service, or who have left to obtain positions at shipyards and other industries performing war service, for which larger compensation is paid. The engineer, the fireman, the conductor, and one of the trainmen are all necessary and material witnesses concerning the accident.

Defendant further submits the affidavit of a physician to the effect that, although the infant plaintiff's left leg has been amputated above the knee, he is strong and robust, and his heart, lungs, and abdomen are normal, and he is otherwise physically normal. Defendant also submits an affidavit from one O'Boyle, presumably an investigator, that he has seen the infant plaintiff, and called upon him with the physician, and that the boy is regularly attending school.

In this case it is manifest that no one is dependent for support upon the plaintiff, and he does not need any medical attendance. On the other hand, the showing made by the railroad indicates beyond question that the just interests of the government would be prejudiced by a present trial of the action in this jurisdiction. An action can be promptly brought in Scranton, where plaintiff resides, and where the witnesses of defendant will be available at a minimum of inconvenience.

[3] In such circumstances I am of opinion that the just interests of the government require that the motion should be granted.

Motion granted.

Addendum.

Since writing the foregoing I note the opinion of Judge Manton, in Harnick v. Pennsylvania Railroad Co., 254 Fed. 748, filed June 14, 1918. In that opinion I find agreement with the view expressed by me, supra, that each case must be considered on its own merits.

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## WASHINGTON WATER POWER CO. v. HARBAUGH.

(District Court, D. Idaho, N. D. August 30, 1918.)

No. 701.

1. ELECTRICITY ⇐⇒4—LICENSES—RIGHT OF WAY—INDIAN RESERVATION—REVOCATION BY PATENT.

In view of the ruling of the Secretary of Interior a license granted plaintiff pursuant to Act Feb. 15, 1901, to maintain a power line across the Cœur d'Alene Indian reservation, *held* not revoked by the granting of a patent under Act June 21, 1906, to lands used as part of the right of way, though no reservation was contained therein.

2. ELECTRICITY ⇐⇒4—LICENSES—RIGHT OF WAY—INDIAN RESERVATION.

A permit under Act Feb. 15, 1901, to construct a power line over the Cœur d'Alene Indian reservation, *held* a mere license revocable by the

⇐⇒For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Secretary of Interior, together with a right of way for a telephone line granted to the same company under Act March 3, 1901, § 3; the latter being a mere incident to the license.

3. ELECTRICITY ⟸4—RIGHTS OF WAY—DUTIES OF OWNER.

Where a patentee of public lands took same burdened by license for power line granted power company, *held*, that power company was entitled to access under certain conditions prescribed to govern both parties.

In Equity. Suit by the Washington Water Power Company, a corporation, against C. W. Harbaugh. Decree for plaintiff.

John P. Gray, of Cœur d'Alene, Idaho, for plaintiff.

C. H. Potts, of Cœur d'Alene, Idaho, for defendant.

DIETRICH, District Judge. [1, 2] The defendant is the owner of 160 acres of land in Kootenai county, Idaho, across which extends a high-tension power line owned and operated by the plaintiff. The land was formerly part of the Cœur d'Alene Indian reservation, and while it was still tribal property the power line was constructed, under a permit granted by the Secretary of the Interior on July 7, 1902, pursuant to provisions of Act Feb. 15, 1901, c. 372, 31 Stat. 790. Upon the same poles the plaintiff also maintains a telephone line, used in connection with the maintenance and operation of the power line, the application for which was approved by the Secretary of the Interior April 15, 1902, under section 3 of the act of March 3, 1901 (31 Stat. 1083, c. 832). After the construction of the power and telephone line, Congress made provision for the opening of the reservation, by Act June 21, 1906, c. 3504, 34 Stat. 335. Pursuant to the terms of this act, the land in question was allotted to one Sophia Christene Mishell, an Indian, who died before final patent issued, and thereafter, on February 8, 1915, it was duly offered for sale, and the defendant, being the highest and best bidder therefor, became the purchaser. Patent in fee simple issued under date of August 18, 1915. The patent contains no notation of any kind referring to the power and telephone line or the right of way therefor. The defendant had knowledge of the existence of the power line at the time he purchased, and apparently made no inquiry touching the rights or claims of the plaintiff company. After his purchase he inclosed the land with a fence, but left no gateways or other openings through which the plaintiff could enter for the purpose of inspecting and repairing its line. He also plowed up the land along the line. It is also alleged in the complaint that he declined to permit the plaintiff to patrol the line, and gave out and threatened that he would prevent it and its employés from going on the same. The plaintiff asserts a right of way extending 50 feet upon either side of its line, and prays for an injunction restraining the defendant from interfering with its proper use of the right of way.

It is not questioned by the defendant that the plaintiff duly procured a right of way for the maintenance of a telephone line, and a permit for the construction and maintenance of its power line, at the dates hereinbefore stated and pursuant to the provisions of the acts of Congress above cited. His contention is that the telephone line is

a mere incident of the power line, and that for the transmission line the plaintiff never acquired anything more than a revocable license, and that the issuance of the patent ipso facto operated to revoke the license. It seems clear that the right acquired for the telephone line was in the nature of an easement, and that the right acquired for the maintenance of a power line was in the nature only of a permit or license revocable at the will of the Secretary of the Interior. It is further true that the telephone line is a mere incident of the transmission line. Hence the controlling question is whether the license or permit for the power line was revoked by the issuance of patent. In transactions between private individuals the general rule is that a conveyance of the land by the licensor operates to revoke the license, and all rights and privileges of the licensee terminate as of course. This principle, it seems, was for some time recognized by express rule of the Interior Department, as being applicable to licenses granted under the act of February 15, 1901, but upon August 23, 1912, after consideration, the conclusion was reached by the department that, "to effectuate the purpose of the statute, it is necessary that a permit once given should be superior to the rights of the subsequent patentee of the land until such time as the permit is duly revoked by the Secretary of the Interior in the exercise of the express authority given by the statute." (Letter of August 23, 1912, to the Commissioner of the General Land Office, by Walter L. Fisher, Secretary of the Interior.) In discussing the question, among other things, the honorable Secretary said:

"The rule of private real property law under which such a license is revoked by the transfer of the fee-simple title has no application to either the legal or the economic data with which Congress was dealing in this legislation, and therefore the intent to enact the said rule should not be imputed to Congress in the absence of clear implication of such intent."

And again:

"In view of the permanent character of the works authorized to be constructed under the act of February 15, 1901, and the large investment necessary to such construction, the statute ought not to be interpreted as giving a precarious tenure except in so far as clearly appears from the words used by Congress. After careful consideration of the matter, I am of the opinion that the intent of Congress was to protect the public by retaining in the hands of the Secretary of the Interior full control over water power development, through the device of making permits revocable at his discretion. The statute authorized, in more generous and comprehensive terms than had been used in any preceding statute, the development of water for domestic and public supply, irrigation, mining, and power, and also the development and transmission of electricity. Its primary purpose was to encourage development under unquestioned public control. The former regulation, which provided that 'the final disposal by the United States of any tract traversed by the permitted right of way is of itself, without further act on the part of the department, a revocation of the permission, so far as it affects that tract,' was directly contrary to the purpose of the statute as above interpreted. It discouraged development by making the title of the permitee subject to that of the final patentee of the land occupied under the permit, and it abandoned all attempt at public control as soon as the land was finally disposed of."

Accordingly, by express regulation, which was still in force at the time the defendant purchased the land and received his patent, it was provided that—

"The final disposal by the United States of any tract traversed by a right of way permitted under the said act shall not be construed to be a revocation of such permission in whole or in part, but such final disposal shall be deemed and taken to be subject to such right of way until such permission shall have been specifically revoked in accordance with the provisions of said act."

It is to be admitted that the language of the act does not put the intent of Congress beyond all doubt, but the reasoning of the honorable Secretary as in part set forth in the foregoing extracts from his letter of August 23, 1912, is not without force, and besides, under a familiar rule, some weight is to be accorded to the practical construction given to a doubtful statute by a high administrative officer. The view is therefore adopted that the issuance of the patent to the defendant did not revoke the plaintiff's license. It may be unfortunate, but it is not of controlling importance, that the patent did not contain a notation referring to the plaintiff's right of way, as required by the regulations of August 23, 1912. The record does not purport to furnish any explanation for this omission, but in view of the other express provisions of the regulations it cannot be held that the silence of the patent in this respect imports an intent on the part of the Secretary of the Interior to revoke the license. It is much more reasonable to assume that the absence of the notation is the result of inadvertence or carelessness on the part of some subordinate officer or employé, and neither the right of the plaintiff to use such right of way nor of the government to control it could be divested by a mere clerical omission. It is hardly possible to contend that the defendant was in any wise misled to his injury. Admittedly he knew that the plaintiff was maintaining and operating the transmission line, and so far as appears he was willing to purchase the property subject to such right as it then had. When he made his offer he had no assurance or intimation that a patent would be issued without a notation referring to the right of way. Accordingly it is held that neither the integrity nor the extent of the plaintiff's right was affected by the issuance of the patent.

[3] The other important question relates to the measure of such right. It is hardly necessary to say that the courts can neither enlarge nor diminish such right as was conferred by the Secretary of the Interior. The definition of this right is to be looked for in the instrument of license. The writings constituting the license consist of a map filed by plaintiff with the Secretary of the Interior simply delineating by course and distance its proposed power line, and of the following indorsement thereon:

"Dept. of the Interior, July 7, 1902.

"The use of the right of way shown on the map is hereby permitted in accordance with the provisions of the act of Congress approved February 15, 1901—31 Stat. 790—and the regulations, present or future, thereunder.

"E. A. Hitchcock, Secretary."

It will be noted that neither upon the map nor in the indorsement thereon is any specific width designated. It must therefore be held that it was the intention of the plaintiff to claim and of the Secre-

tary of the Interior to grant only such occupancy and use, within the maximum width of 100 feet authorized by law, as were reasonably necessary to enable the plaintiff to construct, maintain, and operate its line, and such is now thought to be the measure of the plaintiff's rights. The land belongs to the defendant. He has the right to occupy and use the same, subject to the reasonable needs of the plaintiff in maintaining and operating its line. By the evidence it is shown that, in maintaining and operating the line, the employés of the plaintiff must from time to time pass along it for the purpose of inspection, and of course it will also be necessary to have access at irregular intervals for the purpose of repairs and renewals. It is not necessary that the line be excluded from the defendant's inclosure; but if he maintains fences he must provide gates therein along the line, for the plaintiff's use—gates of sufficient width for the passage of ordinary vehicles. It will be the duty of the plaintiff to furnish locks and to keep such gates locked. In passing along the line the plaintiff's employés must take care not to do more injury to the defendant's growing crops than may be reasonably necessary, and they must keep within 50 feet of the center of the line, and within a roadway upon one side or the other. Likewise, in making repairs or renewals, reasonable care should be exercised not to do unnecessary damage to crops growing along and near the line.

A proper form of decree will be prepared by counsel for the plaintiff, and submitted to counsel for the defendant for his approval, before it is presented for signature.

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## SIEBERT v. PATAPSCO SHIP CEILING & STEVEDORE CO. et al.

(District Court, D. Maryland. November 7, 1918.)

1. MASTER AND SERVANT ⟸358—ELECTION OF REMEDY—WORKMEN'S COMPENSATION ACT.

   A stevedore, injured while loading a vessel, who was entitled under Judicial Code, § 24, par. 3, as amended by Act Oct. 6, 1917, to the remedy afforded by the state Workmen's Compensation Act, *held* not to have elected that remedy by signing at the request of an attorney the notice to his employer contemplated by the Compensation Act, and to be entitled to sue in admiralty, etc.

2. SHIPPING ⟸84(3)—INJURIES TO STEVEDORE—SAFE PLACE TO WORK—ORDERS.

   A stevedore company, though it ordered its foreman to remove all hatch beams, etc., *held* charged with knowledge of noncompliance with order, so that it could not escape liability to a stevedore, injured by the falling of a beam on the ground the company had discharged its duty as to furnishing safe place, etc.

3. SHIPPING ⟸84(4)—INJURIES TO STEVEDORE—VICE PRINCIPAL.

   The foreman of a stevedore company *held* a vice principal as to a stevedore, so the company could not escape liability for the foreman's negligence on the ground he was a fellow servant of the injured stevedore.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

4. DAMAGES ⟸132(9)—PERSONAL INJURIES—MEASURE.
*Held*, that $3,791 should be allowed a stevedore for injuries which necessitated the amputation of his leg below the knee, and caused a loss of wages and expenditure for medical attention amounting to $791.

In Admiralty. Libel by John Siebert against the Patapsco Ship Ceiling & Stevedore Company, the Prince Line, Limited, and Furness Withy & Co., Limited. Decree for libelant against the first-named respondent.

George T. Mister, of Baltimore, Md., for libelant.
John B. Deming and Whitelock, Deming & Kemp, all of Baltimore, Md., for respondents.

ROSE, District Judge. On January 5th last the respondent, the Patapsco Ship Ceiling & Stevedore Company, hereinafter called the "employer," was engaged through its employés, of whom the libelant was one, in loading the Chinese Prince, hereinafter referred to as the "ship." The respondents the Prince Line, Limited, and Furness Withy & Co., Limited, were respectively owner and agent of the ship.

The libelant was working in the ship's hold. By the fall of one of the strong backs intended to support the hatch covers, one of his legs was so badly crushed as to necessitate amputation below the knee. He suffered other serious and painful injuries, but these, fortunately, proved to be temporary.

[1] One week after the accident libelant signed the notice to the employer, contemplated by the Workmen's Compensation Act of Maryland, that he had been hurt, and requesting that it should, in accordance with law, supply him with medical attendance. This notice was countersigned by a well-known member of the Baltimore bar, and by or through the latter was promptly served upon the employer. Thereafter the same attorney filed a claim with the state Industrial Accident Commission. Because libelant was long in the hospital, the hearing was put off, and before it was actually held he asked permission of the commission to withdraw his claim. After inquiry, the commission permitted him to do so, on the ground that in the condition he was at the time he signed the notice he did not so appreciate its nature as to make it fair to hold that he had irrevocably committed himself by it. The employer in this court insists that, in spite of the findings and action of the commission, the delivery of the notice was a final election to waive libelant's right to proceed in the admiralty.

The libelant here testified that he signed such notice because it was brought to him by a young man who told him he should sign it. It was then only a week after the accident, and he was in such a state of pain from some of his injuries that he could not, and did not, give the matter any consideration, but appended his signature, as he had been bidden to do. He said he thought the young man referred to was an assistant to the member of the bar who had countersigned the paper, but how either of them had learned of the accident, or who, if any one, had asked either of them to interest himself in the mat-

ter, he did not know. I sent at once for the attorney in question, and he testified that he had never seen the libelant until the latter was out of the hospital, and had come to tell him that he wanted to put his case in other hands. He further stated that the matter had originally been brought to him by a young lawyer, whose name he gave, and for whom he had occasionally tried cases; but the gentleman had at least temporarily quit practice to accept employment in a munition plant. There the evidence on this branch of the case stopped, except that it appeared that the employer, in consequence of the notice referred to, but without the knowledge of the libelant, had shortly after the accident paid $29 of the latter's hospital expenses. Before he was discharged from the hospital, his total bill had run up to $266.

The evidence shows, as the commission held, that the libelant did not appreciate, and was not in a condition to appreciate, the significance of the paper he had signed, nor did he know that the person who procured his signature was claiming to act as his representative. Every rational system of jurisprudence strives to insure, as far as may be, that a man shall not lose important rights merely because he has done some formal thing in excusable ignorance of its nature and significance.

When it came out for the first time at the hearing in this court that the $29 had been paid, I required the libelant to reimburse the employer as a condition to going on with his case. This was done at once. I did not intend to rule that such a requirement should always be made, as sometimes it might work hardship and injustice; but it is obviously fair wherever the libelant is in a condition to comply with it, as in this case he was. In this state of the record, it is unnecessary to decide anything, except that this libelant was free to prosecute his libel. Whether he could have done so, had he understandingly invoked the jurisdiction of the commission, need not be passed upon.

The act of Congress approved October 6, 1917 (40 Stat. 395, c. 97) gave an employé, injured on water, the right to avail himself of the Workmen's Compensation Law of the state. This result was accomplished by amending paragraph 3 of section 24 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1091 [Comp. St. 1916, § 991]). The relevant portions of that paragraph were a part of the original Judiciary Act of 1789, and gave the District Courts of the United States cognizance of "all civil cases of admiralty and maritime jurisdiction, saving to all suitors the right of a common-law remedy, where the common law is competent to give it." The amending statute added the words, "and to claimants the rights and remedies of the Workmen's Compensation Law of any state." So far as I know, it has never been held that the mere institution of a common-law suit to recover for a maritime tort precluded the plaintiff from subsequently seeking relief in admiralty.

**[2, 3]** It remains to pass upon the merits. The accident happened because the libelant was working under a hatch beam or strong back, which had not been removed, and which was not bolted in place. The hook or the chain, used to raise and lower the load, caught under the beam and pulled it out of its support. There is no question that the

place in which the plaintiff was working was, under such circumstances, unsafe.

It is in evidence that the employer had given general instructions to its foremen always to remove all the hatch beams, or, if any were left in place, to see that they were firmly secured by bolts or pins. It is argued that the foreman was a fellow servant of the libelant, and that the latter assumed the risk of his negligence. It is true that the instruction was given, and that the chief executive of the employer appreciated its importance, and was sincerely anxious that it should be obeyed. It is equally clear, however, that his subordinates habitually disregarded it, in that they never made any real attempt to see that it was enforced.

To remove the hatch beam took from 5 to 15 minutes. The bolts for it were not always right at hand. The foreman and the gang leaders were anxious to maintain their tonnage record. Familiarity with danger made them careless of the safety of the men under them. So generally was the instruction ignored, and so easy would it have been for the employer to have discovered that fact, that it cannot now successfully claim that by merely issuing the order it had done all that was incumbent on it to make sure that the men were given a safe place in which to work. That obligation it could not delegate. Moreover, the foreman or "chargeman," who should have seen that the beam was removed or bolted in, was, upon the evidence, a vice principal, rather than a fellow servant, of the libelant. He had full charge of the loading of the ship and of all the men employed in doing it. Subject to his orders were the gang leaders, who had the right to employ and discharge the workmen—in the modern vernacular, the power of "hiring and firing." The men who did the actual work were bound to obey the orders of the foreman. I am satisfied, although he denies it, that he gave the order not to remove some of the beams, including the one which fell on the libelant, and that the libelant and his fellow workmen, if they were to maintain their places, had no choice other than to do what he told them to do. The employer must be held liable.

There is nothing shown to charge either of the other respondents, and as to them the libel must be dismissed.

[4] The costs of medical attendance, of the artificial limb, and the loss of wages of libelant while in the hospital, total $791. I will allow $3,000 more as compensation for his suffering and permanent injuries, or an aggregate of $3,791.

A decree against the employer for that amount will be signed.

## CORSICA TRANSIT CO. v. W. S. MOORE GRAIN CO.

## THE CORSICA.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1918.)

No. 4950.

1. SHIPPING ⊂=51—BREACH OF CONTRACT FOR CHARTER—LIEN.
Act Cong. June 23, 1910 (Comp. St. 1916, § 7783), applies only to repairs, supplies, and other necessaries furnished the vessel at the home port, and does not give a lien for damages, for breach of contract, for a charter.

2. SHIPPING ⊂=51—CHARTER—BREACH BY OWNER—LIEN.
While liens on vessels which are of a maritime nature may be given by state statute which are not cognizable and enforceable under the general admiralty law, Gen. St. Minn. 1913, § 8318, declaring that every vessel used in navigating the waters of the state shall be liable for nonperformance of any contract of affreightment, etc., did not give a lien on a vessel used in navigating the waters of the Great Lakes for breach of a charter party to carry grain from Minnesota to Ohio.

3. SHIPPING ⊂=51—BREACH OF CONTRACT FOR CHARTER—LIEN.
An executory contract for the future employment of a vessel is not a maritime contract, and consequently a breach gives the charterer no lien.

4. MARITIME LIENS ⊂=16—POWER OF STATE—BREACH OF CHARTER.
A state has no power to grant a maritime lien against foreign vessels navigating the Great Lakes for causes of action which have never been recognized as maritime liens.

Appeal from the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Libel by the W. S. Moore Grain Company against the steamer Corsica, claimed by the Corsica Transit Company. From a decree for libelant, claimant appeals. Reversed.

Frederick L. Leckie, of Cleveland, Ohio (Frank S. Masten and Holding, Masten, Duncan & Leckie, all of Cleveland, Ohio, on the brief), for appellant.

H. R. Spencer, of Duluth, Minn. (R. W. Spencer, of Duluth, Minn., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge. This is an appeal from a decree in favor of the appellee in a proceeding in rem in admiralty. The libel was against the steamer Corsica, of which the appellant is the owner and claimant. The allegations in the libel, so far as they are material are that on or about September 14, 1915, the libelant at the city of Duluth, Minn., chartered said steamer for a cargo of wheat from the port of Duluth to Lake Erie ports, at the rate of 3½ cents per bushel, shipment to be made during the last half of October, 1915, at such times during said period as libelant might select. That the owners of said vessel refused to carry out that contract, after request from libelant, although it was ready and willing at all times to pay the carrying charges thereon. That by reason thereof libelant will suffer damages in the sum of

$5,000; that it has a statutory lien on the vessel for the damages sustained. The prayer for relief is the usual one in proceedings in rem in admiralty proceedings.

The appellee filed its claim of ownership of the vessel, and filed exceptions to the libel, alleging as ground that the allegations thereof do not disclose any admiralty or maritime claim or lien upon the vessel whereupon an attachment could be founded. The exception to the libel having been overruled an answer was filed by the claimant, and upon final hearing a decree in favor of libelant entered. In view of the conclusions reached by us it is unnecessary to set out the allegations in the answer or the proofs upon which the cause was heard.

[1, 2] The appellee makes no claim of a lien by virtue of the maritime law, but in the libel and argument claims a statutory lien under a statute of Minnesota. As the libel alleges that the charter of the boat was made in Duluth, in the state of Minnesota, and the cargo was to be delivered to the boat there, it is immaterial what the laws of the state of Ohio are, which were referred to in appellee's brief and oral argument. The statute of Minnesota, upon which the libelant relies, is section 8318, Gen. St. Minn. 1913, and so far as it is applicable to the issues in the case at bar is as follows:

"Every boat or vessel used in navigating the waters of this state shall be liable for the claims or demands hereinafter mentioned, and which shall constitute liens thereon. * * *

"(3) For all demands or damages accruing from the non-performance or malperformance of any contract of affreightment, or any contract touching the transportation of persons or property entered into by the master, owner, agent, or consignee of the boat or vessel on which such contract is to be performed."

Act Cong. June 23, 1910, c. 373, 36 St. 604, U. S. Comp. St. 1916, § 7783, applies only to repairs, supplies, and other necessaries furnished the vessel at the home port, and not to damages for a breach of contract for a charter, and therefore has no application to the issue involved in the instant case. The Rupert City (D. C.) 213 Fed. 263, 273; The Dredge A. (D. C.) 217 Fed. 617.

Does the statute of Minnesota, where the action was instituted, the contract made, the freight was to be furnished, and the contract performed, give such a lien, which may be enforced in an admiralty court, in a proceeding in rem against the vessel? That liens on vessels, which are of a maritime nature, may be given by state statutes, which are not cognizable and enforceable under the general maritime law may be conceded. The leading case on this subject in The Lottawanna, 21 Wall. 558, 22 L. Ed. 654, which has been consistently adhered to ever since. In The Robert W. Parsons, 191 U. S. 17, 24, 24 Sup. Ct. 8, 9 (48 L. Ed. 73) the court said:

"That a state may provide for liens in favor of materialmen for necessaries furnished to a vessel in her home port, or in a port of the state to which she belongs, though the contract to furnish the same is a maritime contract, and that such liens can be enforced by proceedings in rem in the District Courts of the United States, is so well settled by a series of cases in this court as to be no longer open to question."

But in all the cases the claims were of a nature which were maritime, but unenforceable in a court of admiralty, because furnished at the home port. A rule changed by the act of June 23, 1910.

What is the effect of the Minnesota statute? It will be noted that the statute is limited to "boats or vessels used in navigating the waters of this state." This statute has never been construed by the court of last resort of that state, but other courts, involving state statutes containing the same limitation, have held that it was clearly restricted to vessels "which are confined in their usual and substantial employment in the waters of the state." The Sea Witch, 1 Cal. 162; The Haytian Republic (D. C.) 65 Fed. 120. In The San Rafael, 141 Fed. 270, 280, 72 C. C. A. 388, 398, the court, referring to the California statute, held:

"Courts of admiralty do not get their jurisdiction from state statutes. Roach v. Chapman, 63 U. S. [23 How.] 129 [16 L. Ed. 294]. * * * That state Legislatures cannot restrict or extend the admiralty jurisdiction exclusively vested in the federal courts, said the court in the case of The H. E. Willard [D. C.] 53 Fed. 600, 'has been often decided and conclusively settled. * * * It follows, necessarily, that a lien given by a state statute is not the test of jurisdiction. If it were, a state Legislature might at pleasure modify the jurisdiction of the courts of admiralty by creating or abrogating liens not given by the maritime law.' The lien sought to be enforced in the present case is one given by the general maritime law."

Not only does the libel fail to allege that the libeled vessel is used in navigating the waters of the state of Minnesota but it expressly charges that the breach was the refusal to carry the grain offered at Duluth to the port of Sandusky, in the state of Ohio.

The Menominie (D. C.) 36 Fed. 197, which appellee cites as sustaining its contention, does not construe this act, but a former act, giving a lien for supplies, repairs, and material furnished, all of which are maritime liens, but an action therefor could not be maintained in a court of admiralty, if furnished at the home port.

[3, 4] But, aside from this, we are of the opinion that a state has no power to grant a maritime lien against foreign vessels, navigating, as alleged in the libel, the Great Lakes, for causes of action which have never been recognized as maritime liens. In The Chusan, 2 Story, 455, Fed. Cas. No. 2717, Mr. Justice Story held that such a statute of a state cannot apply to foreign vessels. It is true this opinion was delivered before the decision in the Lottawanna Case, holding that state statutes giving liens for materials and supplies furnished in a home port, which, if furnished in a foreign port, would be enforced in an admiralty court, if maritime liens. In The Lyndhurst (D. C.) 48 Fed. 839, 841, Judge Brown expressed a serious doubt, whether a state is competent to enact a statute affecting foreign vessels, and in The Advance (D. C.) 60 Fed. 766, the same learned judge held:

"To sustain a maritime lien, there must be in all cases, either in fact, or by presumption of law, a credit of the ship; and whenever such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized."

The same doubt was expressed in The Roanoke, 189 U. S. 185, 194, 23 Sup. Ct. 491, 47 L. Ed. 770, citing The Chusan and The Lyndhurst. A similar doubt was expressed in The America, 1 Lowell, 176, Fed. Cas. No. 289, by Judge Lowell. In a late case the Supreme Court has practically removed all doubt on that subject. In Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 37 Sup. Ct. 524, 529 (61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900) the court held:

"Equally well established is the rule that state statutes may not contravene an applicable act of Congress or effect the general maritime law beyond certain limits. They cannot authorize proceedings in rem according to the course in admiralty, * * * nor create liens for materials used in repairing a foreign ship"—citing The Roanoke, supra, and Workman v. New York City, 179 U. S. 552, 563, 21 Sup. Ct. 212, 45 L. Ed. 314.

In the last-cited case, after a careful review of the authorities, it was held that:

"The local decisions of a state court cannot as a matter of authority abrogate maritime laws."

Other cases to the same effect are The Electron, 72 Fed. 689, 695, 21 C. C. A. 12; Cuddy v. Clement, 113 Fed. 454, 51 C. C. A. 288; The Athinai (D. C.) 230 Fed. 1017, 1020; The Sagamore, 247 Fed. 743, 757, 159 C. C. A. 601; The Atlantic City, 220 Fed. 281, 284, 136 C. C. A. 297, Ann. Cas. 1915D, 50.

There are some authorities which hold that such state statutes are enforceable in admiralty against foreign vessels. It was so held by Judge Brown, while District Judge of Michigan, and later a Justice of the Supreme Court, in The J. F. Warner (D. C.) 22 Fed. 342. He was the same judge who delivered the opinion of the Supreme Court in The Roanoke, where he expressed a doubt on that subject, without referring to his earlier decision as District Judge. The only authority which holds that a state statute giving a lien on a vessel for breach of an executory contract is valid and is applicable to foreign vessels is The Energia (D. C.) 124 Fed. 842. It has never been followed by any other court and we are unable to follow it. In The Glide, 167 U. S. 606, 624, 17 Sup. Ct. 930, 934 (42 L. Ed. 296), the court only held that—

"The contract and the lien for repairs or supplies in a home port, under a local statute, are equally maritime, and equally within the admiralty jurisdiction."

Or, in other words, that a state may provide for a lien on a vessel for causes of action which are maritime.

An executory contract for the future employment of a vessel is not a maritime contract. The Schooner Freeman v. Buckingham, 59 U. S. (18 How.) 182, 188, 15 L. Ed. 341; Vandewater v. Mills, 60 U. S. (19 How.) 82, 90 (15 L. Ed. 554). It was there held:

"Consequently, if the master or owner refuses to perform his contract, or for any other reason the ship does not receive cargo and depart on her voyage according to contract, the charterer has no privilege or maritime lien on the ship for such breach of the contract by the owners, but must resort to his personal action for damages, as in other cases."

In Knapp, Stout & Company v. McCaffrey, 177 U. S. 638, 642, 20 Sup. Ct. 824, 827 (44 L. Ed. 921) after a learned review of the former decisions of the court, the following rules are deduced:

"That wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts. But the converse of this proposition is equally true, that if a lien upon a vessel be created for a claim over which a court of admiralty has no

jurisdiction in any form, such lien may be enforced in the courts of the state."

Other authorities in point are The Keokuk, 76 U. S. (9 Wall.) 517, 519, 19 L. Ed. 744; The Lady Franklin, 75 U. S. (8 Wall.) 325, 329, 19 L. Ed. 455; The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345; Martin v. West, 222 U. S. 191, 197, 32 Sup. Ct. 42, 56 L. Ed. 159, 36 L. R. A. (N. S.) 592; The Benefactor (D. C.) 242 Fed. 582, 584, affirmed Clinton v. Smith & Terry, 249 Fed. 119, — C. C. A. —; The Thomas P. Sheldon (D. C.) 113 Fed. 779, 782, affirmed The S. L. Watson, 118 Fed. 945, 953, 55 C. C. A. 439.

But whatever doubt may have existed at one time, Southern Pacific Company v. Jensen, 244 U. S. 205, 216, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900, has removed. See, also, The Samuel Marhall, 54 Fed. 396, 402, 4 C. C. A. 385. The death cases relied on by counsel for libelant do not sustain the contention that a state can make them a lien on foreign vessels for torts not maritime. The leading cases on this subject are The Hamilton, 207 U. S. 389, 28 Sup. Ct. 133, 52 L. Ed. 264, and La Bourgogne, 210 U. S. 95, 138, 28 Sup. Ct. 664, 52 L. Ed. 973. In La Bourgogne, it was held:

"It was settled in The Harrisburg, 119 U. S. 199 [7 Sup. Ct. 140, 30 L. Ed. 358] that no damages can be recovered in admiralty for the death of a human being on the high seas, or on the waters navigable from the seas, caused by negligence, in the absence of an act of Congress, or a statute of a state, giving the right of action therefor. As said in Butler v. Boston Steamship Co., 130 U. S. 555 [9 Sup. Ct. 612, 32 L. Ed. 1017], the maritime law of this country, at least, gives no such right. But in The Hamilton, 207 U. S. 398 [28 Sup. Ct. 133, 52 L. Ed. 264] it was also settled that where the law of the state to which a vessel belonged—in other words, the law of the domicil or flag—gives a right of action for wrongful death if such death occurred on the high seas on board of the vessel, the right of action given by the law of the domicil or flag will be enforced in an admiralty court of the United States as a claim against the fund arising in a proceeding to limit liability. As La Bourgogne was a French vessel, the question is, therefore, did the law of France give a right of action for wrongful death caused by the collision in question?"

This case does not sustain appellee's contention as the tort was maritime, committed on the high seas.

The cases sustaining the half pilotage laws are based on the ground, as expressed by the Supreme Court in Cooley v. Board of Wardens, 53 U. S. (12 How.) 299, 316, 13 L. Ed. 996, and Ex parte McNiel, 80 U. S. (13 Wall.) 236, 241, 20 L. Ed. 624, that such state laws existed ever since the adoption of the Constitution, and that Congress had recognized them by various acts, referring to the acts of August 7, 1789 (1 Stat. 54, c. 9 [Comp. St. 1916, § 7981]), of March 2, 1837 (5 Stat. 153, c. 22 [Comp. St. 1916, § 7982]), of July 13, 1866 (14 Stat. 93, c. 177 [Comp. St. 1916, § 7983]), and of February 25, 1867 (14 Stat. 412, c. 83).

To sustain a state statute giving a lien on a vessel, the cause of the action must be maritime in nature, and a breach of an executory contract for the charter of a vessel is not maritime in nature, and therefore cannot be enforced in a proceeding in rem in an admiralty court, but the party injured must seek redress by a common-law action.

We are of the opinion that the learned District Judge erred in overruling the claimant's exceptions to the libel and therefore the decree is reversed.

SMITH, Circuit Judge (concurring). Owing to the fact that it is not wholly clear to me that the reasons assigned in the foregoing opinion are sound, but being thoroughly satisfied from the whole record that the libelant is not entitled to recover, I simply concur in the result.

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## DR. J. H. McLEAN MEDICINE CO. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5097.

1. CRIMINAL LAW ⟸970(7)—MOTION IN ARREST—INFORMATION.
An information charging defendant made an interstate shipment of drugs misbranded in violation of Food and Drugs Act June 30, 1906, § 8, as amended by Act Aug. 23, 1912 (Comp. St. 1916, § 8724), which alleged false statements were applied by defendant to the article knowingly and in wanton disregard of their falsity, *held* sufficient as against motion in arrest, in view of Rev. St. 1025 (Comp. St. 1916, § 1691).

2. INDICTMENT AND INFORMATION ⟸59—SUFFICIENCY.
In view of Rev. St. § 1025 (Comp. St. 1916, § 1691), the allegations of an information need only fairly inform defendant of crime intended to be alleged, and to make available a plea of former acquittal or conviction, if a second prosecution were instituted for the same offense.

3. DRUGGISTS ⟸12—MISBRANDING—OFFENSES.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, an actual intent to deceive, which may be inferred from the circumstances is essential to conviction, so an instruction that one who makes a statement, not knowing whether it is false, is as guilty as one knowingly making a false statement was erroneous.

4. CRIMINAL LAW ⟸823(1)—INSTRUCTIONS—CURE OF ERRORS.
Though a portion of the charge stated the correct rule, error in another portion was not cured, where the jury were left free to follow the erroneous charge, and there was no attempt to correct it.

5. CRIMINAL LAW ⟸829(1)—TRIAL—INSTRUCTIONS.
The refusal of a requested instruction was not error, where it was substantially covered by the charge given.

6. CRIMINAL LAW ⟸476—EVIDENCE—OPINIONS—EFFECT OF DRUGS.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, where physicians testified the drugs were not effective for treatment of disease as asserted by the labels, etc., testimony that there was no difference of medical opinion on the matter was competent, though the individual opinions of such physicians were incompetent.

7. CRIMINAL LAW ⟸442—EVIDENCE—DOCUMENTS.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, testimonials, etc., are admissible on the question of defendant's good faith, without proof of their execution, etc., where the officer in charge of defendant's business testified he relied thereon, but not where no such reliance was asserted.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

8. DRUGGISTS ⟸12—MISBRANDING—EVIDENCE.
In a prosecution under Food and Drugs Act, § 8, as amended (Comp. St. 1916, § 8724), for misbranding an interstate shipment of drugs, evidence *held* sufficient to carry to the jury the charge that statements in the labels, etc., were made in reckless disregard of their truth or falsity.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

The Dr. J. H. McLean Medicine Company was convicted of a violation of Food and Drugs Act June 30, 1906, § 8, as amended by Act Aug. 23, 1912, and it brings error. Reversed, and new trial awarded.

Chester H. Krum, of St. Louis, Mo., for plaintiff in error.

W. H. Woodward, Asst. U. S. Atty., of St. Louis, Mo. (Arthur L. Oliver, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The plaintiff in error, hereafter called the defendant, was convicted of a violation of the Food and Drugs Act of June 30, 1906 (34 Stat. 768, c. 3915, § 8), as amended by the act of August 23, 1912 (chapter 352, 37 Stat. 416 [Comp. St. 1916, § 8724]), under an information charging an interstate shipment of drugs that were misbranded. The information charged that defendant had shipped an article called "Dr. J. H. McLean's Liver and Kidney Balm," and the misbranding charged was with reference to a number of statements made on the label on the bottle, on the carton in which the bottle was contained, and in circulars inclosed with the bottles regarding the curative or therapeutic effects of the medicine, which statements were alleged to be false and fraudulent.

[1, 2] The first assignment of error argued challenges the overruling of a motion in arrest of judgment. The defendant claims that the information states no offense under the statute, because it is not charged that the statements made were known by the defendant to be false and fraudulent. The information alleged that these statements were applied by the defendant to the article knowingly and in reckless and wanton disregard to their truth or falsity. This was a sufficient description, as against a motion in arrest of judgment, of an intent to deceive which made such statements fraudulent. The allegations of the information need only be so specific as fairly to inform the defendant of the crime intended to be alleged, and to make available a plea of former acquittal or conviction, if a second prosecution were instituted for the same offense. Rev. St. § 1025 (Comp. St. 1916, § 1691); Simpson v. United States, 241 Fed. 841, 154 C. C. A. 543; Dosset v. United States, 248 Fed. 902, — C. C. A. —.

[3, 4] In the instructions to the jury on the question of the fraudulent character of the statements made by defendant the court inadvertently said that—

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

"One who makes a false statement, not knowing whether it is true or false, is as guilty of wrong as the man who makes a false statement knowing it is false."

An exception was saved to this instruction. This portion of the charge was erroneous, as it permitted the jury to find that the false statements were fraudulent, although the defendant honestly believed them to be true. In cases of this character there must be proof of an actual intent to deceive, an intent that may be inferred from facts and circumstances, but which must be proved. Seven Cases v. United States, 239 U. S. 510, 36 Sup. Ct. 190, 60 L. Ed. 411, L. R. A. 1916D, 164; Eleven Gross Packages, etc., v. United States, 233 Fed. 71, 147 C. C. A. 141; Samuels v. United States, 232 Fed. 536, 146 C. C. A. 494. Other portions of the charge correctly stated the rule as to the good faith of the defendant, but did not purport to correct the portion of the charge we have quoted, and did not cure the error, for the jury were at liberty to follow the erroneous portion of the instructions. Mills v. United States, 164 U. S. 644, 17 Sup. Ct. 210, 41 L. Ed. 584.

[5] Complaint is made of the refusal of an instruction tendered by defendant to the effect that evidence of the good reputation of the defendant might be considered on the question of its guilt, and might alone be sufficient to raise a reasonable doubt of such guilt. The court gave an instruction that this evidence might be taken into consideration with the other testimony. This was the practical equivalent of the instruction requested, and was sufficient. Sandy White v. United States, 164 U. S. 100, 17 Sup. Ct. 38, 41 L. Ed. 365.

[6] As a part of the government's case some well-qualified physicians were called as witnesses, and asked if a drug composed according to the formula used by defendant in preparing this article would, in their opinions, be effective for the treatment of the diseases for which the defendant's labels and statements claimed it was effective treatment, and, after answering that it would not be effective, they testified that there was no difference of opinion among medical men on that subject. Objections were made to this testimony, and it is urged that it calls for the opinion of the witnesses, for a conclusion that only the jury could properly make, and that no conviction could be based on such matters of opinion. The testimony that there was a general agreement of medical opinion as to the therapeutic effect of such a preparation, and what that general medical opinion was, was properly admitted to show the falsity of the statements made by defendant. Seven Cases v. United States, supra; Eleven Gross Packages, etc., v. United States, supra; Simpson v. United States, supra; Samuels v. United States, supra; Moses v. United States, 221 Fed. 863, 137 C. C. A. 433. The testimony of the physicians as to their individual opinions of the efficacy of the preparation would have been properly rejected, if there had been disclosed a difference of medical opinion on the subject, as a conviction could not properly rest upon a claim of fraudulent statements, when they were based upon mere matters of opinion on such debatable subjects. School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 Sup. Ct. 33, 47 L. Ed. 90; Bruce v. United States, 202 Fed. 98, 120 C. C. A. 370. But a mere concurrence

of such witnesses' opinions with the uniform course of medical opinion was not open to that objection.

[7] To combat the theory of the prosecution that the statements of the defendant as to the therapeutic efficacy of its medicine for certain diseases were not founded in honest belief, the defendant offered in evidence a number of testimonials it had received. The defendant's president testified that he was the manager of its business, and had found some of these testimonials in the company's safe when he had taken charge in 1911, and that others came to the company since that time. The government's counsel objected to the offer, because the testimonials had not been shown to be genuine, and because the writers were not shown to have been qualified to state the nature of the disease from which they suffered. The court excluded them, as not competent nor material. The defendant claims they were admissible to show the good faith of the defendant in preparing its challenged statements. If these letters had related to the statements made, and had been seen by the defendant's manager, and he believed them to be genuine, and in that belief he had put forth the statements in issue, they would have been admissible on the question of intent, without proof of their execution, or of the truth of their subject-matter. Harrison v. United States, 200 Fed. 662, 119 C. C. A. 78; 4 Chamb. on Evidence, § 2649. As none of the testimonials are contained in the bill of exceptions, we cannot say that they were pertinent to the particular statements of defendant in issue, and they were not material in any event on this record, because the witness did not testify that he relied upon them. The only question answered by him as to his faith in the medicine was asked "on the basis of those letters or any other information you had." There is no error shown in the exclusion of this line of evidence.

[8] One other assignment of error relied upon, that the court erred in refusing to direct a verdict for defendant because there was no evidence of a fraudulent statement, requires a brief statement of the charge in the information and of the evidence in its support. The information after alleging a misbranding of defendant's medicine by reason of false statements made in reckless and wanton disregard of their truth or falsity, set forth the statements made relating to the curative or therapeutic effects of the medicine for a very large number of diseases. One of the statements will suffice as an illustration, as follows:

"Gall Stones—Dr. J. H. McLean's Liver and Kidney Balm will aid in dissolving the gall stones, so that they may pass away."

The defendant admitted the making of this statement. Competent medical men testified that no known medicine would aid in dissolving gall stones in the human body, and that there was no difference in medical opinion on that subject. There was no evidence to the contrary. The president of the company, who had had the management and conduct of the business since 1911, and had dictated its policy in every way, testified that he did not know and had never attempted to learn the therapeutic action of any of the ingredients of defendant's medicine, and that he was neither a druggist nor a doctor. As heretofore indicated, he based his belief in the general efficacy of the medicine on some source which was not definitely disclosed. The defense

offered evidence to show that the Secretary of Agriculture, a year and a half before that shipment, had notified the defendant that the label on the bottle containing this medicine appeared to be misbranded with reference to the statement about gall stones and about other diseases, because the medicine contained no ingredient capable of producing the therapeutic effects claimed for it. This was sufficient evidence to require the court to submit to the jury the charge made in the information of a reckless disregard of the truth or falsity of the statements. Eleven Gross Packages v. United States, supra; Samuels v. United States, supra; Moses v. United States, supra.

Because of the error in the instructions of the court, the judgment is reversed and a new trial awarded.

HOOK, Circuit Judge (concurring). I think there was also error in excluding the so-called testimonials. It is said they are not in the record, but for the purpose of the point here the name applied to them at the trial discloses their character as clearly as if they were set out in full, and that is sufficient. A testimonial is "a writing or certificate in favor of the value of a thing." As testimonials they were excluded; whereas, if they were relied on wholly or in part, of which there was some testimony, they bore upon the defense of honest belief in the advertised efficacy of the medicine—not very strongly perhaps, but that was for the jury.

Neither of the reasons in support of the ruling below was offered there or here.

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BUCHANAN v. ST. LOUIS & M. R. CO. et al.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5084.

1. RAILROADS ⊜72(7)—CONVEYANCE OF LAND—CONSTRUCTION—REVERSION.
A condition in a deed to a railroad company that, if the railroad be not built, etc., the lands should revert to the grantors, etc., *held* a condition subsequent, under which title passed to the company, subject to a right of forfeiture that might be asserted in case of breach of condition.

2. TAXATION ⊜679(4)—SALE OF LAND—TITLE OF STATE—SALE TO RAILROAD COMPANY—REMISSION OF TAX.
Where the former owner of Arkansas lands sold to the state for taxes granted them to a railroad company in July, 1873, by deeds containing conditions subsequent providing for forfeiture in case the railroad should not be built, *held* that, under the Arkansas acts of April 8, 1869 (Acts 1868–69, p. 130), of March 27, 1871 (Acts 1871, p. 199), and of April 21, 1873 (Acts 1873, p. 172), the state's title to the land did not pass to the railroad company, and so no title reverted to the grantor because of breach of the condition.

3. TAXATION ⊜679(4)—SALE TO STATE—TITLE—GRANT TO RAILROAD COMPANY.
Where lands sold to the state for taxes were granted by the former owner to a railroad company, *held* that, under the Arkansas acts of April 8, 1869 (Acts 1868–69, p. 130), and April 27, 1873 (Acts 1873, p. 172), no title passed to the railroad company which could revert to the former

owner for breach of condition subsequent; the acts providing merely for remission of taxes, leaving the title where it was, and there being no showing that the state released the lands.

4. QUIETING TITLE ⟸10(1)—RELIEF.
In order to have title quieted, one must have some title, and the suit cannot be based on the weakness of his adversary's title.

5. QUIETING TITLE ⟸10(2)—SUITS—TITLE OF COMMON GRANTOR.
Where both parties to a suit to quiet title claim from a common grantor, neither can question that title.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit by R. E. Buchanan, trustee, against the St. Louis & Memphis Railroad Company and others. A motion to dismiss the bill was sustained, and plaintiff appeals. Affirmed.

W. G. Cavett, of Memphis, Tenn. (R. T. Simpson, of Florence, Ala., and Manning & Emerson, of Little Rock, Ark., on the brief), for appellant.

George H. Williams, of St. Louis, Mo., Allen Hughes, of Memphis, Tenn., and W. H. Woodward, of St. Louis, Mo. (R. B. Campbell, of Helena, Ark., W. M. Allen, of Springfield, Ill., J. D. Block, of Paragould, Ark., Charles T. Coleman, of Little Rock, Ark., S. W. Ogan, of Wynne, Ark., and C. L. Marsilliot, of Memphis, Tenn., on the brief), for appellees.

Before HOOK and STONE, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. By this suit the plaintiff sought to quiet his title to about 40,000 acres of land in Arkansas. A motion to dismiss the bill was sustained, and plaintiff below appeals. The question involved is whether the bill states a cause of action. There are two separate tracts of land involved, and the decision as to them depends on somewhat different facts.

One tract of land, which Thomas H. McCray assumed to convey to the St. Louis & Memphis Railroad Company, will be referred to as the McCray land, and the other tract, which Isaac Saffron assumed to convey to the railroad company, will be referred to as the Saffron land.

In his bill plaintiff sets forth a chain of title to these lands. He alleges a conveyance of the McCray lands from the United States to the state of Arkansas, and conveyances from the state to various persons other than McCray. He then alleges the assessment of taxes for some of the years between 1865 to 1871, inclusive, against these lands, delinquency in payment of the taxes, a sale of the land for the taxes, and that the lands were bid in and purchased by the state of Arkansas, and that the title to these lands prior to and in 1872 was in the state of Arkansas. It is also averrred that McCray, prior to July 15, 1873, claimed, subscribed, and donated these lands to the railroad company, and it is then stated that McCray executed a deed for these lands to the railroad company, which was dated July 12, 1873, and filed for record on July 15, 1873. This deed recited a consideration of $2 per acre, one-fourth to be paid in first mortgage bonds, and the balance in capi-

tal stock of the railroad company, and in consideration of the building and completion of the railroad in 3 years. Further provisions in the deed read as follows:

"Provided, said railroad shall be built and completed within three years after date hereof."

"That, if the said railroad be not built and completed within three years from date hereof, said lands shall revert to us, our heirs, administrators, and assigns, and this deed to be void."

And in the habendum clause appeared this provision:

"To have and to hold the same unto the said St. Louis & Memphis Railroad Company, and unto their assigns forever, with all the appurtenances thereunto belonging: Provided, said railroad shall be built and completed within three years after date hereof. And we hereby covenant with the said St. Louis & Memphis Railroad Company that we will forever warrant and defend the title to said lands against all claims whatsoever, subject only to the condition that if the said railroad be not built and completed within three years from date hereof, said lands shall revert to us, our heirs, administrators, and assigns, and this deed to be void."

[1, 2] It is alleged that the railroad company did not build and complete the railroad within 3 years nor since. Plaintiff alleges that in 1910, 37 years after McCray's deed to the railroad company, the heirs of McCray executed deeds to grantees through whom plaintiff now claims title, and it is claimed that the lands have been unoccupied up to the time of filing this suit. Plaintiff claims that title is shown in him, as to the McCray lands, by these allegations because a forfeiture was declared of the condition subsequent contained in McCray's deed to the railroad company and he is therefore entitled, not only to the title that McCray conveyed and of which plaintiff claimed a reversion, but also to an independent title which he says the railroad company acquired after it received that deed, and which also reverts to the plaintiff because of the McCray deed.

Taking up these claims of reversion separately, it was held by this court in Rannels v. Rowe, 145 Fed. 296, 74 C. C. A. 376, and in Bryan v. Bliss-Cook Oak Co., 178 Fed. 217, 101 C. C. A. 577, under deeds essentially similar that the conditions recited in the deeds were conditions subsequent, and that title passed to the grantee subject to a right of forfeiture that might be asserted in case of a breach of condition, such as a failure to build and complete the railroad in the time limited. McCray, however, is shown by plaintiff's bill to have been a stranger to the title at the time he conveyed, and, as he conveyed no interest in the lands, none could revert to his heirs, unless, as plaintiff claims, his grantee acquired a new title, and this reverted to McCray's heirs. This claim of title depends on the construction of certain statutes of Arkansas.

By an act of the Legislature approved April 8, 1869 (Acts Ark. 1868–69, p. 130), it was provided:

"That whenever any person having title to, or being the owner of, any lands which have been or may be stricken off to the state, or forfeited for nonpayment of taxes, shall donate or subscribe the same in aid of the construction of any railroad, and the same shall be reported to the auditor of public accounts, as provided in section two hereof, the auditor shall grant his certificate, as in case of redemption, and thereupon all taxes and claims of the state

on account of nonpayment of taxes, on each tract of land so subscribed or donated, shall be remitted and discharged: Provided, that a lien shall exist in favor of the state for the taxes hereby remitted, which may be enforced, and said taxes collected according to law, if such railroad shall not be completed through the county in which, or nearest to which, such lands are selected, within five years from the date of such subscription or donation."

The railroad company was required to furnish annually to the auditor a list of lands acquired by grant, donation, or subscription, and these lands were not to be listed nor subject to taxation until conveyed to actual purchasers by the railroad company.

In 1871 by an act approved March 27, 1871 (Acts Ark. 1871, p. 199), it was made the duty of the president and secretary of any railroad company having lands subscribed and donated to it to certify under oath to the auditor that these lands were subscribed to the companies in good faith, and that there was no arrangement or understanding that the subscribers should have the right to withdraw such lands at any time or for any purpose. Deeds to all lands then subscribed that were to be certified to the auditor were required to be filed for record with the proper county officer by July 1, 1871, and the auditor was then to classify as subject to taxation laws the lands as to which no such additional certificate had been made. By a further act of the Legislature approved April 21, 1873 (Acts Ark. 1873, p. 172), it was recited that gross frauds were being perpetrated on the revenues of the state by the failure of railroad companies to comply with the laws relating to lands subscribed to them and in their exemption from taxation, and it was made the duty of the county clerks to examine the records of deeds by June 1, 1873, and to make out therefrom a list of lands that had been subscribed or donated to any railroad company by deed filed for record on or before July 1, 1871, as required by the act of 1871, and to forward such certified list to the auditor by June 1, 1873. Sections 2 and 3 of the act are as follows:

"Sec. 2. On or before the 1st day of June, 1873, the auditor of the state shall make out a correct list of all the lands and town lots claimed to be exempt from taxation by the various railroad companies, making a separate list for each company; and he shall, on or before the 10th day of June, 1873, or as soon thereafter as such lists shall have been received from the county clerks, proceed to compare the list made out by himself with the list forwarded to his office by the county clerks in accordance with the provisions of this act, and shall forthwith classify all such lands and lots, and all such lands and lots as shall be claimed by any railroad company as exempt from taxation by reason of having been donated or subscribed to such railroad company, and for which it shall be found no deed has been filed for record with the proper officer of the county in which such lands are situated, as is required by section 2 of an act entitled 'An act to protect the state revenue,' approved March 27, 1871, shall be made subject to the revenue laws; and such lands and lots as appear to have been forfeited to the state for nonpayment of tax shall be so classed and shall be sold or otherwise disposed of as is or may be provided by law for the disposal of forfeited lands; and any deed of quitclaim or release by which the claim of the state to such lands or lots, for taxes due thereon, may have been relinquished in favor of any railroad company, shall be cancelled and annulled; and the auditor of the state shall so declare, and shall notify any railroad company claiming such land of his action in the premises; and such lands and lots as do not appear to have been forfeited shall be listed for taxation as other lands are listed; and the auditor of state shall notify the clerk of the county in which such lands and lots

are situated, and he shall place such lands and lots on the tax books of the county, and shall charge the same with all the taxes due thereon; and the collector of said county shall, at the next annual collection of taxes thereafter, collect all taxes due on said lands and lots, but no penalty shall be added for the nonpayment of any taxes up to date of such collection.

"Sec. 3. If any person or persons owning or claiming to own any of the lands or lots mentioned in the preceding section of this act, shall donate or subscribe the same as stock to any railroad company chartered or organized according [to] the laws of this state, and shall subscribe or donate them by deed to such railroad company, and shall file such deed for record with the proper officer of the county in which such lands are situated on or before the 15th day of July, 1873, then the state shall release all the claim which it may have to said lands or lots on account of taxes, as is now provided by law in such cases; and the laws of this state in relation to lands subscribed or donated to railroad companies shall be in force as to such lands; and all such lands or lots as may be classed as forfeited lands or lots, and which any person or persons owning or claiming to own them shall elect to redeem them instead of donating or subscribing them to any railroad company, such lands or lots may be redeemed as is now or may be provided by law for the redemption of forfeited lands on or before the said 15th day of July, A. D. 1873, after which time if not then redeemed or conveyed to any railroad company they shall be sold by the auditor at the next regular sale of forfeited lands thereafter, or otherwise disposed of according to law. And the county clerks of the several counties in this state shall, on the said 15th day of July, 1873, make out and forward to the auditor of the state a correct list of such lands and lots as may appear from deeds then on file in the proper office for record to have been subscribed or donated to any railroad company."

The plaintiff claims that under the provisions of section 3, McCray, although he had no title to these lands, could claim to own them, and did so claim, and that he donated and subscribed them to the railroad company by his deed filed on July 15, 1873, and thereupon the state granted to the grantee named in McCray's deed its title which it had theretofore acquired by reason of the purchase for taxes, and that this title reverted to McCray's heirs when a forfeiture of the estate conveyed by McCray to the railroad company was declared for breach of the condition subsequent, and therefore he is now vested with sufficient title to maintain this suit.

It is urged by appellees that the Legislature of Arkansas, under the restrictions of the state Constitution, had no power either to convey lands that the state had purchased for taxes or to remit or release such taxes, except upon full payment of the amount due. We do not find it necessary to decide this question, for, if this legislation did not purport to convey title to the lands to the railroad company, the plaintiff cannot have acquired any title by claim of a reversion of estate.

Did the acts of the Legislature grant the state's title to the railroad company? The privileges granted by section 3 of the act of 1873 are limited to lands mentioned in section 2 of the act. The lands mentioned in section 2 are those listed by county clerks on or before June 1, 1873, from their records of deeds filed on or before July 1, 1871, and the lands listed by the auditor on or before June 1, 1873, as claimed to be exempt by the railroad companies. The purpose of the act was to limit the list of exempted lands to those in these two classes, but a provision was made that if land appeared on the auditor's list, and no deed thereto had been filed by July 1, 1871, it could still have the benefits of the act, if the owner or claimant donated or subscribed it to a

railroad company and filed the deed for record by July 15, 1873. It was not intended that the door should be opened, so that any lands could be subscribed or donated to railroads, and thus be exempted from taxation; but the purpose was to leave the door ajar for such lands as the auditor had listed on or before June 1, 1873, even though the deeds thereto had not been filed by July 1, 1871, and to close it to all others. The plaintiff does not allege that the McCray lands were so listed by either the county clerk or by the auditor and as the deed by McCray was not made until July 12, 1873, neither the county clerk nor the auditor was authorized to enter it upon their list and the railroad companies were not authorized to make the verified statement required by section 2 that the McCray land was claimed as exempt on or before June 1, 1873, because it had not been conveyed and the presumption is that the officers all observed the requirements of the statutes, and hence it does not appear that these lands were subject to the act of 1873.

[3, 4] There is another reason why this act did not confer any title in the railroad company. The terms of this act provide that the state shall release all the claim it may have to the lands on account of taxes "as is now provided by law in such cases." The law thus referred to is found in the act of 1869 heretofore quoted, and provides merely for the remission or discharge of the taxes to be evidenced by the auditor's certificate "as in case of redemption" and thus left the title where it happened to rest before the issuance of such certificate.

There is no allegation that the state of Arkansas ever executed a release or conveyance of these lands to plaintiff or his predecessor in title. It therefore appears that the plaintiff has no title, if a forfeiture were properly declared, except such title as McCray had when he made his deed to the railroad company, and as he had none the plaintiff acquired none. He does not allege that he has possession of the land. In order that one may have his title quieted to lands he must have some title. Under the liberal modern statutes broadening the remedy one cannot "have a cloud removed from a title which has no existence." The suit cannot be based alone upon the weakness of an adversary title. Dick v. Foraker, 155 U. S. 404, 415, 15 Sup. Ct. 124, 39 L. Ed. 201; Holland v. Challen, 110 U. S. 15, 3 Sup. Ct. 495, 28 L. Ed. 52; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. 1129, 30 L. Ed. 1010; Stark v. Starr, 6 Wall. 402, 18 L. Ed. 925; Guarantee Trust & Safe Deposit Co. v. Delta & Pine Land Co., 104 Fed. 5, 43 C. C. A. 396; Ripinsky v. Hinchman, 181 Fed. 786, 105 C. C. A. 462; Mason v. Gates, 82 Ark. 294, 102 S. W. 190; Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534; Reynolds v. Snyder, 121 Ark. 33, 180 S. W. 752, 183 S. W. 979; Greer v. Vaughan, 128 Ark. 331, 194 S. W. 232; 32 Cyc. 1329, 1330.

[5] An exception to this rule exists where suit is brought to quiet title and both parties claim title alone from a common source. In that case neither party can question the title of the common grantor. Bull v. Campbell, 225 Fed. 923, 141 C. C. A. 47; Wood v. Freeman-Smith Lumber Co., 109 Ark. 499, 160 S. W. 396; 2 Gr. on Ev. § 307; English v. Otis, 125 Iowa, 555, 101 N. W. 293; Howard v. Twibell, 179 Ind.

67, 100 N. E. 372, Ann. Cas. 1915C, 93; Phillips v. Menotti, 167 Cal. 328, 139 Pac. 796; People's Bank v. West, 67 Miss. 729, 7 South. 513, 8 L. R. A. 727.

This suit is not within the exception because the plaintiff shows that the state of Arkansas was the owner of these lands when McCray made his deed to the railroad company, and that the defendants claim the lands through tax sale proceedings by the state and through deeds from other persons than McCray or his successors in interest.

The plaintiff's claim to the Saffron land rests upon a chain of conveyances from the United States to the state of Arkansas, by the state to Jones, by Jones to Ford, and by Ford to Saffron. The deed to Saffron is dated January 1, 1873. He alleges a deed from Saffron to the railroad company dated July 11, 1873, and filed for record on July 14, 1873. A deed from Saffron to plaintiff's predecessors in title was made November 22, 1910. The deed from Saffron to the railroad company contained the same conditions that were contained in the McCray deed. The plaintiff makes the same allegations as to the Saffron land that have been referred to as made with reference to the McCray land, to the effect that the lands had been sold for taxes and purchased by the state and that title was in the state of Arkansas in 1872. The claim of title to these lands is based upon the same contention that has been stated with reference to the McCray lands, that by reason of a donation and subscription of them by Saffron to the railroad company the state then granted its title to the railroad company, and plaintiff is entitled to the reversion of this title for condition broken in the Saffron deed. Our decision that no title passed from the state to the railroad company as to the McCray lands also determines that no title passed from the state to the railroad company as to the Saffron lands and for the same reasons. As it is further shown that Saffron had lost his title in 1872 to the state of Arkansas, his deed to the railroad company in 1873 conveyed nothing and the claim of a reversion for condition broken, if sustained, can restore no title to plaintiff, and he has no standing to ask to have his title quieted.

The defendants who claim the Saffron lands are also shown to be claimants under the tax sale proceedings of the state, and under deeds which are not derived from Saffron's claim of title, and hence they do not claim from a common source with the plaintiff.

The conclusions announced dispose of the case, and render unnecessary the discussion of other questions argued.

The decree will be affirmed.

## CHICAGO, R. I. & P. RY. CO. v. LAWTON REFINING CO.*

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

No. 5080.

1. CARRIERS ⟸45—DUTY TO FURNISH CARS—JURISDICTION OF COURTS.
The courts have jurisdiction over a suit by a shipper to compel a railroad company to furnish cars, as a shipper has a remedy by action for a carrier's refusal to accept proper shipments or supply reasonably adequate facilities.

2. CARRIERS ⟸39—CARRIAGE OF GOODS—DUTY OF CARRIER.
There is a general duty on common carriers to receive, and carry by suitable means, goods which they assume to transport, or which are usually carried.

3. CARRIERS ⟸40—CARRIAGE OF GOODS—DUTY OF CARRIER.
The obligation to carry goods safely often requires that special kinds of cars be supplied for the transportation of goods, which the carrier has accepted or holds itself out to carry.

4. CARRIERS ⟸40—CARRIAGE OF GOODS—DUTY OF CARRIER.
Where articles of an extraordinary character are offered, a carrier is not bound to accept them, or provide facilities of a different kind from those usually furnished for transportation; hence a railroad company was not required to furnish tank cars to carry the oils of a refinery.

5. CARRIERS ⟸40—CARRIAGE OF GOODS—DUTY OF CARRIER.
Where the tariffs of a railroad company, which owned no tank cars, did not purport that the tank cars would be furnished, *held*, the railroad company having leased tank cars some of which it allowed a refinery to use, might withdraw the use of the cars from the refinery when they were needed to carry water to supply its engines and roundhouses, etc.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit by the Lawton Refining Company against the Chicago, Rock Island & Pacific Railway Company. From an order granting a temporary injunction, defendant appeals. Order reversed and set aside, with directions.

C. O. Blake, of El Reno, Okl. (R. J. Roberts, W. H. Moore, and J. E. Du Mars, all of El Reno, Okl., on the brief), for appellant.

B. M. Parmenter, of Lawton, Okl., for appellee.

Before SANBORN and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. This is an appeal from an order granting a temporary injunction. The plaintiff below was a corporation doing business at Lawton, Okl., as a refiner of crude petroleum oils. The defendant was a railway company doing business in Oklahoma, and having connection with plaintiff's refinery by means of a switch track. The parties will be referred to as the refining company and the railway company. The order of the court enjoined the railway company from failing to furnish to the refining company five designated tank cars for the transportation in Oklahoma of its products of gasoline, kerosene, and fuel oil. The facts are undisputed.

The refining company has been engaged in business since 1916. It

receives crude oil from stations in Oklahoma, and ships its refined products extensively to Oklahoma consumers. It has 25 tank cars of its own. The railway company owns no tank cars, but has leased some from private owners; but it has not supplied tank cars to patrons, except that the five cars in controversy had been furnished to the refining company for three months before this suit was begun. This was in pursuance of some arrangement between the companies; but counsel for the refining company denied that the injunction was asked in enforcement of any agreement.

The railway company is a member of the American Railway Association, and by its rules, as well as by common usage, cars are interchanged between railroads in the United States, and cars are distributed ratably to patrons needing them. The railway company would need a large number of tank cars in order to supply the demand of its patrons, if it undertook to furnish such cars, as very few railway companies furnish tank cars to shippers, and, under the usage of interchange of cars, many of the cars would be absent for long periods. The railway company publishes a tariff for the transportation of oil in tank cars. The five cars in controversy had been leased by the railway company from private owners, and for several years had been used by the railway company in carrying its fuel and water supply, and in transporting creosote oil for treatment of its ties and structural timbers.

At the time of this suit a prolonged drought in a portion of Oklahoma adjacent to the railway company's lines had caused a failure of its water supply at many stations, and it had become necessary to haul water over the railroad for use by its engines, its roundhouses, and other instrumentalities. It had no other tank cars available, except these cars, and no other means of securing water, and it intended to prepare them for that use, and had begun the alteration of one of the cars to fit it for such purpose, when the injunction was granted.

The questions involved in this appeal relate to the jurisdiction of the court over the subject-matter, and the sufficiency of the evidence to support the order.

It is to be observed that the injunction is limited to use of the cars in intrastate traffic, and that there was no evidence of the effect upon interstate commerce that would result from enforcement of the order. There was no evidence to show that any other shippers desired that the railway company should furnish them with such cars. Questions of dissemination are therefore not presented by this record, nor are there any questions arising under the acts of Congress regulating interstate commerce; but the case is to be determined by the laws in force in Oklahoma relating to intrastate shipments.

[1] A contention is made that the courts have no jurisdiction over questions relating to the duty of a carrier to furnish cars to a shipper, and that such an order should be made by an administrative body; but counsel do not advise us of any special tribunal having such powers. A similar contention was made in the case of U. S. et al. v. Pennsylvania Railroad Company, 242 U. S. 208, 37 Sup. Ct. 95, 61 L. Ed. 251, as to tank cars demanded for interstate shipments, and it was then held that, if any duty to furnish such cars exists, it is enforceable in the courts, not by the commission. For a carrier's refusal to accept prop-

er shipments, or to supply reasonably adequate facilities of carriage, the shipper has a remedy by action. Louisville & Nashville Railroad Co. v. F. W. Cook Brewing Co., 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; Danciger et al. v. Wells Fargo & Co. (C. C.) 154 Fed. 379; Pennsylvania Railroad Co. v. Puritan Coal Mining Co., 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Illinois Central Railroad Co. v. Mulberry Hill Coal Co., 238 U. S. 275, 35 Sup. Ct. 760, 59 L. Ed. 1306; Missouri Pacific Railway Co. v. Larabee Flour Mills Co., 211 U. S. 612, 29 Sup. Ct. 214, 53 L. Ed. 352; Chicago, Burlington & Quincy Railway Company v. Burlington, C. R. & N. Railway Co. et al. (C. C.) 34 Fed. 481; Butchers' & Drovers' Stock Yards Co. v. Louisville & N. R. Co., 67 Fed. 35, 14 C. C. A. 290; Moore on Carriers, p. 3.

[2] The remaining question is the right of the refining company to the use of these specific tank cars. There is a general duty of common carriers to receive and carry, by suitable means, goods which they assume to transport or which are usually carried. Covington Stockyards Co. v. Keith, 139 U. S. 128, 11 Sup. Ct. 461, 35 L. Ed. 73; Atlantic Coast Line Co. v. Geraty, 166 Fed. 10, 91 C. C. A. 602, 20 L. R. A. (N. S.) 310; Citizens' Bank v. Nantucket Steamboat Co., 2 Story 16, Fed. Cas. No. 2730; McManus v. Lancashire R. R. Co., 4 H. & N. 327; Elliott on Railroads, §§ 1465, 1466, 1474.

[3] The obligation to carry goods safely often requires that special kinds of cars be supplied for the transportation of goods which the carrier has accepted, or which it holds itself out to carry, such as refrigerator cars for perishable products, stock cars for cattle, and the like. Atlantic Coast Line Co. v. Geraty, supra; Johnson v. Toledo S. & M. Ry. Co., 133 Mich. 596, 95 N. W. 724, 103 Am. St. Rep. 464; New York, P. & N. R. Co. v. Cromwell, 98 Va. 227, 35 S. E. 444, 49 L. R. A. 462, 81 Am. St. Rep. 722; St. Louis, I. M. & S. Ry. Co. v. Renfroe, 82 Ark. 143, 100 S. W. 889, 10 L. R. A. (N. S.) 317, 118 Am. St. Rep. 58; Di Giorgio I. & S. Co. v. Pennsylvania R. Co., 104 Md. 693, 65 Atl. 425, 8 L. R. A. (N. S.) 108; Baker v. Boston & M. R. Co., 74 N. H. 100, 65 Atl. 386, 124 Am. St. Rep. 937, 12 Ann. Cas. 1072; People v. St. Louis, A. & T. H. R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656; Forrester & Co. v. Southern Ry. Co., 147 N. C. 553, 61 S. E. 524, 18 L. R. A. (N. S.) 508, 15 Ann. Cas. 143; Loomis v. Lehigh Valley R. R. Co., 208 N. Y. 312, 101 N. E. 907; Hannibal R. R. Co. v. Swift, 12 Wall. 262, 20 L. Ed. 423; Hutchinson on Carriers (3d Ed.) §§ 505, 508; Elliott on Railroads, §§ 1474, 1475.

[4] Where articles of an extraordinary character are offered, a carrier is not bound to accept them or to provide facilities of a different kind from those usually furnished for transportation. For this reason a carrier may be excused from acceptance of explosives or of goods that are improperly packed. Nitro-Glycerine Case, 15 Wall. 524, 21 L. Ed. 206; Harp v. Choctaw, O. & G. R. Co., 125 Fed. 445, 61 C. C. A. 405; California Powder Works v. Atlantic & P. R. Co., 113 Cal. 329, 45 Pac. 691, 36 L. R. A. 648; Union Express Co. v. Graham, 26 Ohio St. 595; Fitzgerald v. Adams Express Co., 24 Ind. 447, 87 Am. Dec. 341; Gulf, C. & S. F. Ry. Co. v. A. B. Frank Co. (Tex. Civ. App.) 48 S. W. 210.

There are other limitations of the carrier's duty to accept goods, growing out of the usual course of business and the limitations of convenience. An express company that handles parcels is not bound to accept articles of great bulk, such as lumber and hay; nor are carriers bound to accept as baggage articles that, by reason of bulk or value transcend the carrier's customary limitations. Pfister v. C. P. R. R., 70 Cal. 169, 11 Pac. 686, 59 Am. Rep. 404; Elliott on Railroads, § 1466.

The ordinary freight cars of the railways, because of their dimensions, impose restrictions of length, width, and height to commodities that may be carried, and they are also unsuitable for the transportation of articles such as acids, oils and gases, which are not packed in containers. In the case of U. S. et al. v. Pennsylvania Railroad Co., 242 U. S. 208–231, 37 Sup. Ct. 95, 61 L. Ed. 251, the Supreme Court recognizes the fact that a tank car is not only a car but a package for the goods. If the producer of oil may demand of the carrier a specially constructed car suitable as a container of the article produced by him, no reason is perceived why the producers of the various forms of gases, liquids, and solids may not also require peculiar cars suitable for such unpacked products. In the case of In the Matter of Private Cars, 50 Interst. Com. Comn. R. 652, July 31, 1918, the Interstate Commerce Commission found that there are 59 varieties of liquids that are regularly transported in tank cars. It is there said:

"Cars used to transport the different liquids cannot be interchanged readily; that is to say, a tank car loaded with fuel oil with an asphalt base cannot be reloaded with refined oils, such as gasoline or kerosene, nor with edible oils, such as cottonseed or cocoanut, without thorough cleaning at an expense of from $5 to $35 per car. A car in which has been transported any of the petroleum oils cannot be used for molasses or other edible liquids, without thorough cleaning to remove every vestige of oil and odor. Some acids require peculiarly constructed cars. A car for tannic acid must be coated on the inside with acid-resisting material and all fittings must be of brass. Muriatic acid requires a wooden lined tank. Wine cars are mounted with a steel tank, lined on the inside with special enamel, surrounded on the outside with a wooden tank, with insulating material between it and the steel, to preserve the contents from deterioration during transportation; and casing head gasoline cars are insulated, so as to preserve a uniform temperature, and are fitted with special dome-head arrangements and safety appliances. A tank car for transportation of asphalt and other heavy oils requires heater coils, in order to liquefy the contents for unloading. Some tank cars are constructed with compartments, so that two or more grades of oil may be transported at a time. Special loading and unloading facilities are necessary for oil shipments. It is necessary to force some oils out of the cars by steam pressure, others by the use of pumps, and from still others the liquid flows out by gravity. * * *

"It is more economical and more efficient for the refiner to furnish a tank car, either owning it or leasing it from some concern, than for the railroad company to own it. A refiner, producing two kinds of oil, gasoline and residuum, requires two kinds of cars. Another refiner, producing all grades of oil, from the lighter oils down to coke, will require several kinds of cars. The cost of cleaning a car which has been used for fuel oil, in order to make it fit for handling gasoline, is very great. These and other reasons, which are given in detail and might be here repeated, if necessary, have led to the system of private ownership of tank cars throughout the country generally. * * *

"The refiner of oil or the meat packer could no more do business on an economical and efficient basis without his private cars than he could without

his modern equipped refining or packing plant. The private car part of the business has grown with the rest. Doubtless in the beginning demands were made by these shippers that carriers should supply tank and meat cars; but it was quickly demonstrated that business could not be done in the most effective manner, were carriers to own or control cars of that kind. As a rule carriers have never furnished these cars, and it has come to be mutually understood that they should not do so. The oil refiner and meat packer demand an adequate supply of cars at all times. It is conceded by shippers that neither an adequate supply nor its efficient distribution can be afforded by carriers. The requirement has been that there shall be the most efficient use of tank and refrigerator cars, which has been one of the results of private ownership. While this has undoubtedly been of benefit to carriers, it has been of incalculable benefit to shippers as well."

It is also disclosed by the report of the Interstate Commission in that case that very few railroads in the United States furnish tank cars for the use of shippers (see, also, United States v. Penn. R. R. Co., 242 U. S. 208–231, 37 Sup. Ct. 95, 61 L. Ed. 251), and that railroad tariffs usually provide that the carriers assume no obligation to furnish tank cars. There is an economic waste in the use of tank cars, because such cars usually are returned empty from the places where their contents are discharged to the points of origin of shipment, and they are not adapted for general use. Under the rules of interchange of cars, a railway company may have a large supply of such cars, and yet have none of them immediately available on its own lines. To meet this difficulty a number in excess of the demands of shippers on its own lines must be provided. We think the rule is a reasonable one, that if the shipper wishes to compel the carrier to accept his goods he must properly prepare and pack his product to suit the cars that the carrier assumes to supply, and which are ordinarily furnished by carriers for such products, and that it is not the usual practice of railway companies to furnish tank cars for shippers. Questions of the proper rates to be given to shippers of liquids, or of discrimination between shippers who furnish their own tank cars and shippers of similar articles in barrels or otherwise, are not involved here.

[5] There is another reason why the railway company was not bound to furnish for the use of the refining company the cars in question. The railway company had published a tariff which announced its readiness to transport oil in tank cars, but this tariff did not purport to furnish the cars for this purpose. It had not held itself out as ready to furnish tank cars for shippers. The five cars in controversy had been leased by it for its own use in operating its railway, and had been but temporarily furnished for the use of the refining company until it should again have need for them. When the prolonged drought endangered its water supply, it was the right of the railway company to withdraw the cars from the use of the refining company, in order to supply its engines and roundhouses with water. The railway company owed a duty to the public to keep its trains in operation, and this duty was superior to the demand of the refining company for these tank cars, in addition to those it owned and operated. L. & N. R. Co. v. Queen City Coal Co., 99 Ky. 217, 35 S. W. 626; Harp v. Choctaw, O. & G. R. Co., supra.

The order of the District Court will be reversed and set aside, with directions to dissolve the restraining order and to deny the application for temporary injunction.

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PUGET SOUND ELECTRIC RY. et al. v. BENSON.

(Circuit Court of Appeals, Ninth Circuit. October 28, 1918.)

No. 3147.

1. STATUTES ⊜196—CONSTRUCTION—CANONS.
A limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction.

2. STATUTES ⊜200—CONSTRUCTION—COMMAS.
The use of commas is not controlling, where the meaning is otherwise clear.

3. MUNICIPAL CORPORATIONS ⊜703(1)—TRAFFIC ORDINANCES—FIRE DEPARTMENT.
An ordinance declaring that apparatus of the fire department, etc., ambulances, responding to emergency calls, etc., should have right of way in use of streets, gives fire apparatus returning from a fire the right of way.

4. EVIDENCE ⊜595—"INFERENCE"—WHAT FOR.
An "inference" is a permissible deduction, which the jury is entitled to draw from the evidence, and which has no probative effect, other than the jury is pleased to attribute to it.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Inference.]

5. EVIDENCE ⊜53—"PRESUMPTIONS OF LAW."
"Presumptions of law" are artificial rules, which have legal effect, independent of any belief, and stand in the place of proof until the contrary is shown.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presumption of Law.]

6. STREET RAILROADS ⊜91—SPEED ORDINANCE VIOLATION—EFFECT.
The violation of an ordinance limiting the speed of street cars is negligence per se, and it is proper for the court to announce the presumption of negligence.

7. MUNICIPAL CORPORATIONS ⊜122(2)—SPEED ORDINANCE—REASONABLENESS—BURDEN OF PROOF.
An ordinance regulating the speed of street cars is prima facie reasonable, and the burden is on those attacking to show its unreasonableness.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Harvey K. Benson against the Puget Sound Electric Railway, a corporation, and others. There was judgment for plaintiff, and defendants bring error. Affirmed.

James B. Howe and Hugh A. Tait, both of Seattle, Wash., for plaintiffs in error.

Griffin & Griffin, of Seattle, Wash., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and WOLVERTON, District Judge.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

WOLVERTON, District Judge. This action is one to recover damages for personal injuries alleged to have been sustained by Benson, the defendant in error (plaintiff below), who was at the time in the employ of the fire department of the city of Seattle. While driving a motor-propelled apparatus, known as a "water tower," belonging to the fire department, easterly along Connecticut street, an electric street car collided with it at the junction of First avenue, which runs at right angles with the above-named street, whereby the plaintiff received the injuries of which he complains. The water tower was at the time returning from, and not going to, a fire.

[1-3] The court was requested at the trial to instruct the jury that Ordinance No. 24597 of the city of Seattle was without application. The request was denied, and error is assigned. The ordinance provides:

"The following vehicles in the order named, shall have the right of way in the use of all streets and public places, viz., apparatus of the fire department, police patrol wagons, ambulances, responding to emergency calls, emergency repair wagons of the street railway companies, and U. S. mail wagons."

The question involved is one of construction. It is insisted that the words "responding to emergency calls" qualify the phrase "apparatus of the fire department," as well as "ambulances," and therefore that it is only when the apparatus of the fire department is responding to an emergency call that it is accorded the right of way under the ordinance.

The application of one of the simplest canons of statutory construction, namely, that "a limiting clause is to be restrained to the last antecedent, unless the subject-matter requires a different construction" (Cushing v. Worrick, 9 Gray [Mass.] 382, and Endlich on the Interpretation of Statutes, § 414), would seem to be decisive of the question. The last antecedent is "ambulances," and under this rule the qualifying clause refers thereto, and not to the antecedents preceding that. Nor does the subject-matter require a different construction. All alarms of fire are emergency calls, and police patrol wagons are brought into service whenever their use is thought to be convenient. So that the supposed qualifying words "responding to emergency calls" would seem to be redundant and useless as applying to these antecedents. They have a peculiar fitness, however, when applied to ambulances. When acting under emergency, it is essential that ambulances move swiftly, until the call has been attended to, without reference to the direction in which they are required to travel, whether to or from; hence the need of according them the right of way upon the streets until the emergency has been met. Otherwise, ambulances are to be afforded no greater privileges upon the streets than other vehicles. On the other hand, fire and police protection may depend as well upon prompt action in housing the fire apparatus and having patrol wagons convenient for any emergency, so that, whether the fire department or the police department is responding to one call or making ready to meet the exigencies of another, it is an act required for rendering prompt and proper fire or police protection, which is the essential purpose of the ordinance. Upon the whole, in

view of the context and of the grammatical construction and the plain purpose of the ordinance, it is clear that the clause "responding to emergency calls" was intended to qualify none of the antecedents except "ambulances." See, further, City of Traverse City v. Blair Twp., 190 Mich. 313, 322, 323, 157 N. W. 81. The use of commas is not controlling where the meaning is otherwise clear.

Whatever may be the true construction to be accorded rule 20, it does not affect the present inquiry. We agree, therefore, with the construction which the trial court gave to this ordinance.

A far more interesting and difficult question is one relating to the court's instruction respecting negligence, as it affected the defendants in the operation of the street car which collided with the water tower.

There is an ordinance which declares that it shall be lawful to operate cars upon street railways within the city limits at a rate of speed up to, but not in excess of, 20 miles per hour. As to the bearing of the ordinance, the court instructed as follows:

"Now, so far as those ordinances are concerned, ordinances of that character are not only for the convenience of the traveling public, but in part for their safety, and where a person violates an ordinance of the city, that is designed to render safe or more safe the lives and limbs of the traveling public, the person who violates such an ordinance is guilty of negligence. This instruction applies to both plaintiff and defendant in this particular case. * * * You understand that, so far as violating one of these ordinances, this ordinance regulating the rate of speed in the city is concerned, by violating that ordinance the city in effect says that it is negligent to run faster than 20 miles an hour, so you would not concern yourselves whether you think an ordinarily careful and prudent person would run faster than that in the city or not."

In connection with the instructions, the court advised the jury further that it was incumbent upon the plaintiff to "establish by a fair preponderance of the evidence that such negligence of the defendant was the proximate cause of his injury." It was left to the jury to say whether the car was being operated in excess of 20 miles per hour.

Thus is presented for our inquiry the question whether the operation of the street car in excess of the ordinance limitation as to speed, where it contributed as the proximate cause of the injury, was negligence per se. This, of course, assumes that the plaintiff was not himself guilty of contributory negligence.

It seems to be the opinion of counsel for the plaintiffs in error that the Supreme and federal courts of the United States are committed to a rule that the violation of a city ordinance regulating the speed of vehicles is evidence of negligence only, and does not constitute negligence as a matter of law. The only case cited that appears directly to support the rule as thus broadly stated is Erie R. Co. v. Farrell, 147 Fed. 220, 77 C. C. A. 446. In that case the trial court instructed the jury in effect to find upon the issue of negligence for the plaintiff, because the evidence was uncontradicted that the train of the defendant was moving in excess of the speed permitted by the city ordinance. The trial court also refused to instruct, at the request of the defendant:

"That the defendant's failure to comply with the ordinance did not in itself constitute conclusive proof of negligence, and that it was for the jury to say, in view of the situation and surroundings in that part of the city and all the circumstances, whether the failure to comply was negligence."

The Court of Appeals held this to be error, saying:

"The rule established by the weight of authority is that the violation of the ordinance is not conclusive evidence of negligence, but is to be submitted to the jury as a circumstance from which negligence may be inferred."

Referring to the case of Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, the trial court instructed that by reason of the railroad train moving in excess of the rate of speed forbidden by a city ordinance the law authorized the jury to infer negligence, "as one of the facts established by the proof." The Supreme Court after premising that it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by ordinance is negligence per se, says:

"But perhaps the better and more generally accepted rule is that such an act on the part of the railroad company is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence."

And, after citing authorities, concludes:

"At any rate, the charge of the court, in this particular, was not unfavorable to the defendant under the law."

It is plain that there was no decision on the direct question whether the running of a train in excess of the speed limitations of an ordinance was negligence per se. We have, however, an expression of the opinion of that court as to what is deemed the better rule. In Hayes v. Michigan Central R. R. Co., 111 U. S. 228, 240, 4 Sup. Ct. 369, 28 L. Ed. 410, the court distinctly holds that an action will lie for a breach of duty in failure to conform to the requirements of a city ordinance, and that such breach will be evidence of negligence. In this relation, the court further says:

"The duty is due, not to the city as a municipal body, but to the public, considered as composed of individual persons; and each person specially injured by the breach of the obligation is entitled to his individual compensation and to an action for its recovery."

As it respects a law of Congress, and the effect of a violation of its provisions, the court has spoken in no uncertain language. Having reference to the Safety Appliance Act (Comp. St. 1916, § 8605 et seq.), in St. Louis, Iron Mountain & Southern Ry. v. Taylor, 210 U. S. 281, 295, 28 Sup. Ct. 616, 621 (52 L. Ed. 1061), it has declared that:

"The obvious purpose of the Legislature was to supplant the qualified duty of the common law with an absolute duty deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the liability to make compensation to one who is injured by it."

That the violation of such an act would constitute negligence per se can hardly be questioned. The only distinction that can be drawn

between the effect of an act of Congress in that particular and the ordinance of a common council of a municipality is that the chances would be that, by reason of the larger experience of the members of Congress, Congress would promulgate more uniformly reasonable regulations. But presumptively the reasonableness of the regulations must obtain in either case until overcome by competent and pertinent inquiry. Thus we have about all there is of a rule of the federal courts as contended for by counsel.

When we turn to the state courts, we find their adjudications on the subject of discussion in hopeless discord. So that it is bootless to attempt to examine the accumulated mass of decisions pertaining thereto and deduce a rule by weight of authority. See the extended and exhaustive note to Sluder v. St. Louis Transit Co., 5 L. R. A. (N. S.) 187.

A more satisfactory result can be arrived at through examination of the subject on primary principles governing the effect of evidence.

[4] An inference is a permissible deduction which the jury is entitled to draw from the evidence. It has no legal probative effect other than the jury is pleased to attribute to it in a given case. Cogdell v. Railroad Co., 132 N. C. 852, 44 S. E. 618.

[5] Presumptions of law are artificial rules which have legal effect independent of any belief, and stand in the place of proof until the contrary is proven. Smith v. Asbell, 2 Strob. (N. C.) 141, 147.

Mr. Wigmore speaks of a presumption in its characteristic feature as—

"a rule of law laid down by the judge, and attaching to one evidentiary fact certain consequences as to the duty of the production of other evidence by the opponent." 4 Wigmore on Evidence, § 2491.

Later in the same section, the learned author says:

"Nevertheless, it must be kept in mind that the peculiar effect of a presumption 'of law' (that is, the real presumption) is merely to invoke a rule of law compelling the jury to reach the conclusion in the absence of evidence to the contrary from the opponent."

Comparing the two, the court, in Cogdell v. Railroad Co., supra, says:

"The presumption has a technical force of weight and the jury, in the absence of sufficient proof to overcome it, should find according to the presumption, but in the case of a mere inference there is no technical force attached to it. The jury, in the case of an inference, are at liberty to find the ultimate fact one way or the other as they may be impressed by the testimony. In the one case the law draws a conclusion from the state of the pleadings and evidence and in the other case the jury draw it. An inference is nothing more than a permissible deduction from the evidence, while a presumption is compulsory and cannot be disregarded by the jury."

[6, 7] Now, what should be the probative value of the circumstance of operating a street car in excess of a speed limit fixed by ordinance adopted for the benefit and protection of the public, where it is charged that the excessive operation of the car is an act of negligence causing injury to the person? Is the circumstance simply one from which, to be considered along with all the testimony in the case bearing upon the subject, the jury may or may not infer negligence,

or is it one of positive probative value, that will, prima facie and without else, support the charge of negligence? If, as is declared by the Supreme Court in Hayes v. Michigan Central R. R. Co., supra, the duty imposed by the municipality is one due to the public, which is the case in the present controversy, and the individual is accorded a right of action against a street car company for a breach of the obligation imposed by the ordinance, why does it not logically and necessarily follow that, when the breach is established—that is, when it is shown that the company has exceeded the limitation of speed fixed by the ordinance—a prima facie case of negligence is made out, and the burden is hence imposed upon the company to overcome the prima facie case? We think there is no escape from the conclusion that it does. If it does, then the fact of a violation of the speed limitation renders the company presumptively negligent, and the presumption is one of law for the court to declare. Being one of law, the violation is per se negligence.

Of, course, the burden is upon the one who alleges it to establish the fact that the speed limitation has been violated, and that is a matter primarily for the jury. But when it is established to their satisfaction, the presumption of negligence follows because of a breach of the obligation imposed by the ordinance. This is negligence per se. To attribute to such a state of the case the probative value of a mere inference from which the jury might or might not deduce negligence would be to destroy the efficacy of the ordinance. The case would stand as if there were no ordinance regulating speed, and the whole question would be relegated, as one of fact for the jury to determine, whether the street car company had exercised reasonable care and precaution in the running of its cars. It would be of little or no value to tell the jury that they should take into consideration the fact that the company had exceeded the speed limitations of the ordinance along with the other facts and circumstances of the case. Besides, it would put into the hands of the jury the power of invalidating the ordinance without any inquiry whatever on that subject.

We have said that the fact of a violation of the speed ordinance is prima facie sufficient to establish negligence. This prima facie case would obtain until overcome by competent proof to the contrary. The issue then arising would be this: The ordinance having been adopted by legal and competent authority, its reasonableness must be taken for granted until the contrary is shown. This would involve an attack upon the ordinance, and the burden would be cast upon those attacking it to show its unreasonableness in the particular assigned, and that because of that fact the provision was one beyond the power of the common council in the performance of its legislative functions to adopt. This was the course pursued in Erie R. Co. v. Weber, 207 Fed. 293, 125 C. C. A. 37.

We hold, therefore, that where a municipal ordinance limits the rate of speed for operating street cars upon the public streets of a city, and such ordinance is adopted for the benefit and protection of the public, it is negligence per se to operate a street car in excess of

such limitation as to speed. It follows that the court below did not err in giving the instructions complained of.

The only federal case that has been called to our attention really opposed to this view is Erie R. Co. v. Farrell, supra; but, with all deference to that able tribunal, we are persuaded that the rule here announced is the better and more logical.

Affirmed.

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HAGAN v. McNIEL.

In re SULPHUR SPRINGS LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. July 18, 1918.)

No. 1615.

1. BANKRUPTCY ⊂=467—REVIEW ON APPEAL—FINDINGS OF FACT.
A finding of fact by a referee, concurred in by the District Court, will not be reversed by the appellate court, unless clearly against the weight of evidence.

2. BANKRUPTCY ⊂=165(4)—VALIDITY OF LIENS—PRESENT CONSIDERATION.
Where a creditor holding an unrecorded lien, but with the right of immediate possession, gave up such right and took a mortgage within four months prior to bankruptcy of the debtor, such mortgage was valid, and not preferential, to the extent of the new consideration, which was the value of the property subject to the prior lien, which was surrendered.

Woods, Circuit Judge, dissenting.

Cross-appeals from the District Court of the United States for the Western District of Virginia; Henry Clay McDowell, Judge.

In the matter of the Sulphur Springs Lumber Company, bankrupt. Claim by Charles F. Hagan, trustee, opposed by W. D. McNiel, trustee in bankruptcy. Cross-appeals from order of District Court allowing claim in part as secured claim. Affirmed in part, and reversed in part.

C. V. Meredith, of Richmond, Va. (Pennington & Handy, of Bristol, Va., on the brief), for appellant and cross-appellee.

W. H. Bond, of Wise, Va. (Bond & Bruce, of Wise, Va., on the brief), for appellee and cross-appellant.

Before KNAPP and WOODS, Circuit Judges, and SMITH, District Judge.

SMITH, District Judge. This case comes up on two appeals from an order of the District Court made November 22, 1917. It appears that on the 10th of April, 1914, Charles F. Hagan, trustee, the appellant, sold and conveyed to Grover B. Bickley and R. Willard Cox all of the merchantable timber belting 36 inches and up in circumference 3 feet from the ground on certain tracts of land in Hunter's Valley, Va. The price of the timber, other than maple, beech, and gum, was $4 per thousand feet board measure, with lower prices for maple, beech, and gum. The purchase money was to be paid on each thousand feet as the same was sold, shipped, or disposed of. If the pur-

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

chasers failed to make payments for the lumber as sold or shipped, they were to have their customers make payments of the purchase money of the timber to People's National Bank of Gate City, out of which the bank should first pay the amounts due for the stumpage. The lumber was to be manufactured and stacked upon the grounds of Hagan, trustee, the appellant herein, which were to be furnished by him free of charge, and the purchasers agreed and bound themselves to keep sufficient lumber on the mill yard itself at all times to pay any arrears that might be due on the stumpage, and a lien was expressly retained on all the lumber manufactured sufficient to cover any amount which might become due to the said Hagan, trustee. The lumber yards were to be kept insured and the insurance made payable to Hagan, trustee. This contract of sale was not recorded. Bickley and Cox, the purchasers, put in a mill and railroad on the property of Hagan, and operated it under the name of Sulphur Springs Lumber Company. The purchasers failed to perform the contract, by failing to pay for much of the lumber the Sulphur Springs Lumber Company had shipped at the time of the shipment, and failed to have their customers turn over the purchase money, as had been agreed to the People's National Bank of Gate City. The purchasers being considerably in arrears on their payments, Hagan, trustee, took action to collect the amount due him, and orders were given to the Sulphur Springs Lumber Company, through Hagan's agents, that no further shipments of lumber would be permitted until settlement was made for the past-due payments, and threatened proceedings to enforce the lien and for a receiver. The lumber company thereupon suspended shipments, but tried to induce Hagan to forego the provisions of the contract.

After considerable negotiation between the attorneys of Hagan and Bickley and Cox a deed of trust was executed on October 9, 1916, which was so drawn as to secure whatever was already due and which might become due under the contract of 10th of April, 1914. This last deed of trust or mortgage was thereafter recorded. Three days before the expiration of four months from the time of the execution of this deed of trust certain creditors of the Sulphur Springs Lumber Company filed a petition for and obtained an adjudication in bankruptcy against the Sulphur Springs Lumber Company, a partnership composed of R. W. Cox and C. B. Bickley. Hagan, trustee, elected to file his claim in the proceeding, and surrendered whatever possession he had of the lumber in the hands of the Sulphur Springs Lumber Company at the time of the adjudication to the trustee in bankruptcy, and filed his claim in this matter as a secured claim against the lumber on the yards and the property embraced in the deed of trust of 9th of October, 1916. Thereupon objections were made to the allowance of the claim as a secured claim, both as to the lumber on the yards and as to the property conveyed by the deed of trust.

The referee held that the deed of trust executed on the 9th day of October, 1916, was ineffectual to give valid liens to the debts attempted to be secured, as having been executed within four months prior to the adjudication in bankruptcy; it being evident that the parties executing the deed of trust were insolvent at the time the deed of trust

was executed, and that Charles F. Hagan, trustee, and his attorney, had sufficient knowledge of such insolvency, and that the deed of trust would create a preference, to put them upon inquiry. The referee, however, held further that so much of the claim of Hagan, trustee, as was actually due and unpaid for the purchase price of the timber was good as a secured claim against the lumber and timber that actually went into the hands of the trustee in bankruptcy, upon the ground that this lumber was in the constructive, if not the actual, possession of the claimant, Charles F. Hagan, trustee, and that the lien reserved to him in the unrecorded deed of the 10th of April, 1914, was good as against the trustee in bankruptcy and the creditors of the bankrupts. Upon petition to the District Court in bankruptcy for the review of this finding of the referee, that court on the 22d of November, 1917, filed its order affirming the order and finding of the referee in bankruptcy.

The assignments of error in the appeal and cross-appeal practically raise three questions: First. Was there any sufficient knowledge of the insolvency of Bickley and Cox on the 9th day of October, 1916, in Charles F. Hagan, trustee, or his attorneys, as would render that deed of trust invalid as a preference under the terms of the bankruptcy statute? Second. Was there any new consideration, and, if so, how much, emanating from Charles F. Hagan, trustee, as consideration for the deed of trust or mortgage of the 9th of October, 1916, which would operate pro tanto as new valuable consideration and good and secured under that instrument? Third. If the deed of trust of the 9th of October, 1916, was invalid as a preference, and there was no new consideration emanating from Hagan, trustee, which would operate to make it valid pro tanto, was Hagan, trustee, entitled as in possession of the lumber and timber stacked on the premises to assert a lien or claim thereon under the terms of the unrecorded contract of sale dated 10th of April, 1914?

[1] The referee has found upon the testimony that Bickley and Cox were insolvent at the time of the execution of the deed of trust of the 9th of October, 1916, and has further found under the testimony that both Charles P. Hagan, trustee, and his attorney had sufficient knowledge of the insolvency and that the deed of trust would create a preference to put them on inquiry at that date. This conclusion of fact has been concurred in by the District Judge. This court does not find that such conclusion is clearly against the weight of the evidence, but, on the contrary, it appears that there is sufficient evidence to sustain it, and it should not therefore be disturbed.

[2] The second question involves a more serious question of law. Under the agreement of 10th of April, 1914, Hagan, trustee, was to be paid for the timber as each 1,000 feet was sold, shipped, or disposed of, and the purchasers agreed also to keep sufficient lumber on the mill yard at all times to pay any arrears that might be due on the stumpage, and that the vendor, Hagan, trustee, should retain a lien on any and all lumber manufactured sufficient to cover any amount which might be due him. In October, 1916, there was a large amount due Hagan for timber shipped and disposed of, and

Hagan was about to institute proceedings for a receivership and to procure payment of it. If Hagan, trustee, had instituted his proceedings then and seized, he could have taken possession at once, under the terms of his contract, of all the lumber that was in the yards. Under the urgency of the bankrupts not to take proceedings, but to give them more time, Hagan, trustee, forebore this right of his, and gave up the immediate rights against the lumber then stacked in the yards, in consideration of receiving the deed of trust or mortgage of 9th of October, 1916. Under subsection 67d of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 564 [Comp. St. 1916, § 9651]), where a lien is given and accepted in good faith for a present consideration under a deed which would operate as a preference under other circumstances, it is not affected as being invalid as a preference to the extent of such present consideration.

The question, therefore, is whether the giving up of this present right of procedure and enforcing payment which was then possessed by Hagan, trustee, in order to enable the bankrupts to continue on, constituted such a present consideration as pro tanto would be valid. The general rule is that a present consideration does not necessarily consist of money. It may consist of the substitution of one security for another, or the giving up of value which could have been secured at the time for a postponement. If Hagan had enforced his debt at the time, there is nothing in the evidence to show that he could not at once have seized, sold, and realized upon the lumber on the yards to pay the past debt for stumpage due him. This constituted a liquid or easily realizable asset which he had the then present right of realizing upon. This present right of enforcement he gave up, and accepted notes which postponed his right of present payment to practically five months after the date of the mortgage. Under these circumstances it would appear that there was a present consideration for the mortgage or deed of trust dated 9th of October, 1916, to the extent of $12,552.87, which appears from the testimony to have been the value of the lumber on the yards on 9th of October, 1916, and which Hagan, trustee, relying upon the substituted security of the deed of the 9th of October, 1916, allowed to be shipped away and the proceeds used by Bickley and Cox or the Sulphur Springs Lumber Company.

With regard to the manufactured lumber on hand at the time of the appointment of the trustee, the referee below found that the lumber on hand at the time of the appointment of the trustee in bankruptcy and the filing of the petition in bankruptcy herein was in fact manufactured and stacked on the lands of Charles F. Hagan, trustee, and that under the law of Virginia, where a lien is given on personal property and possession of the property is delivered to or acquired by the lienholder, the lien is good and can be enforced against other creditors, even though the instrument creating the lien was not recorded.

The referee finds that the lumber had been placed at least in the constructive, if not the actual, possession of Charles F. Hagan, trustee, and therefore the lien given in the contract of April 10, 1914,

was good against the trustee in bankruptcy and the creditors, even though the same was not recorded. This finding of the referee has been affirmed by the presiding judge below, and depends substantially upon the question of whether or not the lumber stacked was in the possession of Charles F. Hagan, trustee; and this conclusion of fact having been found by the referee and the District Judge below, this court sees no reason in the testimony for disturbing it. In the opinion of the court, therefore, the learned District Judge below erred in not finding that there was present consideration at the time of the execution of the deed of trust of 9th of October, 1916, to the extent of the value of the lumber then on the land which could have been seized and sold by the appellant, Charles F. Hagan, trustee, and that in all other respects the decree below should be affirmed.

Modified.

WOODS, Circuit Judge (dissenting). Having a strong conviction that the deed of trust given by the bankrupts, Bickley & Cox, copartners doing business as Sulphur Springs Lumber Company, to Hagan, trustee, was invalid under the bankrupt statute, I am constrained to dissent on that point. On April 10, 1914, Hagan, trustee, sold to Sulphur Springs Lumber Company the merchantable timber on the tract of land described in the contract. The purchase money, represented by a fixed price per thousand feet as the lumber was manufactured, was to be paid on each thousand feet as it was sold. If the purchaser failed to pay as the lumber was sold or disposed of, it was to have the persons to whom it sold to pay the purchase money to a bank, and out of such payments the bank was to first pay the amounts due Hagan, trustee. The lumber was to be manufactured and stacked upon the ground of Hagan, trustee, and lumber of sufficient value was to be kept there to pay any arrears due to Hagan. A lien was retained on all the manufactured lumber sufficient to cover any amount which might become due to Hagan. The purchaser, Sulphur Springs Lumber Company, failed to pay for much of the lumber as it was shipped, and failed to have the purchasers from it turn over the purchase money to the bank as agreed. Thereupon Hagan, trustee, forbade the further shipments until settlement should be made for the amounts due, and threatened to take proceedings to enforce his lien and have a receiver appointed. To relieve its embarrassment, the Sulphur Springs Lumber Company gave to Hagan, trustee, the deed of trust here involved to secure all arrears under the contract and such sums as might thereafter become due. Within four months thereafter the Sulphur Springs Lumber Company was thrown into bankruptcy. The District Court held that Hagan had notice of its impending insolvency when the deed of trust was taken, and that, therefore, it was invalid as a preference under the Bankruptcy Act.

The majority of this court, while agreeing that the deed of trust was taken by Hagan with notice of the insolvency of the debtors, nevertheless holds that there was a present valuable consideration for the deed of trust, and that therefore it constituted a valid lien upon the property which it covered. This present consideration, as stated

by the majority, was the giving up by Hagan, trustee, of the right to seize the lumber then in the yard, and the giving to the debtor additional time in which to make payment. No case has been cited, and I think none can be found, in which the mere extension of an antecedent debt has been held to be such a present consideration as to make a preference valid. The statement that Hagan, trustee, surrendered his right to seize the lumber then on the yard is based entirely upon his oral testimony to the effect that he agreed to allow the Sulphur Springs Lumber Company to ship the lumber without making the payments in accordance with the original contract of sale. This statement of his agreement is in square contradiction of the following provision of the deed of trust:

"It is further expressly agreed and understood that this deed of trust shall in no way affect the rights of the said Charles F. Hagan, trustee, under said contract of April 10, 1914, and the provisions contained therein, and the lien given thereby upon the manufactured lumber, nor is it intended in any way to modify the provisions of said contract, but only to give additional security to the said Hagan for said debt, and all the provisions and obligations contained in said contract and the rights of said Hagan thereunder shall remain the same as if this contract had not been entered into, nor shall the execution of notes for any stumpage due at any time, and time extended for payment, affect the rights of said Hagan or be treated as a novation of said debt for stumpage, nor the right to enforce payment if said contract is violated by failure to keep sufficient lumber on hand to secure said Hagan as provided in said contract or for any other cause."

It is true that a consideration in addition to that expressed in a deed may be proved by parol. That, however, is not the question, nor the difficulty which confronts the creditor. Had nothing more appeared than that a trust deed of land was taken expressing merely that it was taken as additional security, and the creditor had testified that as an additional consideration he had agreed in writing to release the lumber held under his previous contract, there would be no legal difficulty in holding the parol evidence sufficient to prove an agreement to release the lumber. But here the parol evidence is completely destroyed by the express terms of the deed of trust itself. The parol testimony is that the debtor, in consideration of the trust deed, was released from the obligation to keep sufficient lumber on hand to pay the debt. The trust deed expressly stipulated that it should not have that effect, that it should be only an additional security, that the original contract should remain in full force, that the rights of the creditor to enforce it should remain as if the trust deed had not been executed, and that the failure to keep sufficient lumber on hand to secure the creditor would be a violation of it. To allow the creditor, after disaster comes, to destroy the effect of a clear and express provision of the contract by merely testifying that the real contract was exactly the contrary of that explicitly expressed in the writing, is, in effect, to erase from the deed of trust one of its stipulations in favor of the creditor and to substitute in its stead the creditor's parol evidence of what he agreed to.

The fact that the creditor afterwards chose to waive his rights under either or both the written contracts could not relate back, and give either of them an effect contrary to its terms. I think the decree of the District Court should be affirmed.

In re GERMAN SAVINGS & LOAN ASS'N.

NATIONAL BANK OF KENTUCKY v. REEDER.

(Circuit Court of Appeals, Seventh Circuit. April 9, 1918.)

Nos. 2380–2384, 2386, 2392.

1. CORPORATIONS ⟸370(3)—POWERS—AUTHORITY.
A corporation has only those powers that are expressly given and such others as are necessary to the exercise of the named powers.

2. BUILDING AND LOAN ASSOCIATIONS ⟸24—NEGOTIABLE SECURITY—ISSUANCE.
While a building and loan association, which may be characterized as a corporate partnership, may incur debts to carry out its express powers, and of course may give a written acknowledgment thereof, such an association is not authorized, as in the case of other corporations, to issue negotiable bonds, etc.

3. BANKRUPTCY ⟸340—CLAIMS—FRAUD.
A claimant, relying on certificates of indebtedness issued by a building and loan association, must show that he was a purchaser in good faith for value, in order to have his claim allowed; it appearing that the certificates were fraudulently issued and the association received no consideration.

4. BANKRUPTCY ⟸340—CLAIMS—EVIDENCE.
Mere proof of possession of certificates of indebtedness of a building and loan association, which were fraudulently issued and for which the association received no consideration, is not sufficient to show that claimants were good-faith purchasers for value.

5. BUILDING AND LOAN ASSOCIATIONS ⟸40—CERTIFICATES OF INDEBTEDNESS—GOOD-FAITH PURCHASERS.
Where the secretary and general manager of a building and loan association delivered certificates of indebtedness of the association payable to bearer to secure his personal debts, *held*, that persons so receiving them could not be deemed good-faith purchasers for value.

Appeals from the District Court of the United States for the District of Indiana.

In the matter of the bankruptcy of the German Savings & Loan Association. The claims of the National Bank of Kentucky and others were disallowed on objection of Levi N. Reeder, trustee in bankruptcy, and claimants appeal. Affirmed.

William W. Crawford and Keith L. Bullitt, both of Louisville, Ky., for appellants.

Evan B. Stotsenburg, of New Albany, Ind., and Henry Hornbrook, of Indianapolis, Ind., for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

BAKER, Circuit Judge. For many years the bankrupt, organized as a building and loan association under a statute of Indiana, conducted its affairs in the usual and prescribed way. Later, under a resolution of the board of directors, certificates of indebtedness, having the face characteristics of general corporation negotiable bonds, payable to bearer ten years after date, were directed to be signed by the president and

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the secretary and to be issued at par by the secretary as the managing officer.

In the bankruptcy court all claims that were based on such certificates, wherein the money had reached the bankrupt, were allowed. No money ever came to the bankrupt from the certificates presented by appellants, and their claims were disallowed. In all these appeals but one the certificates were received by the holders from the hands of the secretary as collateral security for his alleged debts, and in that one the manner of obtaining possession is not shown. The secretary had simply embezzled these certificates and applied them to his own use.

**[1, 2]** 1. When the bankrupt was organized, the Indiana statute gave building and loan associations only the powers that are commonly known as characteristic of enterprises of that class: To have members who severally take one or more shares of "stock" of a fixed face value; to collect small monthly payments on the stock during a term of years; to levy fines for failure to pay promptly; to loan to members, as moneys accumulate, sums equal to the face of the borrowers' shares; to charge interest that would be usurious between strangers; to charge premiums in addition to interest on the loans; to apportion the net earnings to the stock; to cancel the principal of a borrowing member's indebtedness, the interest and premium charges having been kept up, by canceling his stock when his monthly payments on stock, together with his apportionment of earnings, equal the face value of his stock; and to pay or incur the expenses of conducting that business. Money was to come in only from members in the way of dues, fines, interest, and premiums; was to go out, except for operating expenses, only to members in the form of loans.

If a corporation is to be treated as having a natural person's freedom of action in all directions except those prohibited, it would be senseless for a Legislature to enumerate granted powers; it would be necessary only to list the prohibitions. But the fundamental principle is the converse. A corporation has only the powers that are expressly named and such others as are necessary to the exercise of the named powers. Silence is itself a prohibition. For if a particular power is necessary to the exercise of a named power, it by that necessity becomes itself a named power.

Indiana had various separate incorporation statutes, railroad, mining, manufacturing, commercial, etc. These corporations as a rule were given express authority to bundle up their credits in the form of negotiable bonds and sell them in the money markets. But building and loan associations were not; and the members of this bankrupt association did not themselves undertake to exercise the ungranted power. Are they and the creditors whose money or property actually went into the association bound by the recited actions of the directors and officers? Not unless the power to sell the association's credit by floating negotiable bonds was necessary to the exercise of some granted power.

Building and loan associations have been well characterized as "corporate partnerships." Towle v. American B. & L. Society (C. C.) 61 Fed. 446; Security Ass'n v. Elbert, 153 Ind. 198, 54 N. E. 753. Because the business of such a corporate partnership is confined to its

own members, because a borrowing member is also a lender, interest and premium charges are allowed which would be unlawful between strangers. The dual character of a member eliminates the matter of usury, because until his "stock" matures no one can figure what his loan has cost him. As a matter of common information we know that stocks and bonds of such corporations are not issued, listed, and bought and sold in the exchanges and money markets. To raise capital by floating negotiable securities is counter to the genius of these mutual associations.

Undoubtedly a building and loan association has the implied power to use its credit to the extent necessary to carry out its express powers. It may incur debts for furniture, office supplies, rent, wages, and salaries of employés, and the like. Having incurred a debt, it may of course give a written acknowledgment and promise to pay. But the recovery in such a case should be limited to the debt, and not be based upon the negotiable form of the promise to pay. Towle v. American B. & L. Ass'n (C. C.) 78 Fed. 688; Standard Savings & L. Ass'n v. Aldrich, 163 Fed. 216, 89 C. C. A. 646, 20 L. R. A. (N. S.) 393; Marion Trust Co. v. Crescent Loan Co., 27 Ind. App. 451, 61 N. E. 688, 87 Am. St. Rep. 257; North Hudson Loan Ass'n v. Hudson First National Bank, 79 Wis. 31, 47 N. W. 300, 11 L. R. A. 845.

[3, 4] 2. By the trustee's pleaded and proven objections to the allowance of the claims on the ground that the issuance of the certificates to the claimants originated in fraud and that the bankrupt had received no consideration therefor, the burden was cast upon the claimants to prove that they were good-faith purchasers for value. They merely proved possession of the certificates. That was not enough. Smith v. Sac County, 78 U. S. (11 Wall.) 139, 20 L. Ed. 102; Stewart v. Lansing, 104 U. S. 505, 26 L. Ed. 866; Thompson v. Sioux Falls National Bank, 150 U. S. 231, 14 Sup. Ct. 94, 37 L. Ed. 1063; Mills v. Keep (D. C.) 197 Fed. 360; McNight v. Parsons, 136 Iowa, 395, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665.

[5] 3. What evidence there is tends to prove that the claimants were not good-faith purchasers. Pfau, secretary and general manager of the bankrupt, went to the various places of business of the claimants and offered them the bankrupt's certificates, payable to bearer, as security for his personal debts. True, Pfau was the bearer; but each certificate was itself also a bearer—bearer of information that Pfau was the agent to act in the bankrupt's interest. It was not to the bankrupt's interest to pay or secure Pfau's debts. This self-evident collision of Pfau's personal interest with his official duty should have put the claimants on guard. West St. Louis Bank v. Shawnee Co. Bank, 95 U. S. 557, 24 L. Ed. 490; Moores v. Citizens' National Bank, 111 U. S. 156, 4 Sup. Ct. 345, 28 L. Ed. 385; Western Bank v. Armstrong, 152 U. S. 346, 14 Sup. Ct. 572, 38 L. Ed. 470; Germania Vault & Trust Co. v. Boynton, 71 Fed. 797, 19 C. C. A. 118; Park Hotel Co. v. Fourth National Bank, 86 Fed. 742, 30 C. C. A. 409; Lamson v. Beard, 94 Fed. 30, 36 C. C. A. 56, 45 L. R. A. 822; Board

of Education v. Sinton, 41 Ohio St. 504; Garrard v. Pittsburgh, etc. Ry. Co., 29 Pa. 154.

In each case the decree is affirmed.

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## RAWLS v. PENN MUT. LIFE INS. CO. OF PHILADELPHIA.*

(Circuit Court of Appeals, Fifth Circuit. October 21, 1918.)

No. 3072.

1. INSURANCE ⟸586—LIFE INSURANCE—VESTED RIGHTS OF BENEFICIARY.
Where a life policy reserved to insured right to change beneficiary, and insured, having defaulted, secured a loan on the policies to pay premiums, with the result, on the subsequent default, the automatic extended term insurance, to which the reserve was devoted, expired before the insured's death, the beneficiary cannot recover, on the theory her rights were vested, etc., for, if the insured could wholly destroy such rights by changing beneficiaries, he might do so indirectly.

2. BANKRUPTCY ⟸143(12)—INSURANCE POLICIES.
Where life policy reserved to insured right to change beneficiary, his creditors, on bankruptcy, may claim the cash surrender value.

Batts, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Suit by Edna M. Rawls against the Penn Mutual Life Insurance Company of Philadelphia on two life insurance policies. From a judgment rejecting her demands, she prosecutes this writ of error. Affirmed.

John S. Maxwell and Geo. C. Bedell, both of Jacksonville, Fla., for plaintiff in error.

W. M. Bostwick, Jr., Lake Jones, and Maynard Ramsey, all of Jacksonville, Fla., for defendant in error.

Before BATTS, Circuit Judge, and JACK and EVANS, District Judges.

JACK, District Judge. The plaintiff in error, as beneficiary, sued the defendant on two policies of insurance, for $7,000 and $3,000, respectively, issued on the life of her husband.

The premiums due for the year 1910 were not paid, and the insured failed to exercise within the time limit any of the options provided in such event, and the policies consequently lapsed. Several months later, however, without any new examination, the policies were reinstated and the premiums receipted for. The premiums were not paid in cash, but in two separate certificates executed by the insured, in each of which he acknowledged a loan and stipulated a lien on the respective policies to cover same. The amount borrowed on the $3,000 policy was just sufficient to pay the premium due. The amount borrowed on the $7,000 policy was sufficient to pay the premium due on the policy and that due on another policy not involved in this litigation.

The following year the insured paid neither the loans nor the new

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*Rehearing denied February 1, 1919.

premiums, and again the policies lapsed. Under the terms of the contract, the company deducted from the cash surrender value of the policies the amount of the indebtedness against each, and with the remainder purchased for him term insurance, as provided in both policies. This term insurance, or period of extension, as to each, expired long prior to the date of the death of the insured. Had the insured paid the 1910 premiums in cash, instead of executing this certificate of indebtedness on the policies to cover the premiums, the cash surrender value when the 1911 premiums fell due would have purchased paid-up term insurance for a period of time extending beyond the date of the death of the insured, or had he not paid the premiums or executed the certificates and liens in 1910, but allowed the policies then to remain lapsed, the cash value at that time would still have purchased term insurance extending beyond the date of the death of the insured. This is what the plaintiff claimed should have been done.

She denies the right of the insured to assign or incumber with any lien the policies without her consent, she being the beneficiary, claiming a vested right, and she contends that, when the policies lapsed in 1910 and the insured failed to exercise any of the options granted him under the terms of the policies, she automatically acquired such paid-up term insurance.

[1, 2] These contentions might have been sound, had the policies been ordinary life contracts; but it was plainly stated in the policies that the insured reserved the right to change the beneficiary. Thus, as was held by this court in the case of Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144, the beneficiary acquired only a contingent interest, subject to be extinguished at any time by the insured.

While admitting the right of the insured to change at will the beneficiary, she denies his right to create a lien on the policies without her consent. It would seem that the greater right included the lesser. If the insured could have changed the beneficiary to another person, or even to his own estate, he could have assigned or incumbered the policies to secure a loan. An assignment, in fact, to secure a debt greater than the face of the policies, would have been, in effect, a change in the beneficiary, which the policies specifically give the insured the right to make. The beneficiary could not complain if her rights had been entirely blotted out by such an assignment, and she should not be heard to complain when her rights are only partially affected by the act of the insured. Certainly she had little cause to complain when the very purpose of the loans was to prevent the lapsing of the policies, and thus preserve her rights, and the case is not affected by the remarkable circumstance that the policies would have been in force under the automatic term extension insurance clause of the contracts at the time of her husband's death, had he not borrowed the money to pay the premiums and prevented their lapse in 1910.

The cash surrender value of the policies at the time of the default in payment of the premiums in 1910, or at the time of the second default in 1911, could have been claimed by the creditors of the insured, had he then been in bankruptcy. Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144; In re Bonvillain (D. C.) 232 Fed. 370; Bonvillain v.

Howell, 237 Fed. 1015, 150 C. C. A. 660; In re Herr (D. C.) 182 Fed. 716; In re Jamison Bros. & Co. (D. C.) 222 Fed. 92; In re Shoemaker (D. C.) 225 Fed. 329. Consequently he could voluntarily have assigned the policies to his creditors, and, if he could have assigned the policies to all of his creditors through a trustee in bankruptcy, there is no good reason why he could not have assigned them to one particular creditor, the insurance company itself.

The insured at all times prior to his death had complete domination and control of the policies by reason of his reserved right at any time to change the beneficiary. As was well said by the Court of Appeals, Sixth Circuit, in the case of Mutual Ben. Life Ins. Co. v. Swett, 222 Fed. 204, 137 C. C. A. 644, Ann. Cas. 1917B, 298:

"As the policy to Swett stipulated that he might, on his written request of the company for its appropriate indorsement on the policy, change the beneficiary, his wife did not acquire a permanent or vested interest in it. The existence of such an interest during her husband's lifetime was made impossible by the control over the contract of insurance given to him, independent of her will. Her right was inchoate, a mere expectancy during his lifetime, dependent on the will and pleasure of her husband as holder of the policy, and could not vest until his death happened with the policy unchanged. His control over the policy was, subject to its items, as complete as if he himself had been the beneficiary."

The insured clearly might have changed the beneficiary to himself, or to his estate, without the consent of, or even notice to, the beneficiary, and might then have made the assignment, or granted the lien to the company, and thereafter reinstated his wife as beneficiary. Had he gone through this circumlocution, her interest would undoubtedly thereby have been made subject to the assignment. What he might have done by indirection and circumlocution, he had the right to do by direct action.

The judgment is affirmed, with costs.

BATTS, Circuit Judge (dissenting). I cannot concur in the conclusion reached by my Brethren.

Under the policy the insured had the right to change the beneficiary in the way and under the conditions named by the policy. He also had the right, upon a proper assignment of the policy, to receive a loan. If the beneficiary, his wife, had an interest in the policy, the policy was not assigned, because that interest was not assigned. The interest of the wife was the same as in an ordinary policy, except that it was subject to be defeated by the act of the husband in making a change of beneficiary under the conditions and in the manner provided by the policy. This power was not exercised by the husband, and his execution of an instrument declaring a lien on the policy did not affect the rights of the wife.

These views are sustained by the courts of a number of the states: South Carolina: Deal v. Deal, 87 S. C. 395, 69 S. E. 886, Ann. Cas. 1912B, 1142; Indiana: Indiana Life Ins. Co. v. McGinnis, 180 Ind. 9, 101 N. E. 289, 45 L. R. A. (N. S.) 192; Massachusetts: Tyler v. Treas., etc., 226 Mass. 306, 115 N. E. 300, L. R. A. 1917D, 633; New Jersey: Sullivan v. Maroney, 76 N. J. Eq. 104, 73 Atl. 842; Colorado:

Johnson v. Insurance Co., 56 Colo. 178, 138 Pac. 414, L. R. A. 1916A, 868. Cases from Kentucky and Texas are apparently to the contrary. There are also cited as in conflict, cases with reference to certificates of benefit societies, where the rights of the parties are regulated by the rules of the societies, and bankruptcy cases, where the policy is treated as a part of the estate, because the bankrupt is in position to make the cash value of the policy available for his creditors.

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## GREENBURG et al. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 29, 1918. Rehearing Denied November 1, 1918.)

No. 2563.

1. CRIMINAL LAW ⟸1167(2)—AFFIRMANCE—INDICTMENTS.
   A general conviction on several counts will not be disturbed, because of defects in some of the counts, where there is one good count.
2. BURGLARY ⟸18—THEFTS OF INTERSTATE FREIGHT—INDICTMENT.
   An indictment charging that defendants, in violation of Comp. St. 1916, § 8603, unlawfully broke the seals on a car containing an interstate shipment, in transit from North Carolina to Peoria, in Illinois, etc., and Kansas City, in Missouri, which car was then and there in the possession of the Southern Railway Company, etc., is not defective; the use of the word "there," in connection with the railroad company, not rendering the indictment a mere charge of theft from a car in Kansas City, Mo.
3. CRIMINAL LAW ⟸878(4)—VERDICT—REPUGNANCY.
   Where defendants were convicted of violating Comp. St. 1916, § 8603, under indictments charging, in various counts, that they broke the seal of a box car containing an interstate shipment, that they entered the car, that they stole therefrom, and that they had possession of the stolen property, the verdict was not repugnant, on the theory that a conviction on the last count was inconsistent with conviction on the other counts.
4. BURGLARY ⟸41(1)—THEFT FROM INTERSTATE CARS.
   In a prosecution under Comp. St. 1916, § 8603, for breaking the seal of a car containing interstate shipments and entering and stealing therefrom, etc., evidence *held* to support the conviction.

In Error to the District Court of the United States for the Eastern District of Illinois.

Max Greenburg and others were convicted of violating Comp. St. 1916, § 8603, and they bring error. Affirmed.

Plaintiffs in error were tried and convicted on eight counts of an indictment charging violations of section 8603, U. S. Comp. St. 1916. Each was sentenced to serve five years in the penitentiary, and to pay the costs of prosecution.

William S. Forrest, of Chicago, Ill., and R. Allan Stephens, of Danville, Ill., for plaintiffs in error.

Charles A. Karch, of E. St. Louis, Ill., and McCauley Baird, of Olney, Ill.. for defendant in error.

Before KOHLSAAT and EVANS, Circuit Judges, and LANDIS, District Judge.

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EVAN A. EVANS, Circuit Judge. [1] The conviction on the first four counts of the indictment is especially attacked because the evidence fails to support the charge. While not admitting the correctness of this position, the government, relying on Powers v. United States, 223 U. S. 303, 32 Sup. Ct. 281, 56 L. Ed. 448 (holding that one good count is sufficient to warrant affirmance, where the conviction is a general one, as here), asserts that the last four counts are free from successful attack, and each of them affords support for the judgment pronounced in this case. Our attention can therefore be directed to the last four counts, one of which, No. 5, is herewith set forth (paragraphing and italics taken from brief of plaintiffs in error).

Barring allegations which set forth the names of the plaintiffs in error and the time of the offense, the indictment proceeds:

Count 5.

Par.

1 in the county of St. Clair, in the state of Illinois, in the Eastern District aforesaid and within the jurisdiction of said court,

2 did unlawfully and feloniously break the seal of a certain railroad car then and *there* bearing the name and number, to wit: "Southern 38005."

3 which said car then and *there* contained an interstate shipment of freight, to wit: A large quantity of cigarettes,

4 then and *there* consigned and in transit from Winston-Salem, in the state of North Carolina, to Paris, and Peoria, in the state of Illinois, and Bagnell, Saint Louis, and Kansas City, in State of Missouri,

5 which said railroad car was then and *there* in the possession of the Southern Railway Company, a corporation and common carrier then and there being,

6 with the unlawful and felonious intent then and *there* in them, the said [here naming all the defendants] and each of them, to then and *there* commit larceny in said car.

As to the last four counts of the indictment, plaintiffs in error contend: (a) That each count of the indictment fails to state an offense of which the court had jurisdiction. (b) That the evidence fails to support a conviction on any one of said counts. (c) That the court erred in its charge to the jury. (d) That the verdict is repugnant due to the fact that the plaintiffs in error are found guilty on each of the counts in the indictment, whereas the eighth count is repugnant to each of the other counts.

[2] The attack upon the sufficiency of the indictment to set forth a crime arises out of the use of the word "there" in the fifth paragraph quoted above, it being plaintiff's contention that this word refers to Kansas City, Mo. In other words, it is claimed that the government charged the plaintiffs in error with having stolen a large quantity of cigarettes from a box car in Kansas City, Mo.

As we construe this count and the others similarly worded, so far as the use of the word "there" is concerned, we unhesitatingly conclude that the government charged the plaintiffs in error with unlawfully breaking the seal of a box car located in the county of St. Clair, state of Illinois; that paragraphs 3 and 5 refer back to paragraphs 1 and 2, and contain descriptive clauses modifying the car referred to in paragraph 2. So construed, the indictment is sufficient.

[3] The contention that the verdict is repugnant for the reason that a conviction on count 8 is necessarily inconsistent with a conviction on counts 5, 6, and 7, must fail for want of support in fact. Count 5 charges plaintiffs in error with breaking the seal of a box car; count 6 charges these same parties with entering the box car with intent to steal; while count 7 charges them with having stolen cigarettes from the box car. Count 8, which it is claimed is inconsistent with the other three, charges plaintiffs in error with having in their possession a large quantity of cigarettes. It is quite apparent to us that count 8 is in no way inconsistent with either count 5 or count 6, and it is therefore not even necessary to consider the asserted repugnancy between counts 8 and 7. There being two perfectly good counts, either one of which is sufficient to support the sentence, this assignment of error must be overruled.

We conclude the evidence supports the verdict.

[4] Plaintiffs in error did not testify in their own behalf. The testimony introduced by the government clearly justified the jury in finding: That there was a shipment of cigarettes of the Camel brand from North Carolina to Peoria, Ill.; that the car containing such shipment arrived in East St. Louis on June 9, 1917, seal intact, was there duly checked and found undisturbed; that such car remained in East St. Louis until June 16, 1917, when a new check was made, disclosing a cut seal and a shortage of same 32 cases of cigarettes; that on the night of June 9th or 10th, plaintiffs in error, who made a practice of breaking into box cars and stealing therefrom, selling the loot, and dividing the spoils, broke into several box cars in the yards wherein the car in question was located, and took therefrom many cases of cigarettes, also of the Camel brand, which were later sold to a retailer.

It further appears from the record that this car seal was identified as $\frac{\text{R J R}}{6}$, while the witness who testified against his co-conspirators described the seal of the car that was entered as being $\frac{\text{R J}}{6}$. This discrepancy in the identification of the seal hardly justifies the argument of the counsel that the testimony affirmatively and conclusively establishes the innocence of his clients. The similarity in the identification marks suggests a corroboration of the witness' other testimony rather than a negation thereof. Taken altogether, the evidence presented a jury question.

The contention that the evidence fails to show the car was routed as shown in count 5 must also be rejected. The undisputed facts, and such inferences as legitimately flow therefrom, amply justified the jury in finding the car traveled the route charged in the indictment.

The criticism of the charge to the jury is predicated upon a false assumption of fact.

Our failure to consider the first four counts of the indictment should not be construed as indicative of an opinion that the plaintiffs in error were not guilty of the crimes therein charged. Likewise it should not be assumed that we consider a conviction on count 8 as repugnant to

a finding of guilty on count 7. It is simply unnecessary to consider these questions in order to affirm the judgment.

The judgment is affirmed.

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## BRIDGETON NAT. BANK v. WAY.

In re SEELEY.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1651.

1. BANKRUTCY ⊂=440—REVIEW—APPEALS.
   Appeal is the proper remedy to review an order in bankruptcy, setting aside a deed as a voidable preference.
2. BANKRUPTCY ⊂=173—CASHIER—KNOWLEDGE.
   Though the president and cashier of a national bank were officers of a corporation holding notes of the bankrupt secured by a deed of trust, which was found voidable as a preference, *held*, that the evidence was insufficient to charge the bank, which discounted the notes before bankruptcy, with knowledge of the bankrupt's insolvency.
3. BANKRUPTCY ⊂=173—HOLDER FOR VALUE—DISCOUNTING BANK.
   A bank, which discounted for a customer notes secured by a deed of trust before the maker's bankruptcy, *held* not a holder for value, entitled to enforce the deed of trust, which was voidable between the parties as a preference.
4. BANKRUPTCY ⊂=11—COURTS OF—COURTS OF EQUITY.
   A court of bankruptcy is a court of equity.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk, in bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the bankruptcy of August Scriber Seeley. Petition by the Norfolk Manure Company, in which Luther B. Way, trustee in bankruptcy, joined, praying that a deed of trust be declared a voidable preference. The referee having set aside the deed of trust, the Bridgeton National Bank filed a petition for review, and the matter was sent back to the referee. A second order setting aside the deed of trust was affirmed on review, and the Bank appeals. Affirmed.

See, also, 253 Fed. 41, —— C. C. A. ——.

G. R. Swink, of Norfolk, Va., for appellant.

J. D. Hank, Jr., of Richmond, Va., for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. On December 5, 1916, less than four months prior to his voluntary adjudication, the bankrupt executed a deed of trust on certain personal property to secure notes amounting to $1,500 given by him about that time to one of his creditors, the Kiltone Company, for an antecedent debt. A few days after the adjudication, the receiver of the Norfolk Manure Company filed a petition with the referee, alleging in substance that the property in question belonged to that company, but, if held to belong to the bankrupt's

estate, that the deed of trust should be set aside as a voidable preference. The trustee set up in answer that the property came to him from the bankrupt, who had been in possession of it under the terms of the trust deed, and that it belonged to the bankrupt's estate; but he joined with the receiver in asking that the deed of trust be declared a voidable preference. By consent of all parties the property was sold and the proceeds brought into court. In the bankrupt's schedules the Kiltone Company was listed as a creditor for $1,500, evidenced by two notes secured by deed of trust, and that company appears to have been represented at the first hearing on the receiver's petition. The referee's order set aside the deed of trust, and directed the trustee to administer the proceeds of the property as assets of the bankkrupt's estate.

Thereupon the appellant, Bridgeton National Bank, which had not before appeared in the proceeding, filed a petition for review, alleging that it was the holder for value and without notice of the notes given to the Kiltone Company. The District Court sent the matter back to the referee, with instructions to allow the bank to answer the receiver's petition, and to then rehear the case. In its answer the bank alleges that it became the holder of the notes in question on the 21st of December, 1916, in the usual course of business and without notice; that the notes purported to be secured by the deed of trust mentioned; and that when the same were taken the Kiltone Company had no knowledge or information that the enforcement of the security would effect a preference or enable the holder of the notes to obtain a greater percentage of its debt than other creditors. Payment of the notes and interest from the proceeds of the property was demanded. On this answer there was a rehearing, at which considerable testimony was taken, and the referee again held and decided that the deed of trust was a voidable preference, but allowed the bank to prove the notes as an unsecured claim. Upon review by the court below the order of the referee was affirmed, and the bank appeals.

[1] 1. It is earnestly argued that the appeal should be dismissed, because the case presented is not "a controversy arising in bankruptcy proceedings," but rather and merely a "proceeding in bankruptcy," which is reviewable only by petition to superintend and revise. It would be a waste of time to review the decisions upon this vexatious question, or to attempt its further discussion, and we therefore content ourselves with expressing the opinion that the case at bar was properly brought here by appeal, upon the authority of Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Moody v. Century Bank, 239 U. S. 374, 377, 36 Sup. Ct. 111, 60 L. Ed. 336; Barnes v. Pampel, 192 Fed. 525, 113 C. C. A. 81; Rison v. Parham, 219 Fed. 176, 134 C. C. A. 550; Emerson v. Castor, 236 Fed. 29, 149 C. C. A. 239; Wuerpel v. Commercial Germania T. & S. Bank, 238 Fed. 269, 151 C. C. A. 285; In re Creech Bros. Lumber Co., 240 Fed. 8, 153 C. C. A. 44; and Jones v. Blair, 242 Fed. 783, 155 C. C. A. 371.

The motion to dismiss is denied.

2. Upon conflicting testimony the referee found in effect that the Kiltone Company, when it took the notes and deed of trust, had rea-

sonable cause to believe that Seeley was insolvent, and that the enforcement of the security would give it a preference over other creditors. This finding was affirmed by the learned District Judge, and careful examination satisfies us that it should not be disturbed. It follows that in the hands of the original creditor the deed of trust was invalid and unenforceable as against the trustee in bankruptcy.

[2] 3. Is the bank in any better position? The trustee says it is not, because it is neither a holder without notice nor a purchaser for value. The first contention is based on the fact that the president of the Kiltone Company is the president of the bank, its secretary is the cashier of the bank, and the two concerns have several common directors. Whatever suspicion this close relationship might create, we are not prepared to hold, in view of the cashier's positive testimony, that it was sufficient to charge the bank with knowledge of Seeley's insolvency, and this contention must be overruled.

[3] The other is much more serious. The Kiltone Company, then and now abundantly solvent, kept a checking account with the bank, and was one of its regular customers. When the notes were discounted for the payee, less than a month before the bankruptcy of the maker, the bank advanced no money to the company, but simply placed the proceeds to its credit. There is no evidence or claim that this credit has been drawn upon, or even that the prior balance of the company has been reduced. If the notes had matured without payment, they would have been charged to the indorser's account in the ordinary course of business, and for aught that appears the bank could at any time return them to the company and cancel the credit. In short, whilst the bank is the holder of the notes, which represent a debt of the bankrupt maker to the payee, and may prove them as a claim against the bankrupt's estate, it is clearly not a holder for value, because it parted with nothing when it got them, and must be presumed to have paid nothing since, as it has not attempted to show—and the burden was upon it—that any part of the amount credited has been withdrawn. Dresser v. M. & I. R. C. Co., 93 U. S. 92, 23 L. Ed. 815; Thompson v. Sioux Falls Nat. Bank, 150 U. S. 231, 244, 14 Sup. Ct. 94, 37 L. Ed. 1063; Citizens' Bank v. Cowles, 180 N. Y. 346, 73 N. E. 33, 105 Am. St. Rep. 765; Miller v. Norton, 114 Va. 609, 77 S. E. 452; Third Nat. Bank v. Exum (N. C.) 79 S. E. 498; Union Nat. Bank v. Winsor, 101 Minn. 470, 112 N. W. 999; Code of Virginia, § 2841a, subsec. 59 (2 Pollard's Code, 1469).

[4] In view of this settled rule of law, it seems plain to us that the bank's claim to the fund in question is no better than that of the Kiltone Company. The bankruptcy court is a court of equity, and it would be manifestly unjust, under the facts here disclosed, to allow this bank, which is not a holder for value, and which in any event is protected by a solvent indorser, to enforce an invalid security. The basic purpose of the bankrupt law, the equal distribution of assets, is not to be thus defeated.

Affirmed.

## CHESAPEAKE & O. RY. CO. v. PEYTON.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1639.

1. MASTER AND SERVANT ⟸150(5)—DUTY TO WARN—CHANGE IN CONDITIONS.
While, if motorcars ran on defendant's coal pier at intervals of two to four minutes, an employé injured in crossing could not recover on the ground that no notice by bell or whistle was given of the approach of the motor, he might have a cause of action if the track on which the motor ran was changed without notice.

2. MASTER AND SERVANT ⟸286(40)—INJURIES TO SERVANT—EVIDENCE.
In action by employé on a coal pier, run down by a motor used on the pier to transport coal, the question whether the master was negligent in changing the motor from one track to another without notice, etc., *held*, under the evidence, for the jury.

3. MASTER AND SERVANT ⟸265(14)—PRESUMPTIONS—AVOIDANCE OF DANGER.
There is a presumption that an employé on a coal pier, who knew a motor was running every few minutes, would, when about to cross the tracks, look and listen for the motor in the direction from which he had reason to expect it.

4. MASTER AND SERVANT ⟸293(18)—INJURIES TO SERVANT—INSTRUCTIONS.
In an action by an employé on a coal pier, who was struck by a motor used to carry coal to various parts of the pier, instructions on the duty of the master, etc., *held* correct.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Action by Frank Peyton against the Chesapeake & Ohio Railway Company. There was judgment for plaintiff, and defendant brings error. Affirmed.

William Leigh Williams, of Norfolk, Va., for plaintiff in error.

Daniel Coleman, of Norfolk, Va. (Berry D. Willis, of Norfolk, Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In receiving coal at Newport News, Va., from the Virginia and West Virginia coal fields, and loading it on vessels, the defendant dumps the coal from an ordinary coal car into a motorcar and raises the loaded motorcar by an elevator to the coal pier. On the pier, which is about 1,200 feet long, are laid two tracks from the elevator to the coal chutes through which vessels are loaded. These tracks cross each other in the form of an X, and the motor runs on either the north or the south track as the work requires. A large number of men are constantly employed on the pier, who have to cross the tracks many times every day in their work. The pier is well lighted by electricity, and the motorcars carry electric headlights. The distance from the elevator to the point of intersection of the two tracks is about 150 feet. The motors run at a speed of about 15 miles an hour, and make the trip from elevator to pier every four minutes, sometimes every two minutes. There is no signal bell on the motor, and it is not customary to give warning of its approach.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] From this statement of the method of operation, which is not disputed, it is obvious that the running of the motor from the elevator to the chutes at intervals of only two to four minutes would be notice to every employé on the pier to be always on the lookout in crossing the track on which the motor runs, and therefore an employé injured in crossing that track could not recover, on the ground that no notice by bell or whistle was given of the approach of the motor. Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758. It is equally evident, however, that an employé might have a cause of action, if injured while crossing the track in the course of his work by the motor coming up on the south track without signals, when he had been misled by the defendant, so that he expected and looked out for the motor on the north track. C. & O. Ry. Co. v. Proffitt, 241 U. S. 462, 36 Sup. Ct. 620, 60 L. Ed. 1102; Great Northern Ry. Co. v. Mustell, 222 Fed. 879, 138 C. C. A. 305; So. Ry. Co. v. Smith, 205 Fed. 360, 123 C. C. A. 488; Richmond & D. R. Co. v. Norment, 84 Va. 167, 4 S. E. 211, 10 Am. St. Rep. 827.

[2, 3] Plaintiff's evidence on this point was substantially as follows: On the night of the accident, there was a rush of work, and plaintiff was aiding in loading a government collier. Needing oil for his lamp, he started to a shanty across the track to get it. The motor had been running on the north track, and it was the custom of the defendant to give employés notice before changing the motor from one track to the other. No notice of change had been given. Plaintiff, before undertaking to cross at the intersection of the tracks, looked for the motor only on the north track. As he stepped on the track, the motor running on the south track struck him in the back. The evidence on behalf of the defendant was to the effect that the motor ran on either track as occasion required, and that there was no custom of giving notice to employés of the change. Thus a sharp issue was made whether the accident was due to the negligence of the defendant in not giving notice of changing the motor from one track to the other, and not signaling its approach, so as to protect employés crossing the track, or to negligence of the plaintiff in not looking out for the motor on both tracks. On this issue the case of the plaintiff was strengthened by the presumption that one about to cross the track would look and listen for the motor in the direction from which he had reason to expect it. Texas, etc., Ry. Co. v. Gentry, 163 U. S. 357, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore, etc., R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262; Central Vermont Ry. Co. v. White, 238 U. S. 507, 35 Sup. Ct. 865, 59 L. Ed. 1433, Ann. Cas. 1916B, 252; Pocahontas C. C. Co. v. Johnson, 244 Fed. 368, 156 C. C. A. 654. It follows that there was no error in refusing to direct a verdict for the defendant.

[4] The instructions to the jury on the points really in issue were in strict conformity to the law as we have stated it, and were not inconsistent with each other. In brief, they were as follows: The defendant was under no duty to warn its employés on the pier by bell or whistle of dangers known to them, or to keep a lookout to protect them against such dangers; but the jury might find negligence from failure to give warning or keep a lookout to protect employés from per-

ils brought upon them by unusual and unexpected action of defendant. Applied to the issues of fact made by the evidence, this meant that, if the plaintiff went on the track with knowledge that the motor might come at any time on either track at intervals of two to four minutes, there was no duty on the defendant to warn or keep a lookout; but if he went on the track, having reason to expect and to look out for the motor on one track, and the defendant without notice ran the car on the other track, then the jury might infer negligence from failure to give signals of the unexpected approach, and from failure to keep a lookout for employés. This, as we have indicated, was a correct statement of the law applicable to the issues.

Affirmed.

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## SOUTHERN RY. CO. v. PITCHFORD.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1623.

COMMERCE ⊂=27(5)—FEDERAL EMPLOYERS' LIABILITY ACT—SERVANT ENGAGED IN "INTERSTATE COMMERCE."

A railroad employé, who cleaned and iced intrastate and interstate cars, and who was proceeding to get the ice when injured, was not engaged in interstate commerce, authorizing suit under the federal Employers' Liability Act (Comp. St. 1916, §§ 8657–8665), for he was not so employed in interstate commerce as to be practically a part of it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Interstate Commerce.]

Pritchard, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Action by George W. Pitchford against the Southern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

Thomas B. Gay, of Richmond, Va. (Munford, Hunton, Williams & Anderson, of Richmond, Va., on the brief), for plaintiff in error.

H. M. Smith, Jr., of Richmond, Va. (Smith & Gordon, of Richmond, Va., on the brief), for defendant in error.

Before PRITCHARD and WOODS, Circuit Judges, and CONNOR, District Judge.

WOODS, Circuit Judge. In this action, brought under the federal Employers' Liability Statute (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1916, §§ 8657–8665]), George W. Pitchford recovered a judgment against Southern Railway Company for injuries received in its yard at Richmond. Refusing to direct a verdict in favor of defendant, the District Court submitted to the jury the two questions: Whether the plaintiff was employed in interstate commerce at the time of the injury; and whether the injury was due to any negligence of the defendant. The action having been brought under the federal statute, it is conceded that, if the evidence excluded the inference that

the plaintiff was employed in interstate commerce at the time of the injury, the jury should have been instructed to find for the defendant, without respect to the issue of negligence.

Cars of the defendant, taken from both interstate and intrastate trains, were carried into the defendant's Richmond yard, and there kept until needed. Plaintiff was a regular employé on the yard, known as a car cleaner, his duties being to clear the yard of papers and other refuse, and clean and ice cars, both interstate and intrastate. Every morning a delivery of several thousand pounds of ice was made at the yard. When the ice wagon arrived in response to the call "ice," the plaintiff and other yard employés were required to go to the chute through which the ice came from the wagons to the yard. Their duty was to put a push car on the track, put the ice on, push it to an ice box, and place the ice in the box. It was from this box that plaintiff in the course of his employment took the ice and put it on the cars as it was needed.

On May 21, 1915, plaintiff had finished cleaning a car, and had started on the work of cleaning up the yard, when he heard the call, "Pitchford, the ice is here." In response to the call, he went to the push car to aid in putting it on the track. While waiting by the belt line track for other employés to arrive, he turned to look at an engine approaching on the main track. At that instant, he was struck by a switch engine running rapidly on the belt line track.

But for the accident, the plaintiff with other employés, would have placed the push car on the track, received the ice from the wagons through the chute, pushed the car to the ice box, and removed the ice from the car to the box. After this the plaintiff in the usual course of his employment would have iced from the box cars to be attached to both interstate and intrastate trains. The cars that he would in due course have first iced would have been cars to be used in interstate transportation. Application to these facts of the decisions of the Supreme Court leaves no escape from the conclusion that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the federal statute.

The familiar test is: Was the employé at the time of injury employed in interstate transportation, or in a work so closely related to it as to be practically a part of it? Shanks v. Delaware, L. & W. R., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797.

It is immaterial that the plaintiff's last previous work may have been cleaning an interstate car, or that his next work would certainly have been icing an interstate car from the ice box. Illinois Cent. R. v. Behrens, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163; Erie R. Co. v. Welsh, 242 U. S. 303, 37 Sup. Ct. 116, 61 L. Ed. 319; Delaware, L. & W. R. v. Yurkonis, 238 U. S. 439, 35 Sup. Ct. 902, 59 L. Ed. 1397. He had entered upon the work of receiving ice from the chute and transporting it to an ice box. This work was too remote from interstate commerce to be regarded a part of it. Chicago, B. & Q. R. R. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941. The only difference between the case before

us and the case last cited is that Pitchford was engaged in the transportation of ice and Harrington in the transportation of coal.

The District Court should have directed a verdict for the defendant, on the ground that the evidence conclusively proved that the plaintiff was not engaged in interstate commerce at the time of the injury, and therefore could not recover under the federal statute. This conclusion makes the consideration of the issue of negligence and other questions unnecessary.

Reversed.

PRITCHARD, Circuit Judge, dissents.

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FAIR & CARNIVAL SUPPLY CO., Inc., v. SHAPIRO et al.

(Circuit Court of Appeals, Third Circuit. December 5, 1918.)

No. 2394.

TRADE-MARKS AND TRADE-NAMES ⇐95(1)—SUIT FOR INFRINGEMENT—PRELIMINARY INJUNCTION.

The refusal of a preliminary injunction in a suit for infringement of trade-marks and unfair competition *held* within the discretion of the court.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the Fair & Carnival Supply Company, Incorporated, against Max Shapiro and Nathan Karr, doing business under the firm name of Shapiro & Karr. From an order denying a preliminary injunction, complainant appeals. Appeal dismissed.

Stephen J. Cox, of New York City (Wiedersheim & Fairbanks and J. Bonsall Taylor, all of Philadelphia, Pa., of counsel), for appellant.

Jacob I. Weinstein and Alfred Aarons, both of Philadelphia, Pa., for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the court below the plaintiffs, the makers of dolls, to which it had given the name "Bewtie Dolls" and of which it had sold large numbers, filed its bill charging the defendants with unfair competition and violation of plaintiff's trade-mark, in the sale of a doll of similar appearance under the trade-name of "the Beauty Doll." The plaintiff's application for a preliminary injunction was heard by the court on affidavits and refused. Thereupon the plaintiff appeals to this court.

Without entering upon a discussion of the pertinent facts, we may say the affidavits satisfy us the case was one where there was a considerable range of discretion as to whether a court should decide the question of injunction on preliminary or final hearing. In the exercise of that discretion, the court followed the latter course. Without, as we have said here, discussing the facts and expressing no conclusion there-

on, we may say they disclose no such situation as made the refusal of the injunction at this stage of the case error, instead of a reasonable exercise of the court's discretionary powers in declining present injunctive relief and allowing the case to go to final hearing.

The appeal is therefore dismissed.

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J. E. BAKER CO. v. KENNEDY REFRACTORIES CO. et al.

(Circuit Court of Appeals, Third Circuit. November 30, 1918.)

No. 2389.

1. PATENTS ⊜328—CONSTRUCTION—VALIDITY.
The Baker patent No. 1,063,102, for a material for use in making up, repairing, and replacing linings, etc., of metallurgical furnaces, which consisted of a specially burned dolomite, *held* valid, showing invention.

2. PATENTS ⊜250—INFRINGEMENT—PRODUCT PATENT—IDENTITY.
Where the issue of infringement arises on a product patent, the processes are immaterial, except as they show characteristics of the two products that are either identical or different.

3. PATENTS ⊜328—CONSTRUCTION—INFRINGEMENT.
The Baker patent, No. 1,063,102, for a material for use in making up, etc., linings, etc., of metallurgical furnaces, which consisted of specially burned dolomite, *held* not infringed by defendant's product, which also had a dolomite base; the two products being essentially different.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Suit by the J. E. Baker Company against the Kennedy Refractories Company and H. A. Kennedy. From a decree for defendants (244 Fed. 812), complainant appeals. Modified and affirmed.

Frederick P. Fish and J. L. Stackpole, both of Boston, Mass., and Cyrus N. Anderson, of Philadelphia, Pa., for appellant.

J. H. Brickenstein, of Washington, D. C., and Joseph C. Fraley, of Philadelphia, Pa. (Fraley & Paul, of Philadelphia, Pa., on the brief), for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This suit is on Letters Patent No. 1,063,102 for "Material for Use in Making Up, Repairing, and Replacing Linings, etc., of Metallurgical Furnaces," issued May 27, 1913, to John E. Baker. The claims involved are 2, 3, 4 and 5; the issues, validity and infringement. The District Court found the claims invalid, and indicated in its opinion, that, if valid, they are not infringed. 244 Fed. 812. The plaintiff appealed.

The succinct statement of the prior art and of the invention appearing in the patent specification, and the thorough discussion of both in the court's opinion, make an extended presentation of the case unnecessary.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

[1] For linings of metallurgical furnaces and particularly of basic open hearth steel furnaces, a material that is both basic and refractory is required. The basic quality of the material enhances metallurgical reactions; the refractory quality sustains the furnace lining and prolongs its life. Prior to the patent, various kinds of basic and refractory products were used. They were calcined or burned minerals containing magnesia, lime, alumina, silica, and iron. Of these substances, magnesia is the most basic; it is also intensely refractory. Its purest form occurs in magnesite. The best grade of this mineral is found in Austria.

Magnesite contains a large percentage of magnesia and very little lime. In preparing it for use as a furnace lining, it is subjected to a temperature equal at least to the temperature of the furnace in which it is to be placed, in order to expel all volatiles and consume all combustible ingredients. Before the patent, Austrian magnesite was the only satisfactory material used for lining bottoms of basic open hearth steel furnaces.

In addition to foreign magnesites, a rock found in the United States and known commercially and chemically as dolomite is used in repairing furnace linings. Dolomite is a magnesian limestone, containing in varying proportions the same chemical ingredients as magnesite, but differing radically from magnesite in the preponderance of the relatively low basic element of lime over the high basic element of magnesia. The principal objection to a lime base is its tendency to absorb atmospheric moisture, and in consequence to slack, thereby interfering with its proper behavior in the open hearth furnace.

Dolomite, either in its raw state or burned, has long been used for repairing and patching furnace linings under certain conditions, but, being open to objections arising from its lime base, it never has been regarded even remotely as a substitute for Austrian magnesite.

Dolomite, like all furnace lining materials, must be burned before it is used. Prior to the patent, dolomite was burned by two methods, a cupola method and a rotary kiln method. In the cupola method the furnace was charged with alternate layers of coke and raw dolomite rock. After the heat had driven off the moisture, carbonic acid gas, and other volatiles, the material was taken from the furnace and reduced by grinding to the desired granular size. This method was imperfect because it left in the product powdered material, coke brees, cinder, ash, and a small quantity of volatiles. The results were that the product absorbed moisture readily and slacked quickly and combustion of the unconsumed ingredients continued after it was placed in the furnace lining.

Burning in a rotary roasting kiln likewise failed to expel all volatiles from the rock and likewise left the product readily :rvious to moisture and consequent slacking. For these reasons, dolomite, burned by one or the other of the trade methods, contained such objectionable features that it was not considered in the same class with Austrian magnesite, either chemically or commercially. The way the art regarded their relative values is shown by the prices it paid for them. Burned dolomite sold for about $4.00 a ton, while Austrian magnesite sold for about $30.00 a ton.

Baker conceived a new method of burning dolomite. Its novelty consisted, not in disregarding and breaking away from either of the old methods, but in employing both of them. On first view this would seem a simple and a natural expedient, whereby the advantages of each method are aggregated in a thoroughly burned product. The result, however, was more than this; it was startling and revolutionary.

In making the product of the patent by his method, Baker first ground the rock to the size of railroad ballast and burned it by the cupola method. He got a product lacking uniformity in the expulsion of volatiles and containing the objectionable ingredients of ash and cinder. This product he ground to the proper size for use in the furnace and then burned it by the rotary kiln method. The double burning produced several novel and highly valuable results. It uniformly condensed the product, uniformly expelled all volatiles, completely eliminated combustible ingredients, and coated at least the surface of its condensed grains or particles by reaction of its chemical constituents in a manner that made them resistent to moisture for a longer time than single burned dolomite and made them correspondingly slow to slack. By the apparently simple expedient of double burning, the patentee got a product chemically and commercially unlike any dolomite product theretofore known, which the metallurgical art, notwithstanding the predominating lime base of the product, accepted at once as the equal of and a fair substitute for Austrian magnesite with its magnesia base. It is manufactured and sold under the trade-name of "magdolite."

The patent in issue being a product patent, we are not concerned with the process by which the product is produced; that forms the subject of another patent to Baker (No. 1,063,013). The first question, therefore, is: Does this product involve patentable invention?

The claims in issue describe the patented product in the following terms, differences in the claims being indicated by the bracketed portions:

> As a new article of manufacture, burned dolomite in the form of a granulated mass, the particles (or substantially all of the particles) of which are uniformly substantially free from volatiles (and cinder) and are uniformly condensed (having a substantially uniformly condensed surface part) and (being of a uniform physical character) rendering the same slow to absorb moisture.

The defendant challenged the validity of the claims on two grounds: First, that the patented product is an improvement upon the old article only in degree and excellence; and, second, that the qualities claimed for it are the natural results of thorough burning, and, in consequence, are the mere results of the operation of natural causes. It was on the latter ground that the claims were held invalid. In reaching this decision the learned trial judge realized, and very frankly said, that the issue of invention is so evenly balanced that he yielded with some hesitation to his inclination that invention is wanting. We also realize that in some aspects the issue is close; but after giving the case very full and deliberate consideration we are inclined to the opposite view.

Being of opinion that the product of the patent involves invention and that the claims in issue are valid, it is not necessary to state the grounds of our opinion with the elaboration of which the subject is capable. It is sufficient to say, that, though nothing is added to dolomite rock when it is manufactured into magdolite, so much is taken from it that it is freed of its objectionable features, and it is so transformed that new characteristics, both physical and chemical, are given it, with the result that the product is raised from the low level in which dolomite was regarded by the art as a material for repairing furnace linings to the high level of equality with Austrian magnesite, admittedly the best furnace lining known. We regard magdolite as "a new article of manufacture" in the sense at least of being wholly different from any article previously manufactured and from anything existing in nature, containing elements of novelty and utility in such a degree that its effect upon the arts to which it directly and indirectly relates was immediate and immensely beneficial. While the chemical and commercial values of magdolite were established by its introduction and use as a substitute for Austrian magnesite before the war, its use as a substitute since Austrian magnesite has become unobtainable, has contributed, it may safely be said, in no small measure to the ability of the steel industry of this country to meet the demands which the war has made upon it.

[2, 3] The claims of the patent in issue being valid, the remaining question is one of infringement.

The alleged infringing product is made by the defendant under a patent with which we are not here concerned. It is sold in competition with the product of the patent under the trade-name of "Kendymag" and is offered to the metallurgical art for the same uses, under representations and warranties that it is the equal of Austrian magnesite.

So different are the processes of the two products that they bear no resemblance to each other. As the issue of infringement arises on a product patent, the processes are of course not material, except as they show characteristics of the two products that are either identical or different and that bear accordingly on the issue of infringement.

Kendymag like magdolite is made from dolomite. The rock used is not the run of the quarry but is selected with a regard to its chemical composition. It is then ground to an impalpable powder. During the pulverization process there is added a definite and substantial amount of iron oxide usually in the form of rolling mill scale. The pulverized mass is then fed into an inclined rotary kiln, such as is used in the cement art, and is subjected to a temperature equal to that of an open hearth furnace. The pulverized materials travel down the kiln through progressively increasing temperatures and become aggregated by fusion and chemical reaction into nodules of increasing size until they are discharged. The nodules are then ground to commercial size and the process ends.

For proof of infringement, the plaintiff relies on the identity of the characteristics of the two products. It claims broadly, that in both magdolite and Kendymag the same ingredients, in whatever condition

they are, make up a material that has the same character of an artificial substitute for Austrian magnesite. This contention, though true, obviously cannot alone sustain the charge of infringement, for it does not follow that invention of the first substitute for Austrian magnesite confers upon the inventor a monopoly over all substitutes subsequently invented, without regard to considerations of their distinguishing characteristics of composition and performance.

The plaintiff goes further, however, and claims identity of characteristics specifically, in that both products are used for the same purposes and accomplish the same results; each is made by burning the same kind of rock, whereby each is condensed, made uniformly free from volatiles and uniformly non-hydroscopic.

Referring generally to the plaintiff's claims of identity, it is true that the two products are made from the same rock and are used for the same purposes, but we are persuaded that they do not accomplish just the same results. Kendymag accomplishes more results. While each is "uniformly free" from volatiles when made, that is, while all parts of the same material are uniformly free from volatiles, each material as compared with the other does not remain equally free from volatiles. Kendymag maintains a greater freedom from volatiles for a longer time. Each is not uniformly condensed when in the form in which it is intended to be used. Kendymag is not condensed at all; it is enlarged. While each is uniformly non-hydroscopic, in the sense of uniformity in its own parts, the two products are not equally non-hydroscopic. In differences arising from the lack of equality in essential characteristics, we discern lack of identity.

In considering the defendant's contention that its product differs in structure and physical characteristics from that of the plaintiff, we find differences that are obvious. Magdolite retains substantially the solid crystalline structure of its initial dolomitic rock; but Kendymag loses the crystallization of the initial dolomite in the process of burning and is transformed into a material that is amorphous and porous. Its substance is composed not of the original rock crystallization, but of clinkers built into nodulose masses, the particles of which are aggregated by chemical reactions, in which, not only each nodule but every grain or particle of each nodule is made resistent to moisture, not temporarily as in magdolite, but almost permanently so. This difference goes directly to the qualities of the products as articles of commerce to be transported and stored and to the manner of their performance as furnace linings.

Incident to its crystalline structure, a characteristic of magdolite claimed by the patent is that it—

"is much heavier, volume for volume, than any manufactured dolomite heretofore produced, which has rendered the product available for purposes for which it has heretofore been thought impossible to use dolomite."

This characteristic is obtained by condensing the rock when volatiles are expelled. But the defendant's product, instead of being condensed in the process, is enlarged into a porous structure, with the result that, instead of its weight being increased, it is decreased, and, volume for volume, it is about 28 per cent. lighter than the patented product. It

was shown, however, that when both products are finely ground they are of the same specific gravity. But the metallurigical art does not use the products in a ground state. Grinding or pulverization is the very thing the art desires to avoid. On an issue of infringement, we are concerned only with identity of characteristics of two products in the form in which they are intended for use.

We incline also to the contention of the defendant that there is a difference in the chemical composition of the two products.

It is not clear just what chemical reactions take place in the processes of burning. It is known that certain of the constituent chemicals—silica, alumina, iron—are fluxes, and, in their fusion, cause chemical reactions which transform the rock in some unexplained way into moisture resistent and refractory products. In the magdolite process, the patentee first relied solely on the natural fluxing contents of the rock for chemical reactions, seeking, however, to keep the silica content at a low level of from 4 to 6 per cent. Acting on an opposite theory, the defendant in producing Kendymag seeks a high silica content running from 12 to 14 per cent. and to the natural iron content of less than 1 per cent. adds about 4½ per cent. of iron, whereby it is claimed that ferrates of lime and magnesia are formed which cover the myriads of clinkers and give to its product the characteristic of persistent resistance to the action of moisture. This characteristic admittedly it contains, and by it there is eliminated almost permanently the highly objectionable feature of slacking, which occurs promptly in single burned dolomite, and which occurs after a time in the double burned dolomite of the patent.

Although the chemistry of this subject justified the elaborate discussion in the evidence and briefs, its repetition in this opinion is not necessary to the decision. We are inclined to the opinion that the iron added to the defendant's product, and added after the invention to a portion of the plaintiff's product—the main controversial point in the chemistry of the case—performs an important chemical function in aiding the formation of nodules in the defendant's product and in facilitating in both the chemical reaction that takes place between lime and silica. Iron is a flux, and it is a flux which very certainly tends to regulate and equalize the other fluxes. We are of opinion that the chemical composition of the two products is not identical.

Considering the question of identity a step further, it is to be observed that the defendant's process for making its product was taken evidently from the cement art. Kendymag is not dolomite, unless it can be said that Portland cement is limestone, or is blast-furnace slag. Here as there, one thing is the product of the other. They are not the same thing. The material out of which Kendymag is made is dolomite, but in the process of making it dolomite with its rocklike and crystalline characteristic is destroyed and a new product is obtained having no resemblance to the original. Though radically transformed in its making, magdolite still is dolomite; it is described as such throughout the specifications and the claims of the patent, where it is referred to as "manufactured dolomite," "burned dolomite," "double burned dolomite." If Kendymag is not dolomite, it cannot infringe the patented

product, which is dolomite. If, however, it should be that the defendant's material because initially dolomite remains dolomite in its ultimate form, and, in consequence, both materials are dolomite, then, in our opinion, the distinguishing characteristics of the two dolomitic materials in their structure, physical properties and chemical composition are such as preclude infringement.

The decree below, when modified in accordance with this opinion, is affirmed.

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DUDLO MFG. CO. v. VARLEY DUPLEX MAGNET CO. (two cases).

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918.)

Nos. 2487, 2488.

1. CORPORATIONS ⟸30(6)—ACTS OF CORPORATORS—ESTOPPEL.
Where a corporation was organized to take over the business of a partnership, which by contract acknowledged patent infringement and agreed to cease, *held*, that any estoppel arising from the contract was effective against the corporation, and as it continued the old-method manufacture it was estopped to deny infringement.

2. PATENTS ⟸328—INFRINGEMENT.
The Anderson patent, No. 644,311, for winding coils or helices for electrical apparatus, claims 1, 2, and 3, *held* infringed; it appearing defendant used a single core, etc.

3. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Anderson patent, No. 644,312, for an electric helix, *held* infringed, when defendant manufactured special coils in a stick, etc., which were not cut until the entire stick was wound, etc.

4. PATENTS ⟸177—EXTENT OF MONOPOLY.
A patentee cannot monopolize all means of effectuating a function, whether it be that of the entire combination or of any element thereof.

5. PATENTS ⟸26(1), 245—CONSTRUCTION.
A machine which requires the mediation of an operator for coaction between the elements may be no less a true combination than one securing coaction automatically; and while in a primary patent substitution may not avoid infringement, yet where the invention is in a specific mechanism substitution will avoid infringement.

6. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The Anderson patent, No. 654,583, claims 8 and 46, for a machine for winding helices for electrical purposes, *held*, in view of the prior art, limited to the special mechanism, and not infringed.

Appeals from the District Court of the United States for the District of Indiana.

Two suits by the Varley Duplex Magnet Company against the Dudlo Manufacturing Company. From decrees for complainant, defendant appeals. First decree affirmed, and second reversed, and cause remanded, with directions to dismiss the bill.

Edward Rector, of Chicago, Ill., for appellant.

James K. Bakewell, of Pittsburgh, Pa., and M. A. Keller, of New York City, for appellee.

Before BAKER, MACK, and EVANS, Circuit Judges.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

MACK, Circuit Judge. The two cases were heard together in the District Court and the appeals were argued together in this court. No. 2487 involves letters patents Nos. 644,311 and 644,312, and No. 2488, letters patent No. 654,583, all granted to one Anderson and assigned to appellee.

Letters patent No. 644,311, for a method of winding coils or helices for electrical purposes, and letters patent No. 644,312, for an electrical helix, were held valid and infringed by defendant as to all of the claims. Claim 2 of No. 644,311 reads as follows:

"The method of winding helices for electrical purposes consisting in simultaneously winding a plurality of helices upon separated zones of a single core, inserting sheets of insulating material between the superposed layers of the helices; each sheet being common to all the helices, and then separating the helices by transversely severing said sheets and core between the adjacent helices."

Claim 1 omits the last element as to separation of the helices; claim 3 specifies in detail that each layer of helix is followed by the insulating material. The claims of No. 644,312 are:

"1. An article of manufacture consisting of a plurality of helices for electrical purposes, wound in layers on a single core, in combination with individual sheets of insulating material inserted between the layers and extending throughout all the helices, substantially as described.

"2. An article of manufacture consisting of a plurality of helices for electrical purposes, wound in layers on separated zones of a single core, in combination with layers of insulating material alternating with the layers of the helices and being common to all the helices, substantially as described."

Plaintiff was a pioneer in the manufacture of helices in series, instead of, as theretofore, in units. It thereby secured a greater uniformity of product and a saving in the cost of manufacture. Defendant sought to obtain the same result in substantially the same way. Like the plaintiff, it used, between the layers of windings, sheets of paper common to all of the series of helices, thereby securing the desired uniformity of tension.

## Method Patent.

[1, 2] But it urges in support of its contention of noninfringement of the method patent, first, that it uses no single core; second, that it severs the series of helices into units by cutting the inserted sheets of insulating material between the adjacent units during the winding of the layer of wire thereon and not after the stick of helices has been fully wound.

1. As to the absence of a core.

A. Defendant is the successor of a copartnership, the members of which own the controlling interest in defendant. A minority interest is owned by its largest customer who at one time had been a customer of appellee. This copartnership had been charged by plaintiff with infringement of the patents in suit. By a contract of settlement with plaintiff, the firm had confessed the infringement and had agreed not to infringe thereafter. While defendant's minority stockholder claims to have had no knowledge of the contract at the time he made his investment, the circumstances surrounding the transaction are such that

the trial court was justified in disregarding this testimony. But whether or not he had such actual knowledge at that time is immaterial. The evidence abundantly justifies the conclusion that the corporation was primarily formed for the purpose of evading the obligations imposed by the contract; the corporation took over the business as it was; under these circumstances, any estoppel arising from the contract as against the copartnership, should be deemed equally effective as against the corporation. And inasmuch as defendant made no change whatsoever in the method of manufacture in so far as the core is concerned, it is estopped to deny infringement in this respect.

B. But irrespective of estoppel, defendant, in our judgment, does use a single core. Plaintiff preferentially covers the spindle with a prepared tube to which the first layer of wire of each coil is fastened or anchored. Defendant first rolls four or five layers of paper on the mandrel fastening them with a sticker and then ties the wire around this paper and the mandrel. Thereupon one layer of paper is fed in and while the first coil of wire is wound thereon, the coil and paper are shellacked. Then, ordinarily, three layers of paper are fed in and another winding begins. Until the paper is cut during this wire winding, there is a plurality of coils with a single core, the shellacked paper. Whether or not, at the time of cutting, the upper layer has been completely wound and whether or not it is intended thereafter to wind additional layers so as to produce in the end a coil of only two or of more layers of wire, is immaterial; in either case there is infringement of plaintiff's method of producing the coil by the use of a single core.

2. As to the stick of helices.

A. Concededly, in some instances, whether because of defective machinery or defective operation, defendant, contrary to its ordinary method of manufacture, did not separate the single stick of helices into units until after the winding was complete. Furthermore, some special coils were always manufactured in this manner. In all such cases, infringement is clear.

B. While ordinarily defendant cuts the inserted sheets of insulating material between adjacent helices with sharp knives during the progress of each winding of the wire instead of sawing the stick into units after any desired length of wire is completely wound, infringement, in our judgment, is not thereby averted.

a. Even the smoothness which, defendant claims, results from its successive sharp cuttings of the insulating material, as against the single final sawings of the completed stick, is confined to the edges of the adjacent units; the two ends of the original stick frequently must be and are evened up by sawing. Obviously, however, defendant's more laborious and delicate practice, subject as it was to interruptions and omissions by the quite frequent breaking of the knives, aimed not at a better result but at a mere evasion of plaintiff's method. Plaintiff's inventive concept is the simultaneous winding of a plurality of coils on a common core or spindle in combination with the insertion of insulating layers common to the entire series of helices; it is immaterial thereto whether, because of the cutting of this common insulating material between the adjacent units before the winding is

finished, the units fall apart from one another when they are completely wound, or whether the stick is to be severed into its units by sawing the insulating material between the adjacent helices only after the winding is completed.

b. Moreover, in claim 1, there is no element of separation into units. Defendant, however, contends that because of the statement in the specifications that "the operation of severing the helices may be performed by either the manufacturer or the user" and the further statement that the ends of the helices may be left long, brought out to a convenient point and there connected with each other as in series-parallel or differential relation "this referring to the use of a number of helices on the single tube, the act of severing them into individual coils being omitted," claim 1 must be based upon these statements and that thus limited it indicates the method of manufacturing the finished commercial article of the product patent, the stick of completed but unsevered coils, an article which defendant does not manufacture, at least as a commercial product. We cannot, however, assent to this limitation of claim 1. The claim evidently aims to cover the essentially new step in manufacturing these coils, that is, inserting sheets of insulating material in a manner common to all the coils of the series and building up the coils by simultaneously winding the layers of wires on the whole series. Whether a stick or units of helices be finally formed is unessential; that will depend upon the needs of the manufacturer or user. Ordinarily, separate units are desired; in that case, the stick must be cut up; the cutting or sawing, however, involves no invention.

Even though under defendant's ordinary method of manufacture, the sheets of insulating material, inserted between each two layers of wire, are cut between adjacent units before the upper layer of wire is completely wound thereon, so that the winding continues on the severed helices, this layer of wire is none the less properly described as superposed upon sheets of insulating material common to all helices, and not merely upon such sheets inserted between the layers of wire in separated helices.

Product Patent.

[3] As plaintiff concedes that this patent is limited to the finished "stick" of helices, it is not infringed by defendant's ordinary product, the severed coils. But the special coils which defendant does occasionally make in a stick and the usual coils which, because of breakage of knives or for other reasons, are not cut until the entire stick is wound, clearly do infringe.

Machine Patent.

[4-6] Machines to make single coils of wire with interposed sheets of insulating material were old; machines operated, however, by hand power and without plaintiff's automatic mechanism; and machines to wind series of spools of thread or wires in layers, but without the interposed sheet of material common to all, were likewise old. While Anderson invented the novel article and the novel method hereinabove considered, his machine was not designed solely therefor; it was equally adapted to produce a single coil. This is not only expressly stated

in the specifications, but in some of the claims, both of those in issue and of those not in issue, the combination includes elements essential in producing plurality of coils, while in others it omits them.

As a machine to produce the old article, single coils of wire with interposed sheets of paper, the only novelty was in the patentee's specific mechanism; and as a machine to produce sticks of such coils it was but a new combination of elements, each old in its function, though in some respects of novel mechanism and operation. In no sense was it primary invention. What Anderson aimed at was a machine which, as stated in his specifications, would "more effectively, rapidly, and cheaply * * * wind strands into coils of superposed convolutions and introduce sheet material at intervals in the coils for the purpose of separating, protecting or restraining the convolutions." His inventive concept was the specific mechanism and its operation by which the problem that confronted him could be solved. Of this he says in the specifications:

"It is a comparatively simple problem to wind successive layers of wire; but to introduce between each layer the sheet of paper or other insulating material automatically and without stopping or slowing up the rotation of the winding-spindle, and to provide for the necessarily increasing length of such sheets, due to the increase in diameter of the coil, and to provide for the proper feeding of the paper to the rotating coil, which gradually increases in diameter, are problems which are not so easily solved, but which are solved by this invention."

It is unnecessary to consider all of the claims in issue; each was held valid and infringed; the broadest of them, claims 8 and 46 will suffice. They read as follows:

"8. The combination, with a winding spindle, of means for winding a plurality of coils or bobbins of material thereon, and means for inserting sheets of material at intervals in said coils, each sheet being common to all the coils."

"46. In a winding machine, the combination of a winding core or spindle, a rod or foundation carrying a plurality of guides for fibers, filaments, or strands, said spindle and rod or foundation being bodily movable with respect to each other for the purpose of forming layers upon the spindle."

That other claims add as additional elements the automatic features and the details of the feeding and cutting mechanism does not justify an interpretation of the claims in issue that would cover any and all means. A patentee cannot monopolize all means of effectuating a function, whether it be that of the entire combination or of any element thereof. Moreover, such an interpretation would carry the claims beyond the invention itself. Lewis v. Arbetter, 219 Fed. 557, 135 C. C. A. 325; King Philip Mills v. Kip Armstrong Co., 132 Fed. 975, 66 C. C. A. 45.

A machine which requires the mediation of an operator for coaction between the elements may be no less a true combination than one which secures such coaction by automatic device (Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 125 C. C. A. 394), and in a broad primary patent, the substitution of the one for the other may not avert infringement (Morley Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715; Columbia Wire Co. v. Kokomo Wire & Steel Co., 143 Fed. 116, 74 C. C. A. 310). But when, as

here, the invention is in the specific mechanism, a claim broadly worded, but necessarily in the light of the specifications, drawings, and inventive concept interpreted to cover only the patentee's novel mechanism including the automatic features, will not be infringed by the substitution of nonautomatic devices operating in a different way.

In claim 8, so read, "the means for inserting sheets of material at intervals in the coils, each sheet being common to all the coils," must be held to be the mechanism designed to introduce the sheet "automatically and without stopping or slowing up the rotation of the winding spindle." It is unnecessary to detail the differences in this mechanism and its operation in the two machines; it suffices that defendant's machine, concededly, does not operate automatically and its mechanism necessitates a slowing up of the spindle rotation for the sheet insertion. Furthermore "the intervals" at which plaintiff inserts the sheets are predetermined in its machine, one sheet following each layer of wire; and the increasing size of the successive sheets is automatically obtained. Necessarily as the coil increases in size, the inserted sheet covering and overlapping the layer of wire must likewise be enlarged; with defendant's machine, however, the operator must determine the successive sizes; he may and does insert not one but several sheets between each layer of wire; and he may, if he so desires, omit the sheet between any layers.

As to claim 46, literally interpreted, it would cover the ordinary thread-winding machines with a plurality of guides and would clearly be anticipated. But as an operative device the element of the means by which the spindle and rod are movable in relation to one another is implied in the claim. Limited as this must be to the mechanism described in the patent and its equivalents there is no infringement. Defendant's mechanism for controlling and reversing the direction of traverse of the wires electrically as they are wound upon the several coils differs entirely in character from that of the patent.

The decree in 2487 is affirmed; that in 2488 is reversed, and the cause remanded, with directions to dismiss the bill. Costs in either court that are not divisible as between two suits will be divided equally.

## BINDLEY v. DETROIT RIVER TUNNEL CO. et al.

(District Court, E. D. Michigan, S. D. August 23, 1918.)

1. PATENTS ⟸170—CLAIMS—CONSTRUCTION.
A patentee is entitled to protection against changes, etc., involving only mechanical skill; but a patentee late in an art is entitled only to what he shows and claims.

2. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 745,454, for a method of constructing a tunnel under water, which combined two of the older methods and contemplated the preparation of a chamber and construction of the tunnel in place therein, *held* not infringed.

3. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 745,456, for a subaqueous working chamber in tunnel construction, *held* not infringed.

4. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 745,457, for a subaqueous tunnel, etc., *held* not infringed.

5. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 797,524, for a subaqueous tunnel, etc., *held* not infringed.

6. PATENTS ⟸328—CONSTRUCTION—INFRINGEMENT.
The McBean patent, No. 797,525, for a method of tunnel construction under water, *held* not infringed.

In Equity. Suit by Isa McBean Bindley, administratrix of Duncan D. McBean, against the Detroit River Tunnel Company and others. Decree for defendants.

Wade Millis, of Detroit, Mich. (Parker W. Page and Drury W. Cooper, both of New York City, of counsel), for plaintiff.

Henry Russel, of Detroit, Mich. (Robert H. Parkinson, of Chicago, Ill., and Oscar W. Jeffery and Harry G. Kimball, both of New York City, of counsel), for defendants.

TUTTLE, District Judge. After listening to unusually interesting and able oral arguments for four days, and now at the close of such oral argument, in accordance with my announced custom, I am going to dispose of this case.

[1] The manner of considering the particular art involved in a patent case is not unlike tracing the history of the explorations of a continent. If we start at a sufficiently early date, it is entirely undeveloped. Along come the different explorers, making it impossible for those who come after them to re-do what has already been done. Some are looking for gold, some for fountains of youth, some for fur-bearing animals, and some for homes. These ends desired give the general direction, while the topography of the country, savage natives, and other obstacles to progress are deciding factors in choosing particular mountain passes. Some, like Columbus, do not know where they have landed. If they in reality discovered a continent, we give them credit for it, even though they died in ignorance of what they had accomplished. Others, like Balboa, try to claim, not only what they can see, but make broad and sweeping claims, assuming that

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no one else has any rights. Still others, like our Pilgrim Fathers, prefer to settle down on a little patch and carefully fence it around, to indicate just what belongs to them. A discoverer cannot be content to take previous trails. A Roosevelt may find a river in the wilds of South America, and a Peary may discover the particular spot in the ice where the meridian lines intersect, but the time is past for discovering continents. Those who simply walk in the tracks of their predecessors, and see only those landscapes which are plainly visible from those paths, cannot be said to be discoverers. Such pretending discoverers are merely sightseers and students of geography. Such assumed inventors are in fact only mechanics and engineers.

Applying this thought to the subject of patents, the extent that an inventor is presumed to have explored beyond his actual path is the distance that a skilled mechanic or engineer is able to look from such tracks. The extent of the landscape is not to be determined as of the time the predecessor took the trail, but at the time the man who makes his claim for a patent went that way. He cannot receive credit for discovering those things which are so near to the old tracks that an ordinarily skilled mechanic or engineer, standing in those tracks, could have seen them without having them pointed out by the claimant. So in these patent cases we take the undeveloped portion of the art, and determine how much of what was open to discovery has actually been brought to light by the patentee. A patentee is not entitled to all that is left by prior patents, publications, and uses. He receives only that portion of what is left which he shows and claims.

In this manner, having determined the extent and scope of plaintiff's claims, we may proceed either to determine the question of validity or infringement. If both questions are fairly in dispute, I usually consider first the question of infringement. By pursuing that course, the court is less likely to pass upon matters not in issue, and avoids doing unnecessary damage to plaintiff's patent. In this manner we have studied the art of tunneling.

It is conceded that in 1903, when plaintiff's decedent applied for four of the patents here in suit, there was known in the art the old drifting method, by which for many years mountains had been tunneled. Small rivers, in certain kinds of soil, had also been tunneled by this method; but it was poorly adapted for going under the water. The shield method was another method which had been in use for tunneling under rivers, a well-known example of which is the Grand Trunk tunnel at Port Huron; the United States end being in this state and in this district. One difficulty with the shield method was that it was not possible to go near to the water. It had to go too deep, too far down. It made an unnecessary grade. A still greater objection, and one which ought to have made it prohibitive was the necessity for men working in such high air pressure that there was a tremendous loss of life. Both of those methods had to do with getting under the river by starting in from the side and keeping deep down, far below the bed of the river. It was desirable to have the tunnel as near to the surface of the water as the rules of the War Department for the protection of navigation would permit.

There were three possible methods for that sort of construction then in use. One, the caisson method, by which, as in the shield method, the men were compelled to work under a high air pressure. By this method the workmen by means of the device went down from the surface of the water and worked on the bottom of the river. Although there was no bottom to the device, they were able to keep the water from coming in at the bottom by means of compressed air. It was an undesirable method, because of the danger attendant upon the high air pressure. As they got to a great depth, the pressure became so great that it was impossible for the men to live. Then there was another method of doing the work from above, the cofferdam method, which was possible; but you would finally reach a depth great enough so that it was prohibitive, because of the great hydraulic pressure. The water would be forced in through the cofferdam walls, under the wall or through the bottom. By the cofferdam method the bed of the river formed the base, and the walls were usually of sheet piling. Still another method was to construct the tunnel on shore, and float it to a place above the proposed site, and then sink it into position. No one of these three methods had been successfully employed in deep, broad rivers.

Just how far beyond these admitted methods the art went there is some contention here. As I view this lawsuit, and the just disposition of it, it is not necessary for the court to split hairs over the exact extent to which this art had developed beyond these admitted and well-known methods of doing and attempting to do work of that kind. When the court feels very certain about the proper disposition of a case, it is just the time it is liable to be mistaken about it. In this case I have in my own mind no doubt as to the result that ought to be reached. That is not the situation in many patent cases. In the last one I disposed of I said on the record that I reached my conclusion with doubts on my own part; but in this case I feel perfectly satisfied with the conclusion I reach. I feel that further study and thought would not change my views about it. I say that, knowing that those are just the times when a court is likely to be overlooking something.

[2] I will pass over the many intervening steps between those five admitted, well-known methods of the prior art and the patents in suit. There are many patents, like Weisker, O'Rourke, and Thomson, which made serious inroads upon the art. The effect of these prior patents is in dispute. My conclusion is such that the scope and value of these prior patents would not change the result.

The defendant contends that McBean uses only the cofferdam methods, and says it is the cofferdam method with a roof on the cofferdam. The plaintiff assumes that it is a new and different method from any of the others, and calls it building a tunnel in a working chamber. As I view it, McBean is a combination of the caisson method and the cofferdam method.

What McBean did was to drive down the sheet piles until they were in solid, substantial earth, or to bedrock, so that the walls were as nearly impervious to water as he could make them, making these sections as long as he saw fit, and putting in his sheet piling across the

end, which acted as a bulkhead. And then (I am omitting many steps not here necessary, that are of real importance in the work) he put a roof or cover down under the water across what defendant calls the cofferdam, and in that way made what he calls an air chamber in which he could build a complete tunnel. It was so arranged that he could force air into it, if he was unsuccessful in making the cofferdam structure entirely impervious to water. So far as the sheet piling kept the water from coming in through the sheet piling, under the sheet piling, or up through the bottom, to that extent McBean was using the old cofferdam method; to the extent that it failed in this, resulting in the necessity for forcing in air, he was using the caisson method. He combined the two methods in such a way that he could use both at the same time, and let what had been objectionable in one be overcome by the other. In other words, the compressed air of the caisson method prevented the water from coming in as it had done with the cofferdam method. The resistance to the water from the cofferdam made it unnecessary to use the high air pressure, which was dangerous in the caisson method.

If McBean was entitled to all the credit for taking the steps from the two old separate methods to the new and combined method, I would feel that it was a step displaying such genius and bringing such results that he should be rewarded with a valid patent. Without undertaking now to narrow the art by the patents cited by defendant, I will pass that step and see whether, giving plaintiff the benefit of the serious doubt as to validity, the defendant has infringed.

The McBean patent combines the two well-known methods of the caisson and the cofferdam. For the purpose of this discussion and on the question of infringement I am giving McBean full credit for having made that advance in the art. As already indicated, it is plain that he is not entitled to all that credit.

The so-called first patent in suit is No. 745,454 of December 1, 1903. While there are claims 1, 3, 9, 10, and 11 in suit, it has been agreed on the record by counsel that whatever conclusion I reach as to No. 11 will dispose of this patent, and all of its claims in suit. Claim No. 11 reads as follows:

"11. The method of constructing a tunnel under water, consisting in erecting vertical walls around the site extending to bedrock or below the bottom of the proposed tunnel, then placing a roof thereon to form therewith a chamber, then forcing air into said chamber and expelling the water therefrom, and then constructing the tunnel in place therein."

It is so well agreed on this record just what the defendant has done that I am not going to waste time in attempting to describe it, except as may be necessary in discussing the particular claims.

The big question that has been discussed before me during nine-tenths of the time is whether or not this defendant, when it completed its tunnel and built the structure that went inside of the iron tube was building a tunnel within the working chamber described in this claim No. 11. That is really the meat of this lawsuit, and the thing important to this plaintiff, if he is right in his contention. That should be interpreted in the light of the art, in the light of the McBean drawings,

specifications, and claims. What did he have in mind, and what new and useful thing did he show to the world? He built a complete tunnel in a working chamber. He did everything in the way of making a tunnel in a working chamber, except digging a portion of the trench, driving down some piles, and refilling a portion of the trench. Everything else was done in a working chamber. He dug down to the solid rock and filled in the concrete, just as if it was in the open air, without any interference with the water. He cut off the piles, other than the side piles, to the desired height. He built up his tube in this working chamber, and he put the concrete around the tube inside the working chamber. So he built an entirely completed tunnel in a working chamber.

Now, the defendant, on the other hand, has done nothing in a working chamber, except what was done inside of the iron casing. The question is here whether or not the defendant, by doing the concrete work inside of the iron casing, was building a tunnel in a working chamber, as shown by McBean. Defendant, without any air other than ordinary atmospheric pressure, went into the iron casing and built in the concrete lining, made it strong, made it durable, and finished a tunnel.

That makes it necessary for the court to reach some conclusion as to what is meant, within this patent, by a "tunnel," as well as by a "working chamber." It does not matter much which angle I proceed from, but it seems to me it is well to find out what McBean means by a "tunnel." Now, the problem was to get the tunnel so that it would be impervious to water and would resist the hydraulic pressure. When you had reached that point, so that it might be entered from the land, and anything that was desired could be done in it, without forcing in air, the problem had been solved. The defendant reached that stage in its work before it worked in any working chamber whatever. I find nothing in this patent which prevents defendant from building a tunnel by going down through the water with tremie pipes, pile drivers, and dredges. There is nothing in this patent which prevents defendant from constructing anything it sees fit on the land, and floating it over the place where the tunnel is desired, and then sinking it down in place.

What the defendant has done is to use the old method of working through the water, scooping out a ditch, constructing a tunnel on land, taking it out and sinking it, and by tremie pipes depositing the concrete down through the water under, around, and over the tubes in the bottom of the river, and by these methods finally reaching such a stage in the work that they have a hole under the river, which can be entered from the land. No air pressure is needed on the inside of it; men can enter it, men can work in it, the water is kept out, and when they reach that stage the difficult problem has been solved, and the structure is a tunnel, within the meaning of the patent, and it has been built without any working chamber. It is claimed by the plaintiff that then, from that time on, because defendants lined this tunnel with concrete work three feet thick, which undoubtedly gave it the great strength and durability to be desired in a tunnel, that they built a tunnel in an air chamber under the water.

We must keep in mind the problem that McBean was trying to solve. It is plain that defendant solved it in a way entirely different from McBean. To take the position of the plaintiff in this case would mean that McBean had by this claim No. 11 in this patent in suit obtained such a monopoly over the right of constructing tunnels that no engineer or contractor could construct a subaqueous tunnel by beginning at the outside in his work, no matter what method he used, because just as soon as he kept the water back and resisted the hydraulic pressure sufficiently, so that he could begin from the outside and work inside, and complete his tunnel on the inside, just so soon he was working in a chamber. There is nothing in this patent that warrants any such broad construction or interpretation of it by the court. It seems very clear to me that this patent, called the first patent in suit, has not been infringed.

[3] I turn now to what has been called the second patent in suit, which is No. 745,456, December 1, 1903. It is agreed by counsel that my attention may be directed to claims 2 and 6, and that whatever result I reach as to these two claims ought to be the conclusion I reach as to the others.

Claim 2 reads as follows:

"2. In tunnel construction, a subaqueous working chamber formed by the roof of the tunnel and walls extending downward below the bottom of the structure to be built."

Claim 6 reads as follows:

"6. In tunnel construction, a subaqueous working chamber, comprising impervious side walls, extending downward to bedrock or to a depth below the bottom of the proposed tunnel, and the tunnel roof supported thereon in permanent position."

This is like the so-called first patent, except that it substitutes for what was a wooden roof in the first patent a metallic roof, which is subsequently to become the top of the tube for the tunnel. The conclusion reached as to this patent is the same as that reached as to the first patent, for the reasons mentioned in disposing of the first. Like the first patent, it is held not infringed.

[4] The so-called third patent in suit, No. 745,457, December 1, 1903, is for the actual tunnel inside the working chamber. In his first two patents McBean undertakes to describe the working chamber and the method by which he constructs his subaqueous tunnel, while the third patent, the one last mentioned, describes the tunnel itself. It is agreed by counsel that, while there are three claims in suit, 6, 9, and 10, the conclusion reached with reference to 6 and 10 should be controlling as to 9.

Claim 6 reads:

"6. A subaqueous tunnel, comprising a metallic tube, supporting side walls therefor, a pile foundation and a mass of masonry serving as a bed for said tube, said walls and piles being anchored to said masonry."

Claim 10 reads:

"10. A subaqueous tunnel structure, comprising a mass of masonry, inclosing the tunnel passage, foundation piles imbedded in said masonry, sheeting side

walls anchored to the masonry, and tie rods connecting the sheeting on opposite sides."

Claim 6 claims the very things that were shown in the first patent, and, in addition, the anchorage of the concrete to the sheet piling that formed the sides of the working chamber. McBean went down to bedrock, and this anchorage would, of course, tie the masonry to the sheet piling, and would add to the support from the piling directly under the tunnel the extra support from these sheet pilings at the side. It would also tie the sheet piling to the tunnel proper.

I find nothing of this kind in the defendant's structure. I find no supporting side walls within the meaning of this patent, and no pile foundations within the meaning of this patent. There are no side walls which go down to bedrock. The meaning which I find McBean had for piles in his patent is the meaning which I have always had in mind, a long, tapering timber which goes down into soil that is not substantial enough to be used for a foundation in the ordinary way. These piles are driven down, and then, by reason of the friction between their circumference and the earth, they are substantially solid. I do not find that McBean had in mind such a foundation as the defendant has built here.

There is little, if any, value in these patents, other than the so-called first one. If there was any value to the public in McBean's discovery, it was shown in the first patent. These other patents cover minor matters. I doubt very much their validity, not only because they are a part of what was shown in the first patent, but upon the broad question that they do not approach that degree of skill, genius, and novelty necessary for a valid patent. The first patent stands in a different class. If these other patents have any value at all, they are dealing with things so old that they should be held to the specific things described and the exact combination described. When we come to consider equivalents, or as to any other phase of their construction, they must be interpreted strictly and not given a broad meaning.

Looking more particularly at claim No. 10 I perhaps ought to mention the four posts or piles which defendant used to position the grillage. Plaintiff calls them piles; defendant calls them pegs; but it does not make much difference what name is given them. I am satisfied that the real purpose and function they serve is to fix the grillage as to altitude and level, laterally and longitudinally, in position. That is the real function they serve. It is an important function in that way, but any other thing they do is simply an unimportant incident, and one the court ought not to be influenced by in this lawsuit.

In view of the degree to which the art must be narrowed, and in view of the description given by McBean himself, I am forced to say there is no infringement.

[5] The fourth patent is No. 797,524, August 15, 1905. This is like patent No. 3, just described, except it shows a different method of putting the tunnel together. The only claim I am asked to consider here is claim No. 8. It is agreed by counsel that whatever dis-

position I make of claim No. 8 ought to be the disposition which I make of the other three claims in suit.

Claim 8 reads:

"8. A subaqueous tunnel, comprising a masonry base, inclosing side walls, supporting piles and devices interconnecting said piles and said side walls; said devices and the tops of said piles being imbedded in said masonry."

What I have said in reference to the claims of the third patent applies with equal force to the so-called patent No. 4, and ought to be controlling. There are no inclosing side walls within the definition of the claim. There are no supporting piles within the definition of this claim. Neither are there any devices interconnecting piles to the side walls, within the fair meaning and interpretation of these claims.

[6] Coming now to the last patent in suit, No. 797,525, August 15, 1905, it is agreed by counsel that I should dispose of claims Nos. 1 and 3, and their disposition should control as to 5 and 8.

These claims read:

"1. The method of constructing subaqueous tunnels, which consists in first building a foundation or base, and then progressively erecting the tunnel superstructure thereon within a pneumatic chamber.

"3. The method of constructing subaqueous tunnels, which consists in first preparing a foundation of piles, then imbedding the tops of said piles in masonry to form a tunnel base or foundation, and then progressively erecting the tunnel superstructure thereon."

This so-called fifth patent is more like the first patent, and it rests upon the very same idea covered in the first patent. As I read this claim 1, my first thought, without having in mind the drawing and specifications and what McBean said about it, was that he was claiming that he first built a foundation and then within a working chamber did the rest of the work. Upon more careful thought I am satisfied that he is simply making a broad sweeping "Balboa" claim that will cover everything. I think he intends to cover any tunnel that is built in an air chamber, but what I have said with reference to the first patent disposes of this fully. Defendant did not build a tunnel in a working chamber.

The bill is dismissed, with costs to the defendant, to be taxed.

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## In re BLANCHARD.

(District Court, D. New Jersey. October 14, 1918.)

1. BANKRUPTCY ⟸228—FINDINGS OF REFEREE—REVIEW.

A finding of fact by a referee on conflicting evidence will not be disturbed, unless there is cogent evidence of mistake; but, if the finding be a deduction from established facts or uncontradicted evidence, it is not entitled to such weight.

2. BANKRUPTCY ⟸340—PROVABLE CLAIMS—EVIDENCE.

Evidence *held* insufficient to support a finding that claimant lent stock directly to her sons, one of whom was the bankrupt, rather than to a

corporation of which she and they were stockholders, and by which the stock was pledged.

3. PRINCIPAL AND AGENT ⊂⊃136(2)—LIABILITIES OF AGENT—ACTING FOR DISCLOSED PRINCIPAL.
Where an agent acts on behalf of a disclosed principal, his acts and contracts, within the scope of his authority, are, in the absence of an express agreement otherwise, the acts and contracts of the principal, and involve no personal liability on the part of the agent.

4. BANKRUPTCY ⊂⊃340—ALLOWANCE OF CLAIMS—CLAIMS BY RELATIVES.
Claims of relatives of a bankrupt should be closely and carefully scrutinized, and not allowed, unless the evidence is clear and convincing.

5. PLEDGES ⊂⊃1—ACCOMMODATION PLEDGE—RIGHTS OF PLEDGOR.
Property pledged by the owner to answer for the debt or default of another occupies the position of a surety.

6. BANKRUPTCY ⊂⊃314(1)—PROVABLE CLAIMS—COSURETY OF BANKRUPT.
Claimant, who lent stock to a corporation of which she and three sons, one of whom was the bankrupt, were stockholders, which stock the company pledged to secure its note, indorsed by the sons, on insolvency of the company and her purchase of the note to save her collateral, *held* entitled to prove one-fourth the amount paid against the bankrupt estate, on the ground that as between themselves the stock pledged and the indorsers were cosureties.

In Bankruptcy. In the matter of Theodore C. E. Blanchard, bankrupt. On petition to review an order of the referee, to whom this matter was referred, dismissing a petition of the trustee to re-examine and reduce the claim filed against the bankrupt's estate by Emeline C. Blanchard, and allowing the same, as a general unsecured claim against the estate, in the sum of $297,719.26. Reversed in part.

Robert H. Southard, of Newark, N. J., for trustee.

Albert C. Wall, of Jersey City, N. J., and William F. Allen, of New York City, for claimant.

HAIGHT, District Judge. The primary question in this matter, as I understand it, is whether claimant's stock in the Prudential Insurance Company, which was first pledged with the Fidelity Trust Company to secure the payment of a note or notes of the Blue Ridge Enamel Brick Company, and later with Milton E. Blanchard, to secure a note of the same company made to his order, was loaned by the claimant to her sons jointly—the bankrupt, Fred C. Blanchard, and William W. Blanchard—as it is contended on her behalf, or whether it was loaned to the Brick Company as the trustee contends. The referee has found in accordance with the claimant's contention. If his conclusion in that respect was correct, undoubtedly the allowance of the claim was proper. I have accordingly examined with care all of the evidence which was before the referee, and am forced to the conclusion that his finding was not justified from the evidence.

[1] In so deciding I have not been unmindful of the rule which prevails in this district, and elsewhere I think, that the court will not disturb the finding of fact of a referee, based upon conflicting evidence, involving questions of credibility, unless there is most cogent evidence of mistake and miscarriage of justice. In re Partridge Lumber Co., 215 Fed. 973, 976 (D. C. N. J.). But it is also a general rule that,

if the finding be a deduction from established facts or uncontradicted evidence, it will not carry any great weight, for the court, having the same facts, may as well draw inferences or deduce conclusions as the referee. In re New York & Philadelphia Package Co., 225 Fed. 219, 221 (D. C. N. J.). There was really no question before the referee which had to be solved from conflicting evidence, involving the credibility of witnesses, but rather the question was whether the evidence was sufficient to justify a finding that the stock was loaned directly to the sons of the claimant rather than to the Brick Company. A review of the evidence is necessary, I think, in order that the reasons upon which my conclusion is based may be understood.

[2] On August 1, 1904, the Brick Company borrowed $205,000 from the Fidelity Trust Company on its note, indorsed by the claimant and her three sons before named, and pledged as collateral security for its payment 1,176.46 shares of the capital stock of the Prudential Insurance Company, all or the greater part of which belonged to the claimant. Whether this was an original loan, or whether it was a consolidation of previous unpaid loans, the evidence does not positively disclose; but it would seem that it was the latter, supplemented possibly by an additional loan made on the day that the last-mentioned note was executed. On April 3, 1908, this note, as well as some others made by some of the claimant's sons individually (for the payment of which collateral belonging to the claimant had likewise been pledged), were called, and a demand made that they be paid on or before April 6th. In order to prevent a sale of the collateral, Milton E. Blanchard, another son of the claimant, who apparently was not interested in the Brick Company, took up the note held by the Fidelity, and on April 6th a new note for $216,411.67 (being the amount that he paid to the Fidelity), payable in one year from date, was made to his order by the Brick Company. It was indorsed by W. W. Blanchard, Fred C. Blanchard, and the bankrupt. There was pledged with it, as collateral, 1,225 shares of the capital stock of the Prudential Insurance Company belonging to the claimant, included in which, as far as I can ascertain from the evidence, were the 1,176.46 shares held by the Fidelity as collateral for the $205,000 note. This note was held by Milton E. Blanchard until March, 1914, a short time after the voluntary petition of the bankrupt in this case was filed, when the amount due thereon was paid by the claimant, in order to prevent the sale of the collateral which had been pledged for its payment, and the note was transferred to her. She is still the holder of it.

The disputed part of her claim is $271,155, which represents the amount due on the note, after giving credit for a dividend received from the Brick Company, which in the meanwhile had been adjudged a bankrupt. The claimant, as well as her three sons, were the only persons financially interested, at least to any extent, in the Brick Company. The bankrupt was the president, Fred C. Blanchard the treasurer, and William W. Blanchard the general manager. Its capital stock was originally $100,000, or $150,000, of which the claimant owned 100 shares, of the par value of $10,000. Afterwards she ac-

quired 300 shares of the par value of $30,000—possibly more—in liquidation of a debt due her for moneys which she had advanced from time to time to the company. The bankrupt apparently gave very little attention to the business of the Brick Company; William W. Blanchard having been in active charge of its affairs. There is no evidence that any new arrangement regarding the use of the claimant's stock as collateral was made when the note to Milton E. Blanchard was executed. Apparently the arrangement under which the stock was originally procured from the claimant to borrow money from the Fidelity was continued. The stock which was held by the Fidelity was simply turned over to Milton, and he assumed the position which the Fidelity had formerly occupied.

It is necessary, therefore, to ascertain what the evidence discloses as to the arrangements which were made when, and circumstances under which, the stock was originally acquired from the claimant. There was no written agreement, or any memorandum in writing, respecting any of the original transactions. The only competent evidence on this point, outside of a letter to the Fidelity signed by the claimant, was the unaided recollection of the claimant, and two of her sons and her daughter, as to what generally transpired when they asked her for stock for borrowing purposes, in which pursuit they seem to have been quite extensively engaged, both personally and on behalf of the Brick Company, for 10 years or more preceding the bankruptcy. The claimant, Mrs. Blanchard, a woman over 90 years of age, testified that she did not think that the stock was pledged for the Brick Company's debts, and did not know whether the sons specified the purpose for which they wanted it, although they may have done so. She had no clear recollection of the transactions, or anything about them. Her testimony may be well summarized in her own language, viz.:

"I loaned my stock to my boys. * * * Why, I loaned it to the boys whenever they wanted it; they knew they could have it when they needed it. * * * I trusted my boys and gave it to them; that is all I know about it."

Mrs. Walter, a daughter who lives with the claimant, and whose husband, in later years, has been attending to the claimant's business affairs, stated that she remembered that her brothers frequently met at their mother's home for luncheon, and on some occasions they requested loans of stock of the mother, that they might borrow on it; that she remembered, when improvements were needed at the plant of the Brick Company, the brothers would ask for a loan of the stock, so that they might borrow on it and make the necessary improvements; that her mother sometimes objected to having the stock go out of her hands, and would tell them "to be sure and return it to her as soon as they could"; that they would say that the stock would be perfectly safe with them, and that they hoped to return it soon.

Fred C. Blanchard testified that the brothers met at their mother's home very frequently for luncheon; that the brothers explained the condition of the Brick Company from time to time to their mother,

and that if they borrowed any stock it was for the purpose of getting money from the stock and placing it to the use of the company; that sometimes he procured the stock, and sometimes his brother did; and that—

"we always promised, at those times, to return the stock to her—just as soon as we possibly could * * * We [two brothers and himself] made an explanation of the need of the money and the condition of the company, and gave our promises to return the stock."

He admitted having testified, during an examination held in the general bankruptcy proceedings in this case under section 21a, regarding the manner in which the stock in question came into the possession of the Brick Company, as follows:

"As they needed money they borrowed the stock from my mother, and that was the only way."

The only explanation given by him of the apparent difference in his testimony was that by the use of the word "they" he referred to his two brothers and himself; that the "Brick Company was the three brothers."

W. W. Blanchard testified that, after he and his brothers had used up all of their stock, they felt compelled to go to their mother:

"We would say: 'Mother, it is absolutely necessary; we must have money, and can't you let us have say probably 10 or 20 shares of Prudential stock, and we will get the money on it.' * * * We always assured her we would hold ourselves responsible for the return of her stock. * * * My brother Theo would invariably say she need have no fear whatever; they (referring to the Fidelity Trust Company) wouldn't dare to sell her stock, and, if they did, we will see that it is made good, or she would get the equivalent back."

By "they" he stated that he referred to the Fidelity Trust Company, and by we "to Fred and myself." He further testified, when asked the direct question, that she had loaned the 1,225 shares to the three brothers. He admitted, however, that, when being examined in the general bankruptcy proceedings under section 21a, he had testified that the Blue Ridge Company had borrowed the stock in question from his mother. He attempted to explain the apparent conflict in his testimony by stating:

"I never differentiated between myself and my brothers, nor myself and the Blue Ridge Enamel Brick Company, until my attention had been called to the fact that I had stated that the Prudential stock had been loaned by my mother to the Blue Ridge Company. The importance of it was read to me, or rather the testimony was read to me, and I saw at a glance that I had said what was not the case. That stock was never loaned to the Brick Company, although in my testimony I said it was. I treated as one—we brothers—and never thought of differentiating between myself and my brothers. I did not realize the importance of it."

He then went on to reiterate that the stock was loaned to the sons, and was never loaned to the Blue Ridge. I cannot conceive that the testimony of Mr. John R. Hardin, who acted as an attorney for apparently all of the brothers, as well as the mother, at the time the Fidelity Trust Company note was taken over by Milton, and which was relied on very largely by the referee, was competent as establishing the conditions under which the stock was originally loaned,

or to whom it was loaned, because, as far as it appears, Mr. Hardin had no connection with those transactions, and the impression that he had—and he frankly stated that it was only an impression—that Mrs. Blanchard had loaned the stock to her boys, as distinguished from the Brick Company, was, for all it appears, based on what he had been told by others. It will be noted that all of the testimony recited above, which I have considered competent, was given by interested parties, and, as respects two of them, was quite different from that which they had given when the importance of establishing that the stock had been loaned to the sons, rather than to the Brick Company, was not apparent to them. All of the witnesses testified that the loans of stock by the mother covered a period of 10 years or more prior to 1908. None could testify when any particular loan was made, or how much stock was loaned at any one time. The witnesses were testifying in 1915. Moreover, it is entirely clear from this testimony that the claimant knew, at the time the stock was loaned, that it was to be used for the benefit of the Brick Company, in which she was interested as a stockholder, and apparently, at some of the times, as a creditor. Some of the testimony is more susceptible of the inference that the sons agreed to indemnify or hold her harmless against loss by reason of the delivery of the stock than that they were personally borrowing it. For instance, William testified:

"We always assured her that we would hold ourselves responsible for the return of the stock."

That clearly imports an indemnity agreement. If the stock was loaned to the sons, there was no need of an assurance to their mother that they would hold themselves responsible for the return of it. The bankrupt was not called as a witness, although he had testified in the main bankruptcy proceedings. It appears that on July 5, 1901, Mrs. Blanchard signed a letter, prepared by the president of the Fidelity Trust Company, authorizing the Brick Company "to borrow such sums of money and at such times as may be deemed by them necessary, for their use and benefit, and to pledge therefor certificates [naming them] of the capital stock of the Prudential Insurance Company of America, standing in my name on the books of the company." While, because of the claimant's age and the circumstances under which the letter was signed by her, I attach no great importance to it, the natural inference to be drawn from this letter is that the stock had been delivered to the Brick Company. Later on, when Milton took over the note, he wrote his mother a letter, stating the terms upon which he would hold certain of the pledged stock which he found necessary to be transferred to his own name, and therein referred to the stock as having been "pledged with your consent to secure the loan made by me to the Blue Ridge Enamel Brick Company."

In the dealings of the parties respecting the affairs of the Brick Company, there was apparently no distinction made between the claimant's three sons and the Brick Company itself. The mother was an indorser on the original note, and hence her liability thereon was fixed, irrespective of the stock furnished by her to be used as collateral. I can see no good reason, therefore, why the delivery of the

stock should have taken the form of a loan to the sons rather than to the company. The sons, in seeking to borrow the stock, were unquestionably acting, to the mother's knowledge, as agents for the company; the stock was to be, and actually was, used for the benefit of the latter, in which she was financially interested. The claim is presented by a very near relative of the bankrupt, and is sought to be proved by other relatives, whose interest in the establishment of the claim is apparent and substantial.

[3, 4] Under such circumstances, the evidence must be considered, as I fear the referee overlooked, in the light of two general rules, the latter of which cannot, I think, be too rigidly adhered to. The first of these rules is that, where an agent acts on behalf of a disclosed principal, his acts and contracts, within the scope of his authority, are, in the absence of an express agreement otherwise, the acts and contracts of the principal, and involve no personal liability on the part of the agent. Whitney v. Wyman, 101 U. S. 392, 396, 25 L. Ed. 1050; McCauley v. Ridgewood Trust Co., 81 N. J. Law, 86, 88, 79 Atl. 327; 2 C. J. 812, § 486, and cases there cited. And the presumption in such cases is that it was the intention to bind the principal only, which presumption can be overcome only by clear and explicit evidence of an intention to substitute his personal liability for that of the principal. Moline Malleable Iron Co. v. York Iron Co., 83 Fed. 66, 70, 27 C. C. A. 442 (C. C. A. 7th Cir.); Hall v. Lauderdale, 46 N. Y. 70, 74; 2 C. J. 813, § 487; Id. 923, § 661, and cases cited. The second rule above referred to is that claims of relatives of a bankrupt should be closely and carefully scrutinized, and not allowed, unless the evidence is clear and convincing. In re Domenig, 128 Fed. 146, 148 (D. C. E. D. Pa.); In re Grandy & Son, 17 Am. Bankr. Rep. 206, 214, 146 Fed. 318 (D. C. S. C.); In re Wooten, 118 Fed. 670, 671 (D. C. N. C.); Ohio Valley Bank Co. v. Mack, 163 Fed. 155, 89 C. C. A. 605, 24 L. R A. (N. S.) 184 (C. C. A. 6th Cir.); Baumhauer v. Austin, 186 Fed. 260, 108 C. C. A. 306 (C. C. A. 5th Cir.).

I am unable to conclude that the claimant's contention that the stock was loaned to the bankrupt and his two brothers personally, rather than as agents of the Brick Company, has been established as against other creditors by such clear, explicit, and convincing evidence as the before-mentioned rules require.

[5, 6] The next question is whether the fact that the claimant is now the holder of the note which was given by Milton to the Brick Company to take up the note originally held by the Fidelity, and that the bankrupt was an indorser thereon at the time she acquired it, entitles her to recover the full amount of the note from his estate; and, if not, what part thereof, if any, she may recover. This necessitates an ascertainment of the legal relationship which the pledging of the claimant's stock and the indorsing of the notes by the sons created as between the claimant and the sons. As the evidence fails to establish that the stock was loaned to the sons personally, there is presented a situation where it appears that stock belonging to the claimant was loaned by her, at the request of her sons, and used by them as representing the company, with her consent, for the express

purpose of enabling the Brick Company to borrow money on its note or notes; the latter being also indorsed by the sons for the same purpose. The stock was therefore surety for the payment of the note, for it is well settled that, when property is pledged by an owner to answer for the debt or default of another, it occupies the position of a surety. Brandt on Suretyship & Guaranty, vol. 1 (3d Ed.) § 43, and cases there cited; National Bank v. Silliman, 65 N. Y. 475, 478; Hanford v. Bockee, 20 N. J. Eq. 101, 105. The sons were likewise sureties for the payment of the note, and undoubtedly, as between themselves, their understanding (which parol evidence was admissible to show, Wilson v. Hendee, 74 N. J. Law, 640, 66 Atl. 413) was that they were to be cosureties. Thus it appears that the stock was pledged as security for the same debt as that for which the sons became surety, and at the same time. On this bare set of facts, were it not for the fact that the suretyship of the sons took the form of an indorsement of a promissory note, there would seem to be no question but that the claimant's stock and the sons were cosureties, and as such required to bear a proportionate share of the loss. Brandt on Suretyship & Guaranty, vol. 1, § 281, and cases there cited.

The trustee, however, invokes the rule laid down in a number of cases, and which I think may be considered as a general one, that an accommodation indorser of a note, except there be an agreement to the contrary, is not liable as a cosurety to a surety who signs a note as a maker (see cases cited in Brandt on Suretyship & Guaranty, vol. 1 [3d Ed.] § 286; 32 Cyc. 17, note 16), and contends that the claimant's stock occupied, in effect, the same position as if the claimant had signed the note as an accommodation maker. Hence it is argued on his behalf that, on familiar principles, the claimant cannot recover against the bankrupt. Even if it be assumed that the claimant's stock occupied the same legal position as if the claimant had signed the note as an accommodation maker, it seems to me that the trustee's contention is not sound, because it is entirely clear, in view of the circumstances under which, and the purpose for which the stock was procured and pledged, and the relationship of the parties toward the Brick Company, that the claimant and her sons never intended, as between themselves, that her stock should be liable for a greater proportion of the Brick Company notes than the sons should be liable for, which intention, for all present purposes, may be considered as a sufficient agreement between the sureties to satisfy the exception mentioned in the rule, and to overcome the presumption upon which the rule is based, that those who sign in different capacities are presumed not to be cosureties.

The claimant's contention that they were not cosureties is based on the proposition, set forth in her proof of claim and relied upon at the hearing and the argument, that the stock was not loaned to the company, but was loaned to the sons, and by them loaned to the company. Of course, if such were the fact it needs no argument to demonstrate that the stock, so far as the claimant is concerned, would not have occupied the position of a cosurety with the sons, for in that case the stock would have been pledged as the property of the sons, and not of the claimant. But, as it has been heretofore found, the

evidence does not establish that the stock was loaned to the sons. While there is some evidence from which it might be inferred that the sons had agreed to indemnify the claimant against loss (and if such had been the fact it would have, I think, rebutted the inference that the stock and the sons were cosureties), it would not be permissible, I think, to consider any such evidence in this matter, because it would be so utterly inconsistent and at variance with the theory on which the proof of claim is based, and the matter was tried, and the appeal argued. There could not exist at the same time an agreement to loan the stock to the sons personally and an agreement to loan the same stock to the company upon the sons' indemnity agreement.

The claimant having chosen to attempt to overcome the presumption of cosuretyship on the theory that the stock was loaned directly to the sons, and offered evidence to that effect, she is bound, on this appeal, at least, to stand or fall on the position which she has taken. I do not mean to be understood, by anything that I have just said, as intimating an opinion as to whether or not an indemnity agreement such as that above discussed would be within or without the statute of frauds. It follows, therefore, I think, that the only legitimate conclusion which can be reached is that the claimant's stock occupied the position of a cosurety with the sons for the payment of the note. Such being the relationship, it is entirely well established, as in reason it must be, that the mere fact that the claimant has paid and acquired the note in order to save her stock, does not entitle her to recover against one of her cosureties more than his proportionate share of the debt which she paid. Lidderdale v. Robinson, Fed. Cas. No. 8,337, 2 Brock. 159, affirmed 12 Wheat. 594, 6 L. Ed. 740; German, etc., Bank v. Fritz, 68 Wis. 390, 32 N. W. 123; Dillenbeck v. Dygert, 97 N. Y. 303, 49 Am. Rep. 525; McDaniel v. Lee, 37 Mo. 204; In re Carmichael, 96 Fed. 594 (D. C. N. D. Iowa); In re Bingham, 94 Fed. 796 (D. C. Vt.); 37 Cyc. 428; Brandt on Suretyship & Guaranty, vol. 1 (3d Ed.) § 341. As there is no evidence that the other sureties are insolvent, and no other equity to change the general rule appears, the claimant is only entitled to recover from the bankrupt's estate one-fourth of the amount which she paid to Milton E. Blanchard when she acquired the note. See 32 Cyc. 285, E, et seq., and cases cited.

My conclusion, therefore, is that, in so far as the order of the referee allowed her claim for any sum in excess of such one-fourth, it was erroneous, and should be reversed accordingly.

## THE SARMATIA.

## THE BARBARIGO.

(District Court, D. Maryland. November 14, 1918.)

COLLISION ⇐125—VESSEL AT FAULT—EVIDENCE.

Under conflicting evidence, in view of credit given witnesses, fault for collision between two of a fleet of convoyed ships, depending on which was out of its proper place, in a line, abreast, 500 yards apart, *held* solely with respondent.

In Admiralty. Libel by Peder Christian Moller Pederson, master of the steamship Sarmatia, against the steamship Barbarigo; Umberto Nobile, claimant. Decree for libelant.

George Forbes, of Baltimore, Md., for libelant.

Ritchie, Janney & Stuart, of Baltimore, Md., and Kirlin, Woolsey & Hickox, of New York City, for respondent.

ROSE, District Judge. Shortly after 1 o'clock on the morning of May 16th last, at a point in the Mediterranean something over 200 miles east of Gibraltar, there was a collision between the Danish steamship Sarmatia, hereinafter referred to as the "Dane," and the Italian steamship Barbarigo, spoken of as the "Italian." They formed part of a fleet of seven or eight merchant ships, under convoy of destroyers, armed trawlers, etc. The convoyed vessels were sailing in line abreast. Each ship should have been 500 yards away from its nearest neighbor, whether to the right or to the left.

The night of the collision was calm. The moon had gone down. There may have been some clouds in the sky, and it was therefore dark, but there was no mist. All the witnesses, differing as they do as to much else, agree that ships could be seen for a distance many times greater than would have been necessary to have avoided the accident.

Nothing in the testimony suggests that there was anything the matter with the steering gear or other machinery of either vessel. They came together because one or the other of them was carelessly handled. As a matter of course each of them says it kept its position, and the other came down on it. As it is not likely that more than one of them was out of its proper place to any material extent, the sole question is: Which one was where it should not have been?

The Italian says that the Dane closed down on it and drew a little ahead, so at the time they came together, the Dane was about a half length forward. The Dane's story is that the Italian had been ahead about a half ship's length, and that shortly before the collision, she began to drop back and down upon the Dane, and continued to do so until she struck. There is no question that the bluff of the port side of the Italian's bow struck or was struck by the starboard side of the Dane at a point a little abaft of the latter's main rigging.

If the Italian's version is true, the Dane must have been moving appreciably faster than the other ship. The Dane's account is con-

sistent with the speed of the two ships being at the critical period more nearly equal. While sailing in convoy, the aim is to keep all the ships moving at a uniform rate, a purpose which, of course, is not always perfectly attained.

As the distance between the ships grew perilously narrow, the Dane gave a whistle signal. The collision followed hard thereon. Various witnesses estimate the interval somewhat differently. Some say it was one minute; some three. Such estimates, of course, have no value other than to show that the intervening time was of the shortest.

That the Dane whistled was not disputed, but there is a question as to how many blasts it blew. It says there were two, signifying it was turning to port, and out of the Italian's way. The witnesses from the latter swear that it gave but one; that is, that it gave notice that it was doing what they say it was, namely, turning to starboard. Whether the number was one or two had in itself nothing to do with the disaster. The signal, whatever it was, never caused the collision nor contributed to it. The conflicting stories told about it are, however, significant as bearing upon the truthfulness of the persons who have testified concerning it. Some of the witnesses, who were on one or the other of the ships in collision, were, at the time it happened, asleep, or in such parts of the ship that they did not hear the signal at all; but those who did without exception testify in support of that number of blasts favorable to the vessel upon which they were. Three individuals, who were aboard the Owego, have been examined. It was under the American flag, was a member of the convoy, and was sailing next to the Dane on the latter's port side. Two of these witnesses were produced by the Italian, and one by the Dane. The latter said he heard whistles, but he frankly says he does not remember how many. Whether his use of the plural "whistles" was intended by him to have any meaning does not appear. The mate of the Owego was on her deck at the time the ships came together, and was produced on behalf of the Italian. He says there were two blasts, and the master of the Owego, who was asleep when the signals were given, testifies that when he came on deck a few minutes afterwards the mate told him that two blasts had been sounded. I have no question that the fact was so.

Four of the officers and men of the Italian, being all who were on her deck at the time, and who have been examined, say that there was only one blast. The ships were too close together for any of these witnesses to have failed to hear both whistles, and while it would have been easy for some, it would have been difficult for all of them to have become confused in their recollection as to the number. Their uniting in saying that only one blast was blown suggests that there was a concerted effort on their part to make the court believe that the whistle signal was in accord with the story which it was for the interests of their ship to have accepted. This conclusion, moreover, merely strengthens the unpleasant impression which these particular witnesses made at the hearing. It is true some of them were struggling, and perhaps greatly struggling, with the difficulty which unlettered or slightly lettered men have in conveying their

ideas through interpreters, the latter not familiar with the peculiarities of the particular dialect of the language spoken by them, and entirely ignorant of nautical terms in any tongue. Still, after making all proper allowance on this score, it remains true that they compared unfavorably with those produced from the Dane.

The Italian examined as a witness for it, an Italian army officer who was on board as sort of supercargo. He did not come on deck until a few minutes after the collision. He locates the Italian at that time as about its proper distance from the Norwegian ship on its starboard and from the Owego to the port of the Dane. It is stipulated that the Italian naval officer in command of the merchant fleet, and who came on deck about the same time, would have given like testimony, had it been practical to examine him. It is, however, easy to be mistaken as to distances at sea, particualrly at night. It is curious, but true, that there is a very strong instinct which makes almost every man in a case of collision, be it on land or sea, a partisan, subconscious, perhaps, but no less intense, of the conveyance in which he was at the time the accident happened. In view of these considerations and of the other evidence, I cannot give controlling weight to the testimony of these gentlemen.

At the time of the collision there must have been a number of people on the deck of some of the other five or six ships in the convoy, and some of these may have seen more or less of the accident. I believe both parties have been diligent in their efforts to locate them, but they have succeeded in producing three only, all from the Owego. Of these three, as already stated, but two were on deck when the ships came together, and unfortunately they flatly contradict each other.

The mate of the Owego was then in charge of her navigation. He claims that at the moment of collision the two ships were from 800 to 1,000 yards to the starboard of his vessel. This is the approximate position in which they would have been had the collision taken place as the Italian says it did. The master of the Owego, who came on deck a moment or two later, confirms this estimate. In weighing the value of their testimony, it is probably unimportant to note that they were mistaken as to what happened after the collision. They think that the Dane dropped to the rear. It was the Italian who fell back. Their error, in a respect in which they did not claim to be positive, does not discredit their testimony. At night they could readily have been mistaken. The testimony of these witnesses was taken in New York, and I did not have the advantage of seeing or hearing them.

The third witness from their ship was an enlisted man in the United States navy. He was a member of the armed guard. He testified in open court, and struck me as being unusually intelligent and impartial. He locates the Dane at the time of the collision about 150 yards to the right of the Owego's course; the Owego then being a ship's length ahead of the Dane. This would be about the position in which the Dane would have been, had its testimony been true, namely, that the only departure it made from its proper place was in turning somewhat to port to avoid the Italian. He, moreover, agrees with the wit-

nesses from the deck of the Dane, in that, not long before the collision, the Italian seemed to be something like a half ship's length ahead of the Dane. The only portion of his testimony inconsistent with the account given by the witnesses on the Dane is that, according to him, the latter was about as close to his ship when he went on watch as it was at the time of the collision. According to the story of the Dane, before it moved down towards that ship in an effort to avoid the Italian, it was 400 or 500 yards away from the Owego.

The written testimony of the master and mate of the Owego has not favorably impressed me. They appear to be persons who would scarcely have been holding these positions, had not the demand, created by the war, for qualified officers, put many men in places which they could not otherwise have attained. They were rather singularly forgetful of things which it would have been natural for them to remember. For example, they cannot recall that there was a ship on their port side. It seems quite satisfactorily established that there was in that position a large five-masted Italian steamer.

Some comment has been made on the failure of the Dane to produce its helmsman. There is no question that, from the time the case got into the hands of its proctor in this port, all diligence to secure him was exercised. It is unfortunate that we do not have the benefit of the story he could have told.

As is usual in these cases, there are discrepancies among the stories of the witnesses for the Dane. It remains true, however, that the impression made on my mind by all the testimony is such that I am constrained to find the Italian solely to blame.

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## UNITED STATES v. GOULED et al.

## SAME v. GOULED.

(District Court, S. D. New York. September 13, 1918.)

SEARCHES AND SEIZURES ⟸5—DISPOSITION OF PROPERTY SEIZED—MATERIAL EVIDENCE.

The addressee of a letter, taken from him under a search warrant issued on a sufficient showing charging him with crime, is not entitled to return of the letter, where it contains material evidence against the writer, who is a codefendant.

Criminal prosecutions by the United States against Felix Gouled, Aubrey W. Vaughan, and David L. Podell, and against Felix Gouled. On motion of defendant Gouled for return of books and other property seized under search warrants. Denied.

See, also, 253 Fed. 242.

Francis G. Caffey, U. S. Atty., of New York City.

Martin W. Littleton, of New York City, for defendant Gouled.

MANTON, Circuit Judge. This is a motion to require the district attorney of the United States for the Southern District of New York

to deliver to the petitioner (defendant herein) all books, papers, contracts, memoranda, check books, account books, check vouchers, letters, personal diary, diaries, ledger, telephone address books, and other papers described in his petition. The property taken from the defendant was seized on the 17th of June and on the 22d of July, 1918, from his place of business at No. 1 Madison avenue, New York City.

The grand jury has indicted the defendant and others for violation of section 37 of the United States Criminal Code. Act March 4, 1909, c. 321, 35 Stat. 1096 (Comp. St. 1916, § 10201). A conspiracy to defraud the United States is alleged, and consists of fraud in the sale of articles of clothing to the government. The affidavit on behalf of the government indicates that a search warrant was issued on each of these days, and each search was made pursuant to the warrant. A search warrant may be issued as a means of obtaining evidence of crime. Adams v. New York, 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575.

But the defendant urges that this search was made in violation of the Fourth and Fifth Amendments of the Constitution, relying upon Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367. But the distinction in the Weeks and Flagg Cases and the case at bar is that here there are two search warrants, which were used and which are not successfully attacked as irregular or invalid. Judge Coxe, in his opinion in the Flagg Case, said that—

"had there been such a warrant issued on proper proof by competent authority in the case at bar, the defendant's contention that the seizure of his property was unlawful, wanton, and in violation of his constitutional rights might have been unavailing. Such a warrant, issued by a court of magistrate having jurisdiction, protects the officer executing it, even though he may transcend his authority."

The question of whether the use of the evidence may compel the defendant to be a witness against himself is prematurely raised, and whether or not there has been a violation of the Fifth Amendment must be tested when proof is offered upon the trial. The Fourth and Fifth Amendments must be treated as quite distinct, and have been by the courts. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652. The language of the Espionage Act (Act June 15, 1917, c. 30, tit. 11, § 2, subd. 2, 40 Stat. 217) is that a search warrant may be issued—

"when the property was used as the means of committing a felony, in which case it may be taken on the warrant from any house or other place in which it is concealed, or from the possession of the person by whom it was used in the commission of the offense, or from any person in whose possession it may be."

It was the intention of Congress to thus grant the use of the search warrant for the discovery and detection of crime, which proved to be an infraction of the so-called Espionage Law. It does not go further than this. The circumstances of this case do not warrant a finding of unreasonable search. There was reasonable ground to believe that the crime had been committed, as demonstrated later by the finding of

the indictment and the plea of guilty of one of the defendants. Warrants were issued after sworn affidavit was made by duly authorized agents, and are sufficiently descriptive of the property which was taken, so as to sustain their validity. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 28 Sup. Ct. 178, 52 L. Ed. 327, 12 Ann. Cas. 658. The papers taken, at least those coming into the hands of the district attorney, were returned at the time of the hearing of this motion, except a letter sent by Podell to Gouled, which was a bill for services, and which it is asserted will be used as an exhibit on the trial, and is referred to in the indictment as a letter sent through the mails in violation of section 215 (Comp. St. 1916, § 10385); one of the counts of the indictment being a violation of this section. Clearly this exhibit would be admissible against Podell, and should not be returned to Gouled.

The motion is denied.

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## WEST VIRGINIA TRACTION & ELECTRIC CO. v. ELM GROVE MINING CO. et al.

(District Court, N. D. West Virginia. December 9, 1918.)

No. 46.

COURTS ⊂=284—FEDERAL COURTS—ENFORCING FEDERAL LAWS—ORDER OF FUEL ADMINISTRATOR.

Though, in the absence of diversity of citizenship, the federal court has no jurisdiction to determine the controversy of price at which defendant agreed to furnish coal to plaintiff, a public service corporation, it will, leaving that question for courts of competent jurisdiction, enjoin defendant from disobeying the order of a state fuel administrator, under the Lever Act, to continue furnishing plaintiff with coal till the act by its terms ceases to be in effect, by termination of the war, ascertained and proclaimed by the President.

In Equity. Suit by the West Virginia Traction & Electric Company against the Elm Grove Mining Company and others. On motions to award temporary injunction and, per contra, dissolve restraining order. Motion to dismiss denied, and application for temporary injunction granted.

John J. Coniff, of Wheeling, W. Va., for complainant.
Joseph Handlan, of Wheeling, W. Va., for defendants.

DAYTON, District Judge. The plaintiff here has filed its bill and amended bill, alleging in effect that it is a West Virginia corporation, a common carrier, operating some 16 miles of street railway in Wheeling, and from that city to the Pennsylvania line, at West Alexandria, also an electric power plant at Elm Grove, W. Va., and a waterworks just outside of Wheeling. It charges its car line accommodates, in transportation of passengers, freight, and express, among others, several hundred workmen in plants outside the limits of Wheeling, engaged in the manufacture of munitions for the government; that its electric power plant furnishes electricity to about 12,000 families, and

its waterworks water to about 1,500; that the defendant corporation is a West Virginia coal-mining corporation, operating at Elm Grove, of which defendant Paisley is president and defendant Skillcorn is manager; that on May 4, 1910, its predecessor, the City & Elm Grove Railway Company, made a contract with the predecessor of the defendant corporation, the Elm Grove Coal Company, which contract has been assumed by the plaintiff and defendant corporations for and on behalf of their respective predecessors, by which plaintiff was to be supplied with coal. An admitted copy of this contract is exhibited with the bill.

A bitter controversy turns upon the construction to be given certain of its provisions. By its terms, the defendants' predecessor, for itself, its successors and assigns, for 10 years from its date and so long thereafter as it should be able to supply the necessary quantity from its mine, undertook to furnish run of mine bituminous coal free from dirt, slate, and noncombustible material, in a quantity of 40 tons a day, subject, however, to the right of the purchasing corporation, by written notice given on the 1st of a month, to either increase or diminish the amount to be furnished until a similar notice on the 1st of another month was given to the contrary; the purpose being that the purchasing corporation should be furnished all the coal required for the operation of its power plant, if the selling corporation was able to furnish it. It is then stipulated that the selling corporation should erect a trestle from its mines to the power plant of the purchasing corporation, and in effect the latter should pay each year 6 per centum of its cost, so long as it was used for the delivery of such coal. For the coal, so delivered, the price to be paid was $1 per ton of 2,000 pounds, payable on the 20th of each month for the amount furnished the preceding month, subject to this condition:

"Whenever any increase or decrease shall be made from the mining rates now in force and operation, then the price to be paid by the said party of the second part (the purchasing corporation) to the said party of the first part (the selling corporation) for the coal delivered under the provisions of this agreement shall be increased or decreased, and such increase or decrease shall apply with respect to the price to be paid under this agreement whenever any subsequent changes in mining rates shall occur during the continuance in force of this agreement."

What was meant and included in the words "the mining rates," as used in this contract, has given rise to substantially the whole trouble between the parties. The plaintiff contends that the interpretation must be restricted to the cost of cutting and loading coal into mine cars at the miner's place of work. On the other hand, the defendants insist that it should include the total cost of production, presumably thereby meaning to include overhead and outside work, and fixed charges, such as interest, insurance, tax, and office expenses.

It is not likely that these terms were used in this contract without a mutual recognition of the fact that they were used in a sense generally understood by those engaged in mining coal. It would seem, therefore, to be an easy matter to determine from mine operators and mine workers this common understanding, and settle accounts accordingly. The plaintiff charges, in effect, that from May 4, 1910, the date

of the contract, to November, 1916, when it assigned the contract to the defendant corporation, a period of over 6 years, the Elm Grove Coal Company accepted compensation for the coal furnished at the price of $1.11 per ton, according to an agreed adjustment as to "the mining rates," in accord with plaintiff's interpretation of their meaning, but that about a month after it had become the assignee of the rights and obligations of the Elm Grove Coal Company, in December, 1916, the defendant corporation demanded a fixed price of $1.30 per ton; then in January, 1917, the sum of $1.44; in May following, $1.58 per ton, basing these demands on alleged increase in cost of production and 10 per cent. additional; and finally, on December 24, 1917, notified plaintiff, unless it settled for all coal furnished from November 1, 1916, at the rate of $1.90 per ton it would cease on January 1, 1918, furnishing it any at all.

The plaintiff charges it refused these demands, but made repeated requests to be furnished with data upon which the price payable for and on account of increased "mining rates" could be adjusted, which was refused—made propositions that a friendly suit be instituted to interpret the contract, or that the controversy be submitted to arbitration, which proposals were rejected. I cite the case as made out by the allegations of the bill, without taking the time to set forth wherein its charges are either denied or modified by the answer, because this motion is to dismiss, and, if there be issues of fact raised by such answer, they could only be settled after time had been given to bring forward the evidence to determine them.

But, be all these things as they may, it is very apparent, if this were all, there could be no possible excuse for this court taking jurisdiction of the matter in any way. Its right to do so is based upon these further facts: Congress passed an act approved August 10, 1917, commonly known as the Lever Act, "to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," 40 Stat. 276. This act, by the terms of its twenty-fourth section, "shall cease to be in effect when the existing state of war between the United States and Germany shall have terminated, and the fact and date of such termination shall be ascertained and proclaimed by the President." Under the powers conferred by it, the President, by executive order of date August 23, 1917, designated and appointed Harry A. Garfield as Fuel Administrator to carry into effect the provisions of the act so far as relating to fuel, and authorized him to appoint all necessary assistants. In accord with this power, the Fuel Administrator so appointed promulgated a series of regulations whereby state administrators, county administrators, and local committees were provided for. In this state J. Walter Barnes was appointed such state administrator, Charles M. Ketchum was appointed as administrator and chairman of the local committee, composed of himself, James W. Ewing, and Roy B. Naylor, for Ohio county.

Without entering into minute detail, it suffices to say that when the demand of December 24, 1917, for $1.90 per ton was made by defendants, under penalty for noncompliance of their ceasing to furnish coal

on January 1, 1918, the plaintiff appealed to the state administrator to intervene and prevent such action. In the meantime the President, under and by virtue of the powers conferred upon him by this Lever Act, had fixed a maximum price for coal in this district of $2.45 per ton. The result of this appeal was that the state administrator, advised by his local committee, promulgated an order on December 29, 1917, directing the defendant coal company to continue to furnish coal at the price provided in the contract, or at a price not exceeding $2.45 per ton. An immediate contention arose between the parties as to the meaning of this order. The defendants insisted that under its terms they were permitted to charge the maximum price fixed by the President. The plaintiff insisted that the contract must govern, and no price greater than its terms provided could be charged.

Thereupon the local committee, "at the expressed and written request of both parties," took further action in the premises. They undertook to construe the meaning of the contract in the use of the words "mining rates." They concluded that the interpretation thereof contended for by the plaintiff was the true one, and should be held to mean "the cost of cutting and loading coal into mine cars at the miner's place of work." They further undertook to ascertain the changes in "mining rates," so construed, that had occurred since the date of the contract in May, 1910. They ascertained these changes to be three in number, and that the average contract price for the period, by reason of these changes, would be $1.49. For reasons, however, set forth in their report, they recommended a compromise price of $1.70 to be paid. This plaintiff agreed to pay for future deliveries, upon condition that all its rights under the contract were reserved to it. Upon this condition, it alleges, it from time to time tendered to pay this price for coal delivered, but it was refused, and, on April 17, 1918, the defendant corporation gave notice that it would stop furnishing on April 18, 1918, and did stop so doing from noon of that day, until required to furnish such coal by an order of the state fuel administrator issued on April 19, 1918. The state fuel administrator, rightly takes the position that he has no power to construe the terms of the contract, but that because the plaintiff is a public service corporation, and its need for the coal is apparent for the public welfare, he has right to require the coal company to furnish it. He thereupon issued this order of April 19, 1918, requiring the defendant to furnish coal at the price fixed by its contract, not to exceed the maximum price fixed by the President.

The defendant coal company refused to obey this order in practical effect. It gave notice on May 9, 1918, to plaintiff, that it would, on the following day, at noon, discontinue furnishing coal unless prior thereto it had been paid at the rate of $2.45 per ton of 2,000 pounds for all coal furnished since January 1, 1918, to May 4, 1918, and plaintiff in writing had agreed that it would continue to pay such price. Thereupon the plaintiff filed on May 10, 1918, its bill, upon which a temporary restraining order was granted by this court. A hearing was directed to be had on the 18th day of May following, continued to May 20th by agreement of counsel, when plaintiff filed an amended

bill, the defendants filed their motion, with grounds therefor in writing, to dismiss, and this motion and plaintiff's application for a temporary injunction were argued by counsel under agreement that the temporary restraining order should continue in effect until the decision of the court upon such application, and the further agreement that on or before the 23d of May, 1918, the defendants should be permitted to file their answer, which should be read as an affidavit in resistance of the motion for temporary injunction. This answer was filed on May 23d, and on October 1st the defendants further filed papers entitled "Statement of Account," and "Cost of Production by Companies, Panhandle Coal Operators' Association."

I greatly deplore the delay that has occurred in the decision of these questions. War conditions, quarantine regulations, and very greatly increased court work on account of criminal prosecutions under war statutes have been largely the cause of it. The questions involved are wholly ones of first impression, too, and have required careful consideration. I have hereinbefore said that the state fuel administrator rightly took the position that under the Lever Act he had no power to construe the existing contract between the parties; that he could only require, in the interest of the public welfare, that the plaintiff, as a public service corporation, should be supplied with coal necessary for its operation by the defendant coal company in execution of its contract and upon its contractual terms and conditions. It was not the purpose and intent of this Lever Act to abrogate existing contracts. By its express terms it so declares in these words:

"The maximum prices so fixed and published shall not be construed as invalidating any contract in which prices are fixed, made in good faith, prior to the establishment and publication of maximum prices by the commission."

In this contract, made and operated under without objection for more than 6 years, the price is fixed at $1 per ton, subject from time to time to increase or deduction in accord with changes occurring in the mining rates. That the Fuel Administration had and could have nothing to do with the controversy arising as to the meaning of these terms in the contract, or with the settlement of disputed accounts between parties growing out of different constructions thereof, is to me clear and conclusive. The parties had the plainest and simplest remedy. If the coal company desired to establish its contention, it had only to bring its action at law in any court of competent jurisdiction for the sums it felt itself entitled to, wherein a judicial construction of the contract would be made, and it would be awarded its compensation according to such construction. It admits its assumption of the contract. It may be one very unfavorable to its interests under present conditions; on the other hand, it may have been a very favorable one to it when executed 8 years ago, when the coal market was overstocked and prices very low. Be that as it may, it has assumed this contract, and it should abide by it, appealing to the courts to determine its construction and all controversies arising in the course of its execution.

For it, on the contrary, to determine to place its own construction on the contract, refuse to sue or arbitrate, within short intervals, charge increased sums over what had been paid to and accepted by its assignor

as the contract price for more than 6 years, until at last a sum over two times greater was demanded under penalty, within 24 hours, of ceasing to furnish coal at all, thereby necessitating a complete cessation of plaintiff's street car and lighting facilities, does not seem to me, under any conditions, to be in accord with equity and good conscience. To do so in war times, when the life and welfare of the country demand of us all every sacrifice for the common good, such a course becomes far more reprehensible. I am persuaded that to prevent just such lines of conduct was one of the purposes of Congress in the enactment of this Lever Act. No question is raised here as to its constitutionality, and I know of none that can be raised. Clearly it gives power to the President, through officers authorized to be and appointed by him, to so conserve and regulate the distribution of food and fuel in such way that greed and extortion should not run riot, and the ability of men, women, partnerships, and corporations to work for the successful ending of the country's conflict should not be either crippled or hindered.

That Barnes, as state fuel administrator, is a government officer, charged with governmental duties and obligations, cannot be questioned. That the order issued by him on April 19, 1918, requiring this coal company to continue supplying the plaintiff with coal, was within the scope of his power and duties as such government officer, it also seems to me, cannot be denied, in view of the terms and requirements of this Lever Act. The primary duty and obligation of federal courts are to construe and enforce the federal laws. For this purpose they were created.

It cannot be assumed that, because Congress did not expressly so provide, federal courts can shirk the responsibility of enforcing the administrative orders of the fuel administrators acting legally and rightly within the terms and requirements of this act. Therefore it is not only permissible, but an absolute obligation upon this court, upon the appeal here made, to see to it that this order of the state fuel administrator is enforced. Like him, it cannot and will not assume to construe the contract, or in any way attempt to settle the conflicting claims and accounts arising under it, but leave that for courts of competent jurisdiction to do, if the parties persist in disagreeing. That this court does not have jurisdiction to do so seems to me to be very clear, for the reason that a purely civil controversy is involved therein, with no diversity of citizenship existing between the parties.

The motion to dismiss will be overruled. The application for a temporary injunction will be granted, to be in force until further order of this court, but in no event longer than the expiration of the Lever Act by virtue of the President's proclamation of the end of the war. It will be limited alone to put in effective force the state fuel administrator's order of April 19, 1918, requiring the defendant coal company to continue to supply coal to plaintiff under the contract, expressly reserving to the parties all right to assert and maintain, in any court of competent jurisdiction, any and all claims, accounts, and demands, one against the other, as to the contract, its construction, and the price to be paid for the coal delivered and to be delivered. It will allow the plaintiff to make such payments as it may deem it should under the

contract make, and the coal company to receive the same, without in any way compromising or affecting their several rights under the contract.

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## In re KLIGERMAN.

(District Court, E. D. Pennsylvania. December 3, 1918.)

No. 4830.

1. BANKRUPTCY ⊂⊃264—COMPOSITION—SALE.
Where the referee, as part of a composition plan, sold property of the bankrupt, and confirmation of the sale was conditioned upon confirmation of the offer of composition by the court, the sale is null and void, where the offer of composition was rejected.

2. BANKRUPTCY ⊂⊃382—COMPOSITION—CONFIRMATION.
In determining whether an offer of composition should be accepted, the court will not consider the interest of the bankrupt, or a purchaser of the bankrupt's property, etc., but only the interest of the creditors.

3. STATUTES ⊂⊃216—CONSTRUCTION—CONGRESSIONAL DEBATES.
The amendment of 1910 to Bankruptcy Act, § 47a (2)—Comp. St. 1916, § 9631—declaring trustees shall be vested with all the rights of a creditor holding a lien by legal or equitable proceedings, etc., *held* not so ambiguous as to warrant recourse to congressional debates.

4. DOWER ⊂⊃46(3)—PENNSYLVANIA—LIABILITY FOR DEBTS.
In Pennsylvania, land is a chattel for payment of debts through a species of conversion, which extinguishes every derivative interest and it may be seized as personal property on a fi. fa., and passes by sheriff's sale to the purchaser, free from dower rights of the debtor's wife.

5. BANKRUPTCY ⊂⊃143(8)—BANKRUPT'S LANDS—DOWER RIGHTS.
Under the amendment of 1910 to Bankruptcy Act, § 47a (2)—Comp. St. 1916, § 9631—which gave the trustee the rights of a creditor holding a lien by legal or equitable process, etc., and in view of section 70 (section 9654), *held*, that the land of a Pennsylvania bankrupt could be sold free from dower rights of his wife; such rights under the state laws being subject to the claims of creditors.

6. BANKRUPTCY ⊂⊃11—JURISDICTION OF COURT—RECORDS.
Where, pursuant to an offer of composition, the trustee executed a deed to the bankrupt's property to carry out a sale, contingent on confirmation of the composition, *held* that, the matter having been referred to a special referee, after an increased offer, the court, on exceptions to such referee's report, was without jurisdiction to order expunged from the records the trustee's deed, which had been recorded without authority.

In Bankruptcy. In the matter of Harry Kligerman, bankrupt. On petition for confirmation of composition, and on exceptions to report of special referee. Confirmation of composition refused, exceptions overruled, and cause remitted to special referee.

See, also, 219 Fed. 758.

H. H. Gilkyson, of Phœnixville, Pa., for creditors.
G. Albert Smyth, of Philadelphia, Pa., for bankrupt.
W. S. Talbot, of West Chester, Pa., for trustee.
Geo. B. Johnson, of West Chester, Pa., for exceptants.

THOMPSON, District Judge. Harry Kligerman, upon his petition in voluntary bankruptcy, was adjudicated a bankrupt on June 3, 1913.

⊂⊃For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In his schedules was included a farm in Chester county of 106 acres, valued at $4,500. The bankrupt, on November 11, 1913, made an offer of composition to his creditors, to pay all costs, fees, and priority claims, in full, in cash, and to pay unsecured creditors 10 per cent. of their claims in cash, upon condition that a private sale of the real estate of the bankrupt to Abraham Kligerman, freed and clear of liens, be approved. The offer of composition was accepted in writing by a majority in number and amount of creditors on December 16, 1913. The total amount to be paid under the offer was $2,399.76. The referee reported the offer to the court with a favorable recommendation on November 21, 1914. On the same day the referee ordered a private sale of the real estate to Abraham Kligerman, clear of all liens and incumbrances, for the sum of $2,010, "upon the confirmation of the offer of composition by the United States District Court for the Eastern District of Pennsylvania."

Nothing further was done towards confirmation of the offer of composition until March 14, 1918, because litigation was pending in the state courts over fire insurance covering buildings upon the farm which were destroyed by fire after the offer of composition was made. On December 20, 1917, however, the trustee executed a deed to Abraham Kligerman, in which the wife of the bankrupt joined, which was left in the possession of the trustee under an agreement between George B. Johnson, Esq., counsel for the bankrupt, and Wesley S. Talbot, Esq., counsel for the trustee, that it so remain until the question of confirmation of the composition should be determined by the court.

On March 14, 1918, a petition of the trustee was presented to the court, setting out that he had joined with the wife of the bankrupt in a deed to Abraham Kligerman, and had in bank for distribution to the creditors $2,655.41, sufficient to carry out the terms of the composition. Attached to this petition was the petition of the bankrupt, sworn to November 1, 1917, praying for confirmation of composition.

The present referee, Thomas R. Haviland, Esq., having called the attention of the court to an offer for the real estate of $3,000, afterwards increased to $3,500, free of liens and incumbrances, an order was entered referring the matter to Referee Haviland, as special referee, to ascertain and report the facts, together with the testimony and his findings and recommendations thereon.

A motion to vacate the order of reference was overruled in an opinion filed April 15, 1918, in which it is stated that, under the circumstances:

> "The court should not confirm the composition, unless all the facts are thoroughly made known to all of the creditors and a full report is made to the court, as indicated in the order of special reference."

On August 17, 1918, the special referee returned his report, with exceptions thereto on the part of the bankrupt, and his rulings upon the exceptions. The referee reports that, having given notice, he held a meeting of the creditors at his office on May 10, 1918. The meeting was not largely attended. Mr. Johnson, as attorney for the bankrupt, was present representing the bankrupt and nine creditors, whose claims aggregated $1,391.04; Mr. Talbot, as attorney for the trustee

and representing a creditor with a claim of $767.81, also two creditors with claims of $81.40 and $243, respectively, and the tax collector of Charlestown township, Chester county, having a claim for taxes. Of the creditors present or represented at the meeting, all voted in favor of the original offer of composition, excepting the tax collector.

The referee reports that the increased offer for purchase of the premises, if accepted, would realize a dividend for the common creditors of over 19 per cent., as against the 10 per cent. offer. This percentage is based upon the opinion of the referee that a sale in bankruptcy by the trustee would divest the dower interest of Kligerman's wife.

The exceptions to the referee's report consist largely in statements of fact. * * *

The recommendations of the special referee are:

(1) That the offer of composition of 10 per centum to the common creditors and the payment in full of the preferred and secured claims be rejected.

(2) That an order be made remitting the cause to the referee for the further and ordinary administration of this estate.

(3) That an order be made, if the court has jurisdiction, expunging the deed of Harry F. Taylor, trustee of Harry Kligerman, to Abraham Kligerman, dated December 20, 1917, and recorded May 10, 1918, from the records in the office of the recorder of deeds for Chester county, at West Chester, Pa.

[1-5] In passing upon the first recommendation of the referee, the first inquiry is whether the composition offered is to the best interests of the creditors, and the answer to that question depends upon whether a sale under an order of the bankruptcy court would divest the dower interest of the wife of the bankrupt. If the dower would be divested by such sale, the common creditors would receive nearly double the dividends they will receive if the present offer of composition is confirmed. The confirmation of the sale by the former referee was expressly conditioned upon the confirmation of the offer of composition by the court. If the court is not satisfied that the composition offered is for the best interest of the creditors, the offer should not be confirmed. If the offer of composition is not confirmed, the sale ordered by the former referee would be absolutely void and of no effect.

The interest of the bankrupt and that of the purchaser are to be regarded as entirely outside of the consideration of the court in determining what is for the best interest of the creditors. * * *

The question whether, under a duly authorized sale in bankruptcy, the purchaser takes the bankrupt's real estate free from the wife's inchoate right of dower, depends upon the construction to be given to the amendment of 1910 (Act June 25, 1910, c. 412, § 8, 36 Stat. 840 [Comp. St. 1916, § 9631]) to section 47a (2) of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 557). The language of the amendment is as follows:

"And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied."

Prior to the amendment of 1910, the courts, in construing the effect of bankruptcy upon the dower in the bankrupt's real estate, followed the ruling of the Supreme Court in Porter v. Lazear, 109 U. S. 84, 3 Sup. Ct. 58, 27 L. Ed. 865, where the question arose under the Bankruptcy Act of August 19, 1841 (5 Stat. 440, c. 9).

Since the enactment of the amendment, the question has arisen in the Middle district of Pennsylvania in the cases of In re Codori, 30 Am. Bankr. Rep. 453, 207 Fed. 784, and In re Freedman, 31 Am. Bankr. Rep. 53; Judge Witmer holding in those cases that the amendment of 1910 to section 47a (2) has the effect of vesting in the trustee in bankruptcy the enlarged rights, remedies, and powers of a judgment or other creditor having a lien upon the bankrupt's real estate, enabling him to sell such real estate acquitted and discharged of the inchoate right of dower, with the same effect as by a sheriff's sale after levy on a proper writ of execution.

In the Western district of Pennsylvania, in the case of In re Chotiner, 32 Am. Bankr. Rep. 760, 216 Fed. 916, Judge Orr held that the amendment does not authorize a trustee in bankruptcy in Pennsylvania to sell the bankrupt's real estate free from the wife's claim of dower, because the Bankruptcy Act as amended cannot be construed to affect estates other than that of the bankrupt.

Thus, in carefully considered opinions, contrary conclusions have been reached by Judge Witmer and Judge Orr affecting the title to real estate of bankrupts in Pennsylvania.

Judge Orr appears to have been influenced by the fact that the purpose of the amendment, as appears by the discussion in the House of Representatives in the Congressional Record for the Sixty-First Congress, Second Session, pages 2263 to 2279, was to remedy the defect in the trustee's title to property made apparent by the decision of the Supreme Court in the case of York Manufacturing Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782.

The question at once arises whether there is such ambiguity or doubtful meaning in the language of the amendment as to justify recourse to the statements of the Representatives in Congress, during debate upon its passage, in aiding its construction. United States v. Union Pacific Railroad Co., 91 U. S. 72, 23 L. Ed. 224; United States v. Trans-Missouri Freight Association, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007.

Mr. Justice Trunkey, following the established policy of the courts recognizing the common-law right of dower, and citing the Pennsylvania decisions upholding the right, except as affected by the rights of creditors, said in the case of Lazear v. Porter, 87 Pa. 513, 30 Am. Rep. 380, which was affirmed by the Supreme Court of the United States in Porter v. Lazear, supra:

"A statute ought not to be interpreted as authorizing a sale of the husband's lands, freed from dower, unless such is its clear intendment. Were the meaning of the bankruptcy law and the effect of a sale of the bankrupt's land, as to dower, doubtful, the conclusion must be that the wife's estate is not divested."

But the language of the amendment in terms free from doubtful meaning includes "all property in the custody or coming into the cus-

tody of the bankruptcy court." Nor is there doubtful meaning in the language vesting the trustee with "all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon." "All property" embraces, not only the bankrupt's personal property, but his real estate. What, then, are the rights of a creditor holding a lien by legal or equitable proceedings upon real estate in Pennsylvania upon the inchoate right of dower?

The law of Pennsylvania differs from the common law, in that the right of creditors prevails against the right of dower.

Land is a chattel for the payment of debts through a species of conversion, so far as may be necessary to the purpose of satisfaction, which extinguishes every derivative interest in it. Thus a judgment or a mortgage binds it and converts it, and it may be seized as personal property on a fi. fa., and passes by virtue of the sheriff's sale to the purchaser free from dower. Kirk v. Dean, 2 Bin. (Pa.) 341; Mitchell v. Mitchell, 8 Pa. 126; Helfrich v. Obermyer, 15 Pa. 113; Blair County Directors v. Royer, 43 Pa. 146.

Under the clear language of the amendment, therefore, the title vested in the trustee as to all the property in the custody of the bankruptcy court, both real and personal, instead of being, as it was before the amendment of 1910, only such title as the bankrupt himself had and could alone convey, is in addition thereto such title as a creditor could cause to be conveyed to a sheriff's vendee through and by judgment, execution, levy, and sale. In other words, the title which vests in the trustee is the title of a sheriff's vendee.

Judge Orr points out difficulties in applying the provisions of the various acts of assembly in relation to execution by the sheriff to a sale by a trustee in bankruptcy. But a trustee in bankruptcy derives his authority to sell from the provisions of the Bankruptcy Act, and is not required, in selling under an order of the bankruptcy court, to follow the statutes of Pennsylvania relating to execution.

Section 70 (Comp. St. 1916, § 9654) directs that the real and personal property belonging to a bankrupt's estate shall be sold, and that the title to property which has been sold shall be conveyed to the purchaser by the trustee. The trustee, therefore, having the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, and having the power to sell all the property of the bankrupt, conveys to the purchaser the same title which a creditor could have conveyed to a sheriff's vendee upon compliance by the sheriff with the statutory requirements of execution, levy, inquisition, appraisement, etc.

I am unable to see that the question is affected by the incident that, if the trustee as to land in Pennsylvania is vested with title, free of dower, the Bankruptcy Law would not be uniform, because in other states there is no conversion of real estate for the payment of debts, so as to divest the wife's dower. There has never been any question of uniformity as to the rights of creditors variously affected by the statutes of the several states in relation to exemption allowed under the Bankruptcy Act. There is no hardship if the property coming into the custody of the bankruptcy court is subjected to the claims of cred-

itors to the same extent and in the same manner as if their claims were asserted in the state courts. Where a creditor may sell the real estate of his debtor clear of the wife's inchoate right of dower in the state courts, it is unjust and inequitable to creditors that such rights should be denied them in a court of bankruptcy within the same state.

These views are in harmony with, and not in contravention of, the provisions of section 8 (a) of the Bankruptcy Act (Comp. St. 1916, § 9592), providing that, in case of death, the widow and children shall be entitled to all rights of dower and allowances fixed by the laws of the state of the bankrupt's residence. The laws of the state of Pennsylvania give a lien creditor the right to sell the real estate free of dower, and the wife is therefore not deprived of any right she would have as against a creditor having a lien on her husband's real estate under the laws of Pennsylvania.

Entertaining the views herein expressed, I agree with Judge Witmer in the conclusion reached by him in the cases of In re Codori and In re Freedman, that the title passing upon a sale by the trustee of the bankrupt's real estate would be free and clear of dower. As a sale under the present offer would produce a fund which would nearly double the amount offered in composition, it is apparent that the composition is not for the best interests of creditors, and should not be confirmed.

The confirmation of the offer of composition is refused, and the cause will be remitted to the referee for the ordinary administration of the estate, in accordance with the second recommendation of the special referee.

[6] As to the third recommendation of the referee, the court has no jurisdiction in these proceedings to order that the deed of the trustee be expunged from the records in the office of the recorder of deeds for Chester county.

It remains to dispose of the exceptions on behalf of the bankrupt. As heretofore observed, the exceptions are devoted largely to statements of fact; they were recklessly and frivolously made, and are not only without any foundation in proof, but proved to be untrue.

Without further comment, the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth exceptions to the findings of fact, and the first, second, third, fourth, and fifth exceptions to the conclusions of law, are dismissed, at the costs of the exceptant.

## UNITED STATES v. LEW LOY.

(District Court, N. D. Ohio, E. D. April 22, 1918.)

No. 8918.

1. ALIENS ⟸23(2)—CHINESE PERSONS—DEPORTATION.
Where the entry of a Chinese person as a merchant or student is valid, he does not lose his right to remain because he subsequently becomes a laborer.

2. ALIENS ⟸23(2)—CHINESE PERSONS—INFERENCES AS TO ENTRY.
Where a Chinese person is admitted as a student, merchant, or miner child of a merchant, the weight to be accorded the inference from his immediate adoption of the occupation of a laborer depends on the circumstances, etc.

3. ALIENS ⟸32(5)—CHINESE PERSONS—CERTIFICATE OF ADMISSION.
Where a Chinese person, admitted as the minor child of a merchant, received a regular certificate of admission, the government, in subsequent deportation proceedings based on the fact such person had become a laborer, has the burden of showing that the entry was not for the purpose of conserving the family relation and following the occupation of a merchant.

4. ALIENS ⟸32(8)—CHINESE PERSONS—CERTIFICATE OF ADMISSION—EVIDENCE TO OVERTHROW.
The effect of a certificate of admission issued to a Chinese person as the minor son of a merchant can be destroyed only by substantial evidence, and cannot be overthrown by a mere suspicion that such person entered to become a laborer.

5. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION—EVIDENCE.
In proceedings to deport a Chinese person, who was admitted as the minor son of a merchant, but subsequently became a laborer, evidence *held* insufficient to warrant deportation, not showing that such person entered intending to become a laborer.

Deportation proceedings by the United States against Lew Loy. On appeal from a judgment of deportation rendered by a United States commissioner. Judgment reversed, and defendant discharged.

F. B. Kavanagh, Asst. U. S. Atty., of Cleveland, Ohio.

White, Johnson, Cannon & Neff, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. This is an appeal from a judgment of deportation rendered by a United States commissioner on a former hearing. The commissioner's order was affirmed, and on appeal to the Circuit Court of Appeals this judgment of affirmance was reversed, and the case was remanded for a new trial. 242 Fed. 405, — C. C. A. —. At this new trial additional evidence has been introduced. Upon consideration of all the evidence, I find the following facts:

Lew Loy is a Chinese person, and the son of Lew Fook Shing. The father, in October, 1910, when defendant entered the United States, was a merchant resident in the United States. He was then, and from October 6, 1907, had been, interested in and connected with a store at No. 1261 Broadway, Oakland, Cal., which business was later removed to No. 527 Twelfth street, Oakland, Cal., and was there continued until a recent date. This appears from the testimony of de-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

fendant, his father, and R. J. Faneuf, superintendent of the United States post office at Oakland, Cal.

Defendant arrived at the port of San Francisco on the steamship Mongolia about October 15, 1910. He was not permitted to land until about a month later, during which time the United States immigration officers investigated his right to be admitted. Witnesses were brought forward, who, it must be held, established to the satisfaction of these officials the defendant's status as a minor son of Lew Fook Shing, and the latter's status as a Chinese merchant lawfully in the United States. He was thereupon permitted to enter, and a proper certificate was issued to him, bearing date of December 12, 1910. Attached to this certificate is a photograph plainly recognizable, notwithstanding the lapse of time, as the defendant. This certificate states defendant's age as being 20. On this hearing defendant's father testifies that his son was really only 19, as the age thus given is according to the Chinese rule of counting ages, which, it seems, treats a child as one year of age as soon as he is born, and two years of age at the next birthday of the Chinese emperor, even though that birthday should arrive one or two months after the birth of the child. I accept as true this statement, first, because the photograph attached to the certificate is obviously that of an immature youth; and, second, the father's testimony in my presence convinced me that he was a witness entitled to full credit.

About a year later a younger son, named Lew Horn, arrived at the port of San Francisco, was also admitted as the minor son of a resident Chinese merchant, and is now, according to the testimony, at Los Angeles, Cal., engaged in business, not as a laborer, but as a Chinese merchant.

These two sons are the only children of Lew Fook Shing. The mother remains in China; and, in explanation, Lew Fook Shing testifies that she is a bound-foot woman, that she has a home, that he at one time furnished her with $2,000 in money, and has since sent her money to aid in her support; that, because she is a bound-foot woman, it is difficult for her to get about; that she likes to be with relatives, and is adverse to coming aboard a steamer.

Defendant, upon his arrival and after the delay in San Francisco, incident to establishing his right to enter, went to Oakland, Cal. There is some uncertainty in the testimony as to how long he remained in Oakland and San Francisco before coming to Cleveland, Ohio. Defendant, when first arrested, April 30, 1914, at Cleveland, Ohio, was immediately interrogated by the immigration inspector, and at that time answered the question, "How long did you stay in Oakland?" "About one or two months; then I came here." Upon the former hearing he said:

"I stayed in San Francisco about two months to learn the business, and then went to Oakland and stayed with my father about four months, and left him and came to Cleveland."

His father on this hearing goes into greater detail, and says that when his son was first admitted he came to his store and lived with his father at Oakland for a few months, then he went to San Fran-

cisco and stayed at the Fook Weh store at No. 707 Grand avenue, for the purpose of learning the business, and attended school. Then, about two months later, he returned to his father's store at Oakland, remaining there some two months more, before his departure for Cleveland.

The father did not testify at the former hearing, but his statement was taken ex parte before an immigration inspector at San Francisco, and was introduced on behalf of the government. He was not asked how long his son had remained with him in Oakland, nor how long he remained in San Francisco. He does say that his son was engaged in learning business after his arrival and before his departure for the East.

I believe and find that the father's statement of his son's movements before coming East is true. The unrefreshed recollection of the son, made immediately upon his arrest, does not deprive his later testimony, or that of his father, of credibility, especially as other inaccuracies to the defendant's prejudice in matters of time appear in the same statement.

Defendant came to Cleveland, Ohio, not later than six months after his arrival in the United States. He and his father say that he came in company with two Chinese merchants and family friends named Chin Check Weh and Low Lim, and that he came for the purpose of finding a suitable location and engaging in business. He has not, since his arrival in Cleveland, been engaged in or connected with any mercantile business, but has lived with the owner of a laundry, and such labor as he has performed has been in and about that laundry; hence the government's contention that he did not in fact and in good faith enter as the minor son of a Chinese merchant, but really for the purpose of engaging in the occupation of a laborer.

The government's evidence, other than statements of defendant and his father, shows only that defendant had worked in the laundry of Ben Hop Lee, 10613 Euclid avenue, during a period of less than one year prior to his arrest. The witnesses, William Graham, John G. Harvie, W. I. Rich, Frank M. Potter, Franklin J. Savesky, George F. Wilson, Joseph Francis, and H. T. Grubbs, testified June 4, 1915. None of them had seen the defendant more than two or three times; none of them fix the time at which he was seen in the laundry at work earlier than 13 months prior to this date. The others give dates ranging from 2 or 3 months to 6 months. He was apparently, as testified to by these witnesses, in working clothes, sometimes ironing, other times handing out laundry parcels, and apparently occupying the same relation to the business as any other Chinese person there employed. Defendant was arrested April 30, 1914, and practically all of the work thus done was at a date later than his arrest.

An inspection of defendant's hands, made by the United States commissioner at the hearing May 22, 1914, and at the former hearing June, 1915, showed that the defendant's hands were calloused, as those of a person doing manual labor. The defendant's movements from the time he left Oakland, shortly after his arrival, until the time covered by the foregoing testimony, depend on his statements, those of his father, and Loo Way, owner of the laundry in question.

Father and son have testified that the son left Oakland with the two Chinese merchants, as already stated; that when he left Oakland no definite destination was in the mind of any person; that these Chinese persons then believed that the East afforded good prospects for engaging in business; that the father furnished the son with $200 in money and intrusted him to the supervision primarily of Loo Lim. The father next heard from the son in Cleveland. All witnesses agree that he immediately took up his residence at the Ben Hop Lee laundry. About a year later Loo Lim left Cleveland and went to Boston, later returning to Cleveland, and in 1913 returning to China. Chin Check Weh remained longer in Cleveland, but within a period of 2 years he disappeared; he was not produced at the trial, and his whereabouts, counsel state, are unknown. The father says he was advised that his son had been left with a friend of Chin Check Weh.

The son testifies that he made inquiries and investigations after his arrival in Cleveland, relating to his project of engaging in business, but admits he never engaged in any mercantile business. The evidence is inconclusive and unsatisfactory touching his efforts to engage in business.

I agree with the finding made at the former hearing that defendant's statement that he remained continuously at this laundry until the time of his arrest, without laboring on his own account, and depending exclusively upon remittances from his father for support, is too improbable to be believed. The greater probability is that at some time, either immediately after his arrival or more remotely he did engage in manual labor, and that such labor was in and about the Ben Hop Lee Laundry. This finding of fact, however, is not, in my opinion, controlling in the disposition of this case.

The father's testimony on this hearing agrees with the son's testimony on the former hearing, in that they say $200 was given by the father to the son when he started East, and that the father had sent him money from time to time thereafter, aggregating from $70 to $90 per year. The ex parte statement of the father, introduced on behalf of the government at the former hearing, does not mention the $200, and does say that $80 or $90 was all the money he had sent to his son. The father in the ex parte statement was not inquired of as to the money given to his son at his departure, and, in explanation of the other statement, says that he understood the question asked and to be answered was how much money he had sent his son this year. He also testifies to frequent communications by letter during this period of absence, but no letters are introduced.

The father impressed me as a witness worthy of credit, and as a person of the mercantile, and not of the laboring, class. His appearance and manner of testifying were substantial evidence of this conclusion. His intelligence was obvious, notwithstanding the difficulty of interrogating him through an interpreter. The son's appearance also impressed me as that of an intelligent, clean-cut, young Chinese person, not of the laboring class.

From these facts, the ultimate question to be determined is whether or not defendant's entry was in good faith in the interest of the re-

lationship of a minor son of a resident Chinese merchant, or was in bad faith and in reality as and for the purpose of immediately becoming a laborer, in evasion of the Chinese Exclusion Act. This ultimate conclusion must be drawn from the facts above found—in other words, is an inference from the other facts.

[1] The law is settled that if the entry of the Chinese person is valid—that is, as a student or merchant—he does not lose his right to remain because subsequently thereto he changes his occupation and becomes a laborer. Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888; Lew Ling Chong v. United States (6 C. C. A.) 222 Fed. 195, 137 C. C. A. 635; Lam Fung Yen v. Frick (6 C. C. A.) 233 Fed. 393, 395, 147 C. C. A. 329, Ann. Cas. 1917C, 232; Lew Loy v. United States (6 C. C. A.) 242 Fed. 405, 155 C. C. A. 181; Lui Hip Chin v. Plummer (9 C. C. A.) 238 Fed. 763, 151 C. C. A. 613.

[2-5] The inquiry, then, is whether or not, at the time of entry, the defendant was a minor son of a Chinese merchant, and, if a minor son of a Chinese merchant, was his real purpose then to obtain entry with a view to becoming a laborer? It is conceded that he was the minor son of a Chinese merchant. The inference that his entry was unlawful and in bad faith results exclusively from his conduct after he departed from Oakland and arrived in Cleveland. Cases are cited in which it is said that if a Chinese person seeks admission as a merchant, and immediately after admission becomes and continues a laborer, this is strong evidence tending to show that he came into the United States as a laborer. United States v. Foo Duck (9 C. C. A.) 172 Fed. 856, 97 C. C. A. 204; Lew Loy v. United States, supra.

The weight to be accorded the inference from immediate adoption of the occupation of a laborer depends upon the circumstances. If the person thus entering obtains admission as a student or merchant, and immediately engaged in the employment of a laborer, great, if not controlling, weight should be attached thereto. If, however, such admission is obtained as the minor son of a Chinese merchant, and, in point of fact, he is such minor son of a Chinese merchant, the inference is less strong. If the minor is several years under age, the inference probably could not be made. Likewise, if of age, the force of the inference diminishes in proportion as the change of occupation is remote from the date of entry.

In the present case the defendant was at least 2 years under age, as I have already found, and for 6 months after his arrival he was domiciled with his father, or in close proximity to him, and was engaged in studying and learning business conditions. In this situation there is not such close proximity of time between his admission, arriving at full age, or engaging in labor, as to warrant a strong inference that his purpose in coming to the United States and obtaining admission was to engage in manual labor. He did so engage at some time after his arrival in Cleveland; but another explanation, more probable than fraudulent entry, suggests itself for this conduct. Considering the father's undoubted status here and in China as of the mercantile class, the greater probability is that both father and son in good faith

entertained the belief, when defendant was admitted and for some period of time after his departure for the East, that the son would adopt and follow his father's calling. Their obvious intelligence and apparent superiority to the ordinary Chinese person impresses me with the fact that defendant did not purposely and intentionally drop immediately into the laboring class, but that his doing so was the result of other conditions and circumstances.

My conclusion is that defendant entered lawfully and in good faith as the minor son of a Chinese merchant. This conclusion is emphasized by another consideration. The immigration officials at the port of San Francisco, upon his arrival, must be held to have investigated carefully his status and right to enter, consuming therein not less than one month's time, and after doing so they found that he was entitled to be admitted and issued to him the usual certificate. His right to enter or to remain is not called into question until 3½ years later, and then only because of fraud practiced in procuring admission, and not for any offense against the laws of the United States. This certificate of admission, having been produced on this trial, casts upon the government the burden of showing that the entry was not in fact for the purpose of conserving the family relation and following the occupation of a merchant, but for the purpose of immediately becoming a laborer. Liu Hop Fong v. United States, supra; Lew Ling Chong v. United States, supra; Ong Chew Lung v. Burnett (9 C. C. A.) 232 Fed. 853, 147 C. C. A. 47; Wong Yee Toon v. Stump (4 C. C. A.) 233 Fed. 194, 147 C. C. A. 200; Lam Fung Yen v. Frick, 233 Fed. 393, 147 C. C. A. 329, Ann. Cas. 1917C, 232; Lew Loy v. United States, supra; Lui Hip Chin v. Plummer, supra.

This burden the government has not sustained. Substantial evidence should be produced in order to destroy the effect of the certificate. It is not sufficient that a mere suspicion be aroused, but substantial evidence is necessary to destroy the force and effect of the original decision of the immigration officials and the certificate issued by them. If the immigration officials decide that he is not entitled to admission, the rule seems settled that the courts will not disturb such finding, if it is in any way supported by the testimony. Lem Moon Sing v. United States, 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; Fok Young Yo v. United States, 185 U. S. 296, 22 Sup. Ct. 686, 46 L. Ed. 917; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040.

In Liu Hop Fong v. United States, supra, a Chinese person had obtained admission as a student, and proofs show that almost immediately upon arrival he became a laborer, and while, according to this fact its due weight, the Supreme Court of the United States reversed the United States commissioner and the District Court for ordering deportation on the ground that it was not sufficient to destroy the force and effect of the certificate.

In Wong Yee Toon v. Stump, supra, the Circuit Court of Appeals of the Fourth Circuit, on appeal in a habeas corpus case, reversed the judgment of the commissioner and of the District Judge, where it appeared that the minor son had been admitted after investigation

and was in possession of a certificate, although he began work for a laundry within 2 months after his admission.

In Lew Ling Chong v. United States, supra, the Circuit Court of Appeals of this circuit reversed a judgment of the commissioner and the District Court ordering deportation in a case in which it appeared that the Chinese person had been admitted as a minor son of a Chinese merchant, and was in possession of a certificate, although the facts appear to be at least as strong as in the present case.

An order will be entered, reversing the commissioner, and discharging the defendant.

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ROBINSON v. WEMMER et al.

(District Court, N. D. Ohio, W. D. November 11, 1918.)

No. 185.

1. EQUITY ⟸51(2)—JURISDICTION—CONSPIRACY—MULTIPLICITY OF SUITS.
   It is no conspiracy for two or more persons, each having a separate and independent cause of action against a third, to agree that they will simultaneously, by independent and separate suits, proceed against their adversary, for there is no other way in which they could individually make their contentions than by separate suit; hence, though such persons so agreed and employed the same attorney, it is no ground for equitable relief in favor of the person sued.
2. INJUNCTION ⟸26(4)—MULTIPLICITY OF SUITS.
   A court of equity will not entertain a bill by complainant against a large number of parties, to whom he had sold corporate stock, and who had begun separate actions to recover for fraud on the theory equity will restrain a multiplicity of suits, where proof as to nonreliance on the misrepresentations, etc., would not be binding on all the various parties.
3. COURTS ⟸328(4)—FEDERAL COURTS—JURISDICTIONAL AMOUNT.
   Where a number of persons sued complainant in the state court for fraud in the sale of corporate stock, the amounts of their several distinct claims cannot be aggregated, so as to give the federal court jurisdiction of a bill against them all to restrain multiplicity of suits.
4. COURTS ⟸491—JURISDICTION—ACQUIESCENCE.
   Where complainant filed answers in various suits in the state court, he could not thereafter maintain in the federal court a bill to restrain the suitors in state court on the ground of multiplicity of suits.
5. COURTS ⟸262(2)—EQUITY JURISDICTION OF FEDERAL COURT—REMEDY IN STATE COURT.
   One against whom numerous suits were begun in state court cannot maintain a bill in federal court to restrain multiplicity of suits, on the ground that the venue of the state court was hostile to him, but, if entitled to protection on that ground, must seek it in the state court.

In Equity. Bill by Arthur D. Robinson against Henry G. Wemmer and others. On motion to dismiss. Bill dismissed.

John L. Davidson, of Chicago, Ill., and Jas. W. Halfhill, of Lima, Ohio, for plaintiff.

Dan R. Tripplehorn and Welty & Downing, all of Lima, Ohio, for defendants.

KILLITS, District Judge. This case is before the court on a motion to dismiss the amended complaint for want of jurisdiction to en-

tertain the same, and for the further reason, among others, that it appears from the complaint that suits are pending covering the subject-matter of the complaint in the state court, to the jurisdiction of which the complainant has submitted himself.

The complainant was interested in the promotion of a corporation, and in that capacity sold stock therein to 19 residents of the city of Lima, Ohio. The enterprise coming to grief, each of these parties, who are made joint defendants to the complaint under examination, separately sued Robinson in the state court to recover the amount he had paid for stock. The amounts involved vary from $750 to $3,075 in the several cases. In but two instances is the amount at stake of itself sufficient to meet the jurisdictional requirements of an action in this court, for it should be observed that there is a diversity of citizenship; Robinson not being a citizen of this district. Service was had in each of these 19 actions on Robinson within the city of Lima, and in each case he has set up a defense by way of answer.

[1] What we know about the nature of these state suits is to be gathered from the averments of the complaint itself, from which it appears that each of the plaintiffs therein sues to recover on the ground of fraud alleged to have been practiced upon him by Robinson. A motion similar to this was interposed to the original complaint and granted. In sustaining the motion we filed a memorandum as follows:

"It is decisive of the question before us that there is no community of interest between the several defendants in the case as planted here, plaintiffs in the state court, against the complainant here. There is an apparent community of interest, to be sure, which grows out of the fact that each of the plaintiffs in the state court predicates a claim against the defendant upon a similar state of facts growing out of transactions of almost identical nature. The claims, however, are presented in individual and independent rights; because one plaintiff might be successful, there results no adjudication of the right of any other claimant. In this respect the cases of Marshall v. Holmes, 141 U. S. 589, 12 Sup. Ct. 62, 35 L. Ed. 870, and McDaniel v. Traylor, 212 U. S. 428, 29 Sup. Ct. 343, 53 L. Ed. 584, are clearly distinguishable. In each of these cases, the interests were bound together indistinguishably. In the earlier case, Mayer, the judgment creditor, owned all the judgments, all taken against the same debtor, Marshall. The defendants to the case are none other than the solitary judgment creditor, Mayer, and the sheriff of the parish, Holmes. The situation is not comparable to the situation before us. In the latter case, the aggregation of the causes of action making up the jurisdiction of the federal court was the result of fraud; the court saying, on page 433 of 212 U. S., on page 344 of 29 Sup. Ct. (53 L. Ed. 584): 'As we have already seen, it was the fraudulent combination and conspiracy which united the claims and made the aggregate of the claims the matter in dispute.' It is no conspiracy for two or more persons, each having a separate and independent cause of action against a third, to agree that they will simultaneously, by independent and separate suits, proceed against their adversary. There is no other way in which they could individually make their contentions than by separate suit, and it means nothing that they agree together to sue, or that they employ the same attorney. The coincidence that each claimant against Robinson in the state court predicates his claim upon facts analogous to the facts relied upon by every other claimant is not enough, even when combined with an agreement for each independent claimant to sue, to permit the aggregation of these claims and either a removal to this court or an appeal to this court for injunctive relief to stop the state proceedings. The remedy sought by complainant is beyond the extraordinary powers of this court."

Broadly, the difference between the complaint thus disposed of and the amended complaint now under attack exists in the incorporation in the latter in great detail of the history of the disagreements between the parties, together with complainant's understanding of the nature of the fraud alleged to have been perpetrated by him upon each of the plaintiffs in the several suits in question. There is also an allegation that the parties are conspiring to embarrass him by a multiplicity of suits, and that there is a prejudice against him in the local state court, growing out of the notoriety of the transactions, which will greatly embarrass him in making his defense in that venue. So far as the complaint enlightens us as to the nature of the alleged conspiracy, it seems to rest upon the fact that the same attorney represented each of the plaintiffs and that the petitions are identical in terms mutatis mutandis. It is very plain that each of these cases proceed upon the same state of facts so far as allegations involving Robinson are concerned, and that in each the same measure of recovery is depended upon.

It is alleged that all the controversies between the complainant and the defendants could be fully adjudicated in one suit in equity, to the avoidance of a multiplicity of suits, and the relief sought here is that each of the defendants may be enjoined and restrained from proceeding with their several suits pending in the state court until the further order of this court, and that upon the final hearing here the injunction may be made permanent, and that the complainant have such other and further relief as may be proper. There is no prayer that the issue between Robinson and his several antagonists be heard here together, or that the 19 plaintiffs in the state court be required either to join there in one action or to participate in a representative suit.

[2] The complainant relies for his appeal to this court upon the general proposition that equity will restrain the multiplicity of suits, and that this is an occasion where that function should be exercised, because, in the theory of the complainant, the situation is one within the third category of possible conditions in which the doctrine may be applied as defined by Pomeroy, Equity Jurisprudence (3d Ed.) § 245, where the text reads as follows:

"Where a number of persons have separate and individual claims and rights of action against the same party, A., but all arise from some common cause, are governed by the same legal rule, and involve similar facts, brought by all these persons uniting as coplaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class."

As shown by the authorities, which support Pomeroy's text as above quoted, the practice in this class of cases applies principally to situations where a suit may be brought by one in behalf of himself and others similarly situated, or where all parties having a common interest may be joined together, and where neither of the parties interested as complainants have an individual action at law. A typical case is that of Boyd et al. v. Schneider et al., 131 Fed. 223, 65 C. C. A. 209. Because of its peculiar facts, Virginia-Carolina Chemical Co.

v. Home Ins. Co. of New York, 113 Fed. 1, 51 C. C. A. 21 (case below Home Ins. Co. of New York v. Virginia-Carolina Chemical Co. [C. C.] 109 Fed. 681), cannot be cited as in any degree justifying the complainant's position here. It will be noted that this case, however, consistent with other decisions in which the point is raised, recognizes that actions of this sort are merely ancillary to the proceedings against which they are severally directed, wherefore, as complainant here is seeking absolute relief, he is beyond the purview of the principle which he is invoking. This is made more plain when we consider the fact that he is not proceeding in a situation where he is without remedy at law. He has a plain remedy at law, namely, to defend in the actions at law brought in the state court. We are therefore of the opinion that he has not improved his position by the amendment of his complaint, but that the same reasons which required us to grant the motion to the original complaint obtain here.

In complainant's brief we are advised to consider that, no matter how palpably fraudulent were the misrepresentations of complainant to induce any party now suing him in the state court to buy stock, still he would not be liable unless as to that party it were shown that the latter relied wholly upon those representations for his influence to make the investment. It seems to us that it needs but a reference to this feature to show that the doctrine of Pomeroy does not apply here, for the reason that the rights of action of the several causes respectively do not involve similar facts. It is manifest that the proof touching the reliance or nonreliance of any one of these individual purchasers upon the complainant's alleged fraudulent misrepresentations is applicable only to the controversy between those two individuals. It could not be said that proof which would bind, for instance, Wemmer in this respect would be proof likewise affecting Steiner. It is clear, therefore, that the merits of the several controversies are entirely separable and not coincident, and therefore that an essential criterion of the right to enjoin to prevent a multiplicity of suits is absent.

[3] It will be noted that but 2 of the defendants here are pressing causes of action against the complainant in the state courts in amounts meeting the jurisdictional requirement of an action in this court. If other conditions, therefore, favor the complainant's right to the relief he seeks here and to the maintenance of this proceeding, as to the remaining 17 defendants whose several controversies with the complainant in the state court involve amounts less than $3,000, the complainant could have no standing in this court at all. It has been held that parties having causes of action against an individual coming within the limits of Pomeroy's doctrine may not invoke the jurisdiction of this court, even though other jurisdictional requirements are present, by aggregating their individual claims, each less than the jurisdictional amount, and thereby reach that amount. Wheless v. St. Louis et al., 180 U. S. 379, 21 Sup. Ct. 402, 45 L. Ed. 583. Conversely, therefore, it must be true that the complainant cannot bring these 17 parties into this court by asserting that the aggregate amount involved exceeds $3,000, and we do not think either of these 17 cases

may be attacked in this action because each of the other 2 does, in fact, involve the jurisdictional amount.

[4, 5] It appeals to this court that complainant, having already submitted to the jurisdiction of the state court through his answers, is no longer in position to press this complaint, whether or not he might have done so originally; nor do we regard the allegation that the venue of the state court is hostile to him as one which would tend to confer jurisdiction upon this court. If he is entitled to any protection from such assumed hostility, he must press for it before some state tribunal. Of course, if the 19 suits pending in Allen county are legitimately separate actions, the multitude of them is of no consequence, so far as having a right to come into this court is concerned, for it is well argued here that there is a distinction between a multiplicity of suits and a multitude of them.

The motion to dismiss in this case is equivalent to a demurrer. So considering it, we do not regard the complaint as sufficient to make a good cause of action for conspiracy, for the reason that the allegations which are assumed to bear upon that charge seem clearly inadequate.

Other reasons why this motion should be granted are earnestly pressed to our consideration, but we have said enough to indicate here the motion is well taken, without further extending this opinion.

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## In re DUBOSKY.

(District Court, E. D. Pennsylvania. November 8, 1918.)

No. 4919.

BANKRUPTCY ⊂⊃192—CLAIMS—MECHANIC'S LIEN CLAIMANT—RIGHTS OF.

Where one, who had filed a mechanic's lien claim against the property of a Pennsylvania bankrupt, filed in the bankruptcy court his claim based on the same, and the property was sold free from liens long before expiration of the two years within which the Pennsylvania statute required sci. fa. to be issued, *held*, that the right of such claimant to participate in the fund representing the property will not be denied because sci. fa. was not issued.

In Bankruptcy. In the matter of Anthony Dubosky, bankrupt. Sur certificate for review of an order of the referee disallowing the claim of C. E. Christ and others. Order reversed, with directions.

See, also, 232 Fed. 380.

Arthur L. Shay, of Pottsville, Pa., for petitioner.

John B. McGurl, of Minersville, Pa., for defendant.

DICKINSON, District Judge. The question really involved in this petition for a review can be best presented through a skeleton statement of the facts. On July 7, 1913, C. E. Christ et al. filed a mechanic's claim, the lien of which reverted to an earlier date. The claim was filed against the bankrupt as owner and contractor, and if valid admittedly

had priority of lien to the judgment which the First National Bank of Tamaqua had secured against the bankrupt. The adjudication was entered October 13, 1913, and on February 7, 1914, the real estate against which the above mechanic's claim and judgment were respectively liens was sold under proceedings divesting both liens. On June 29, 1914, application was made to the court of common pleas in which the mechanic's claim was filed to strike it from the record, on the ground that no notice of its filing had been given in accordance with the provisions of the Pennsylvania act of assembly of June 4, 1901 (P. L. 431). Distribution of the proceeds of sale was proceeded with before the referee, before whom both the mechanic's claim and the judgment were presented as entitled to share in the distribution, each claiming a priority of lien. Objection was made to the mechanic's claim as invalid, because of the fact that the record showed the failure to give notice of the filing of the claim within the time required by the act of assembly.

The referee disallowed the mechanic's claim. On a certificate for review, the order made by the referee was reversed, and the cause recommitted to him for further proceedings. The grounds for this action were that it appeared, in conjunction with the proceedings to strike off the lien, that application had been made to the court of common pleas, in the office of the prothonotary of which the mechanic's lien had been filed, to amend the record of the date of the filing of the proof of notice referred to; the averment being made that the filing date, as it appeared of record, was a clerical error of the prothonotary. The cause was remanded, in order that the parties to the proceedings before the referee might be able to present the action of the court of common pleas on the application to correct its record. That court, being satisfied the filing date was incorrect, permitted the true date to be shown by its record. The mechanic's claim was then re-presented before the referee. The record then showed a compliance with the requirements of the act of assembly, and the objection which had been made to the allowance of the mechanic's lien claim was removed.

A new objection, however, to the claim, because of another failure to comply with the requirements of the state statute, was then interposed. This was that no sci. fa. had issued within the two-year limit of time within which the statute requires that such writ should issue, and, of course, no judgment in any such proceeding had been recovered within the limit of five years, as the statute further requires. The referee found this objection to be well taken, and disallowed the claim. The order embodying this finding has been brought before us for review.

To sharply present the point of the controversy the pertinent dates already given may be restated. July 7, 1913, mechanic's claim filed, and February 7, 1914, the real estate premises against which the said lien was filed were sold. As a mechanic's lien claim is primarily, at least, a claim in rem, a very practical difficulty is thus presented. Within the two years, at any time during which a writ of sci. fa. might issue, the premises subject to the claim were sold. The sale further took place before it would be practically possible to reduce the claim

to judgment, or for a writ of sci. fa. even to issue, because no such writ of any value could issue until the status of the lien had been established.

In the proceedings in the court of common pleas to amend its record, action was not taken until after the sale. Whenever a sale takes place within the two-year period, one of two consequences flow. The mechanic's lien claimant loses because of this what is otherwise a perfectly valid claim, or he must proceed by sci. fa. proceedings to judgment. He must not only resort to this seemingly useless proceeding, but he must also, in some way, overcome the difficulty of sustaining a proceeding in rem against a rem which has been relieved of the operation of the lien which is the foundation of the whole proceeding. Assuming, for the purpose of presenting the point in mind, the proceeding to be one wholly and purely in rem, if a sci. fa. had issued, the purchaser of the property would have been served with process, or in any event would have had the right to intervene as defendant. He would, of course, have presented the defense of the divestiture of the lien. How could the plaintiff be awarded judgment? If there were no form of judgment which could be rendered under such circumstances, then we would have a law which denied to the claimant the recovery of what was due him because he had failed to secure judgment therefor, and the same law which thus punished him for not securing judgment would forbid him from getting judgment.

The referee has met the difficult situation thus presented by taking his stand upon the absolute declaration of the statute that the claim shall be "wholly lost" unless the sci. fa. issues and judgment is recovered, and sought to dispose of one of the obstacles in the way of the issuing of the writ by citing Mesta Mach. Co. v. Dunbar Furnace Co., 250 Pa. 472, 95 Atl. 585, in which a sci. fa. issued after bankruptcy with notice to the trustee, and supports his view of the unyielding character of the statutory requirement by citing the cases of Sterling Bronze Co. v. Syria Imp. Ass'n, 226 Pa. 475, 75 Atl. 668, and Philadelphia v. Sciple, 31 Pa. Super. Ct. 64, to which are added Hunter v. Lanning, 76 Pa. 25, Philadelphia v. Kelly, 63 Pa. Super. Ct. 133, and Kountz v. Consolidated Ice Co., 36 Pa. Super. Ct. 639. Reference is also made to the cases of Ward v. Patterson, 46 Pa. 372, Hershey v. Shenk, 58 Pa. 382, Hoole v. Cox, 21 Pa. Dist. R. 118, Kittanning Ins. Co. v. Scott, 101 Pa. 449, and Cope's Appeal, 96 Pa. 294.

These cases fully support the referee in the proposition for which he cites them. The proposition is in substance that a failure either to issue the sci. fa. or to secure judgment cannot be excused because of interposed delays, even if it be true that the delays were in large part at least "the law's delays."

It is to be observed, however, that in every one of the cases cited there was no legal impossibility interposed as an obstacle to the issuing of the sci. fa. or the recovery of a judgment. It is further to be observed that in the instant case, however, such impossibility does exist, unless we read into the act a contraction of the time from two years and five years to the seven months which intervened between the filing of the lien and the sale of the premises, or we must hold pro-

ceedings against the rem might go on to judgment after the lien was gone. We assume there is no justification for the requirement that either a sci. fa. should have issued or a judgment have been recovered within the seven months. If the sci. fa. proceeding, therefore, be, as before stated, a proceeding wholly in rem, then a compliance with the requirements of the act was a legal impossibility, unless it can be held that the claimant can pursue the rem after it had been relieved of the lien of his claim.

Counsel for the bank, in supporting the findings of the referee, asserts that the mechanic's lien claim can be upheld only by a finding either that the failure to comply with the act was excused because of the error of the prothonotary in entering upon his record the date when proof of notice was filed, or that the time which was lost in the correction of this error should be excluded. This way of meeting the real question involved would seem to merely evade it.

If the learned referee was misled into taking this view of the question really presented, he was clearly right in disposing of it as he did, because the rulings which he cites lay down the principle that neither of the excuses indicated will avail a mechanic's lien claimant. It does not seem to us, however, that the two subsidiary questions thus put by counsel present the real question. This is, as before indicated, whether a mechanic's lien claimant can be found to have been guilty of a default, because of his failure to do a thing which it is a legal impossibility to do.

The general proposition of law upon which the argument proceeds, to wit, that the rights of a mechanic's lien claimant are purely statutory, and because of this hedged about by all the limitations and conditions imposed by statute, is well sustained by any one of the long list of cases cited. The question recurs, however, whether, when a claimant has a valid claim, which has been created by and of course recognized by the law, he shall lose it because of his failure to do something which it is impossible to do, and whether the meaning that he shall lose it can be found in the act of assembly, or whether proof before the court making distribution of the fund is not the legal equivalent of sci. fa. and judgment.

In the very clear argument which counsel has presented, the case of Howes Brothers' Appeal, 9 Pa. Super. Ct. 586, is cited as the only exception to the line of cases before referred to known to counsel. This exception, however, is very suggestive of making an exception also of the instant case, not so much on its facts as on the line of reasoning adopted by the court. In that case, no judgment had been recovered within five years, but inasmuch as the claimant had secured a verdict, and because, by virtue of the provisions of the act of 1877 (P. L. 34) that verdict, although not a judgment, was a lien, the court permitted the plaintiff to recover by entering judgment upon the verdict. The ruling might have been upheld upon the phraseology of the act of 1901, which is in the alternative of a verdict recovered or judgment entered; but it is significant that the ruling is not put upon this ground, but upon the ground that a claim is not "wholly lost" which is within the act of 1877.

The learned counsel for petitioning creditor plants the right of his client to share in this distribution upon the proposition which, for the purpose of presenting it, may be recast in the following mold:

If there had been no error in the record, distribution would have been made well within the two-year period; the validity of the claim being then not otherwise questioned. The amendment of the record relates back to the time when that record was made, and therefore the lien was then a valid lien, and entitled to participate in the distribution. It is therefore the same as if the lien had been presented at the time it was presented, together with the record as amended, and, as the evidence had been closed, no subsequent happenings could affect the rights of the claimant, which had then become fixed in his right to share in the fund for distribution. This view is forcibly presented, but as presented it seems to be too refined for acceptance, because it rests in effect upon the doctrine that the claimant should not be penalized for the "law's delays." It would seem, on the contrary, that the consequences of these delays are to be borne by him. Substantially the same argument, however, so far as it is acceptable, is embraced in the broad view that the claimant, having filed his claim, thereby secured a lien upon the land, which was transferred to the fund, and upon proof of his claim had the right to share in the fund, because of such lien, without waiting to secure a formal judgment upon his lien, even had he had the right to secure one.

The common sense of this view is enforced by the practical consequences of holding otherwise. Where there is a fund which in other respects is ripe for distribution, and mechanics' claims against it are presented, and their validity is undisputed, must the distribution of the fund be withheld until the claimants go into another court to secure judgment, assuming, for the sake of the argument, that such judgment could be secured? Suppose, for further illustration of the practical difficulties, there should be a dispute over the justness of the claim made with respect, for instance, to the amount due, and the court making the distribution felt bound to find under the evidence that a certain sum was due. Must it refer this question to another tribunal which might make a different finding? The answer would seem to be that the court having jurisdiction of the fund, and having through it jurisdiction of all claimants upon that fund, may proceed to make distribution without waiting upon the action of any other court. If this proposition adequately presented the question before us, the question would, we think, not be raised. It, however, does not, for the reason that one of the findings involved, and which must be made, is that this claimant has a valid claim upon the fund, and he has no such claim unless he has a valid lien, and how can the lien be valid if, in the words of the Pennsylvania statute, it has been "wholly lost?"

This brings us back to the real question in the case, which is whether there was any legal necessity to issue a sci. fa. and to secure a judgment after the lien had been divested by the sale, and whether by the failure to do this the lien was lost? One aspect of the question, it seems to us, is presented in the line of cases which deal with the proposition of whether a judgment creditor, whose judgment has been

divested by a sheriff's sale, is bound to revive his judgment at the cost of losing his claim upon the fund if he does not do so before actual distribution.

The doctrine of these cases is that, under the provisions of the acts of assembly relating to judgments and debts which are liens against the real estate of a decedent, creditors cannot participate in a fund for distribution unless their claims were at the time of sale liens against the real estate, the proceeds of the sale of which is being distributed. This carries the implication that, if then liens, they may participate, and do not lose their right, because, if the land had not been sold, they would have lost their lien against it by a failure to issue a sci. fa. In re Cake's Estate, 157 Pa. 457, 27 Atl. 773.

The analogy, we admit, is by no means complete, and not even close; but it is suggestive of thoughts, some of which are helpful and others controlling. One of them is that a creditor claimant in a bankruptcy court has the status (through the title of the trustee) of an owner, and as such has an interest in the fund for distribution, which is fixed as of the date of the vesting of that title. The same doctrine applies, generally speaking, to all proceedings dealing with claimants to a fund. Another is, and this, if sound, is controlling, that the proof of a claim which a court is distributing is the legal equivalent of a formal action brought and judgment recovered. This it ordinarily undoubtedly is. Why should such a case as the instant one be regarded as an exception to the general rule?

In Bindley's Appeal, 69 Pa. 295, such proofs before an auditor were, for the obvious reasons there so clearly pointed out, held not to be the legal equivalent of the sci. fa. proceedings required to enable a creditor of the ancestor to follow real estate into the hands of the heirs. The judgment in that case was delivered by a father of the law, whose expressed opinions of what the law was would be accepted as authoritative. We would not only hesitate; we would not presume to differ with him. It is clear, however, that he regarded the condition with which he was dealing to be an exception to the general rule. We have a like high regard for the judge who wrote the opinion in Howes' Appeal, supra. There, again, however, as we read that opinion, we find ourselves in accord, and not in conflict, with the view there expressed. There the act of 1877 was deemed to be a permit to disregard the words of the act of 1901. The recognized principles governing the distributions of a fund we regard as the grant of a like permission.

The line of reasoning followed by Judge Rice is that, in imposing conditions upon the grant of the right given to mechanic's lien creditors, we must assume the Legislature to have had in mind all the difficulties in the way of a compliance with those conditions. Noncompliance with the conditions, therefore, cannot be excused by writing into them something which is not there. When the Legislature, however, by another act (in Howes' Appeal, the act of 1877), has excused strict compliance in certain situations, noncompliance may not be an obstacle to the assertion of the right.

The practice of courts in distributing funds may make another or like exception, and the instant case is thus brought within the doctrine

of Howes' Appeal. So, in the Bindley Case, the doctrine is recognized that proof of a claim in any court (and of course, or even a fortiori in bankruptcy cases) is accepted as the equivalent of scire facias, or other writ of summons, verdict, and judgment, although it is also there held not to apply to the fact situation presented in the case.

This leaves us at full freedom to apply the approved doctrine in the instant case. That this is universally done in practice argues for the soundness of the principle. In the distribution of funds, raised by sheriff's sales or otherwise, if the lands sold were at the time of the sale subject to mechanics' or other claims, allowance is always made upon proof of the claims. The very point involved here was presented and passed upon in Re Falls City Shirt Mfg. Co. (D. C.) 98 Fed. 593, and discussed at page 594 of the report of the case.

The view taken of the legal merits of the claim, which the referee disallowed, has been presented with great fullness, because this aspect of the question before the referee does not appear to have been presented to him, or, at least, has not been discussed in the very clearly reasoned report which he has made. This aspect of the question was, however, fully discussed at the argument before us, and no suggestion made of anything to be gained by recommitting the cause to the referee. We would have valued the aid which a discussion by him would have given us, but dispose of it as the question is presented to us.

This calls for the allowance of the petition for review, and the reversal of the order made by the referee, with instructions to further proceed with the cause in accordance with this opinion.

It is therefore so ordered.

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Ex parte BLAIR. Ex parte PHILLIPS. Ex parte TEMPLETON.

(District Court, S. D. New York. October 16, 1918.)

Nos. M3-292 to M3-294.

1. CONSTITUTIONAL LAW ⟸46(1)—CONSTITUTIONALITY OF ACT—NECESSITY OF DETERMINATION.

It is an almost universal rule of the courts not to decide constitutional questions until the necessity for decision arises in the record before the court.

2. HABEAS CORPUS ⟸27, 30(1)—FUNCTION OF WRIT.

Generally the writ of habeas corpus will not issue, unless the court under whose warrant the petitioner is held is without jurisdiction, and it cannot be used to correct errors.

3. HABEAS CORPUS ⟸32—CONSTITUTIONALITY OF STATUTE.

Petitioners who refused, without invoking the Fifth Amendment, protecting against self-incrimination, to obey a subpœna duces tecum, or to answer questions propounded to them in a grand jury investigation, under Act Cong. June 25, 1910, as amended by Act Aug. 19, 1911, and Act Aug. 23, 1912 (Comp. St. 1916, §§ 188–198), of corrupt practices in a senatorial primary election cannot, having been committed for contempt, secure release on habeas corpus on the ground that the statute was unconstitutional.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Applications for habeas corpus by Frank W. Blair, Thomas P. Phillips, and Allan A. Templeton. Applications denied.

Martin W. Littleton, of New York City, for petitioners.

Francis G. Caffey, U. S. Atty., of New York City, S. R. Rush, Sp. Asst. Atty. Gen., of Omaha, Neb., and Oliver E. Pagan, of Washington, D. C., for the United States.

HENRY D. CLAYTON, District Judge. These three cases were argued together; each rests upon the same facts, and each presents the same questions of law.

The facts, and they are not disputed, but appear of record, essential to an understanding of the questions presented, are as follows: Blair, Phillips, and Templeton, residents of the city of Detroit, in the state of Michigan, were each duly served with subpœnas at Detroit, requiring them to appear before the United States grand jury sitting in the Southern district of New York, at New York City. The subpœna to Blair, and the one to Templeton as well, was a subpœna duces tecum, requiring in the case of each of them that they produce before the grand jury certain records of the Truman H. Newberry senatorial committee described in the subpœnas.

The witnesses appeared separately before the grand jury in obedience to the process and were duly sworn. Each witness separately was then asked certain preliminary questions as to his residence, occupation, etc., and each was then asked questions touching the matter then before the grand jury, to wit, an inquiry among other things, concerning supposed violations of section 125 of the United States Criminal Code, Act March 4, 1909, c. 321, 35 Stat. 1111 [Comp. St. 1916, § 10295]), which relates to perjury; and the so-called federal Corrupt Practices Act (Act Cong. June 25, 1910, c. 392, 36 Stat. 822), as amended by Act Aug. 19, 1911, c. 33, 37 Stat. 25, and further amended by Act Aug. 23, 1912, c. 349, 37 Stat. 360 (U. S. Comp. St. 1916, § 188). This act defines political committees, requires the keeping and filing of certain financial statements, limits the amount of money that may be expended by candidates for nomination and election to the offices of Representative and Senator in Congress, forbids certain acts and promises by candidates and committees, and provides punishment for the violation of the act. The act also contains the following provision (section 8):

"Every statement herein required shall be verified by the oath or affirmation of the candidate, taken before an officer authorized to administer oaths; and the depositing of any such statement in a regular postoffice, directed to the clerk of the House of Representatives or to the secretary of the Senate, as the case may be, duly stamped and registered within the time required herein shall be deemed a sufficient filing of any such statement under any of the provisions of this act." Comp. St. 1916, § 195.

The inquiry before the grand jury, and about which the testimony of the witnesses was sought, had to do with the verification in the Southern district of New York, and the filing of reports to the secretary of the United States Senate by Truman H. Newberry, a candi-

date for the Republican nomination to the office of United States Senator at the primary election held in and under the laws of the state of Michigan in August, 1918, which office is to be voted for at the general election in November, 1918. The witnesses were informed that this was the object of the grand jury investigation, that the purpose of the prosecution was not to charge them with any offense, and that, if the answers to the questions tended to incriminate or degrade the witness, the law would not require them to answer.

Each of the witnesses then refused to answer the questions asked concerning the matter under investigation on the grounds set out in a written statement read to and left with the grand jury in each case. This written statement was to the effect that the reason they did not answer the questions was because the grand jury and the court were without any jurisdiction to inquire into the manner and method of the conduct of a campaign in Michigan for a party nomination, through the means of a primary election, for United States Senator; that said federal Corrupt Practices Act as amended is unconstitutional, and that no federal court or federal grand jury in any state has the constitutional authority to conduct an inquiry under said act regarding a primary election for the nomination of a United States Senator; and that they made their statements upon advice of counsel. The witnesses were thereupon each separately asked by counsel for the United States whether they refused to testify for the reason that so to do would incriminate them, to which question each witness replied that he would make no other answer than a reference to the reasons for his refusal as set forth in the written statement read to and left with the grand jury. The witnesses Blair and Templeton also refused, for the same reasons, to produce the documents and papers called for in the subpœnas duces tecum served on them.

On October 10, 1918, the grand jury presented the witnesses to the court, Judge Edward E. Cushman presiding, for contumacy in having refused to answer the questions. The court, after hearing the argument of counsel for the petitioners, including the argument as to the unconstitutionality of the act, and also the argument of counsel for the United States, ordered the witnesses to go again before the grand jury and answer the questions.

On October 11, 1918, the witnesses were called again before the grand jury, and counsel for the government again propounded the questions relating to the matter then before the grand jury. The witnesses each again, for the reasons stated by them when they first appeared before the grand jury, declined to answer the questions or to produce the documents and papers called for in the subpœnas duces tecum. Thereupon the matter and the witnesses were again presented by the grand jury to the court.

The matter was heard by the court, Judge Cushman presiding, and he adjudged the witnesses in contempt for failure to answer, and remanded them to the custody of the United States marshal, to be committed to the Ludlow Street Jail until they should comply with the order of the court directing them to answer the questions asked by the grand jury.

The witnesses each now petition the court for a writ of habeas corpus, and each alleges that he is unlawfully restrained of his liberty, and without due process of law, and in violation of the rights of petitioner secured to him under the Constitution of the United States. Each petitioner alleges that he is restrained solely under the authority of the order of the court of October 11, 1918, committing the petitioner to the custody of the marshal for an alleged contempt in refusing to answer certain questions propounded to him before and in the presence of the grand jury. The petition in each case avers:

"Petitioner is restrained of his liberty solely under and by virtue of said order of commitment and not for any other cause or reason."

Paragraph 11 of each of the petitions alleges:

"On information and belief: That the Congress of the United States has no jurisdiction to enact laws regulating, controlling, or in any manner affecting the holding of primary elections for the nominations by political parties of candidates for the office of United States Senator to be voted for at succeeding general elections to fill said office, or regulating, affecting or controlling in any manner the conduct of candidates for such nomination at said primary elections. That neither the United States grand jury nor the District Court of the United States for the Southern District of New York has any power or authority to inquire into the method or manner of holding primary elections in the state of Michigan or elsewhere, or to inquire into, indict, or try any person for an alleged violation of said act of Congress, hereinbefore described, which attempts to regulate the conduct of candidates for the nomination for the office of United States Senator at such primary elections. That said act of Congress is unconstitutional and void, so far as it relates to primary elections, and that the arrest and detention of the petitioner is without due process of law and in violation of his constitutional rights. That under the facts hereinbefore set out petitioner was not guilty of contempt in refusing to answer the questions asked him before said grand jury, and that said court had no jurisdiction or power to adjudge petitioner guilty of contempt, and said order of commitment is null and void."

[1] The application for the writ coming on to be heard, the United States moved to discharge and dismiss the writ of habeas corpus, and to recommit the petitioners to the custody of the marshal, for the reason and upon the ground that, under the facts and circumstances stated in the petition and shown by the record, said writ, in legal effect, is a writ of error.

Counsel for petitioners has ably and earnestly urged that the act in question is unconstitutional, in so far as it relates to the selection through primary elections of candidates for the office of United States Senator and the office of Representative in Congress, and while it may be said that the government has not made satisfactory answer to his contention, yet this case, as will be seen, does not render it necessary to pass upon that question now. As was said by Mr. Justice Peckham in Baker v. Grice, 169 U. S. 284, 292, 18 Sup. Ct. 323, 326 (42 L. Ed. 748):

"It is a matter of common occurrence—indeed, it is almost the undeviating rule of the courts, both state and federal—not to decide constitutional questions until the necessity for such decision arises in the record before the court."

The question in the instant case goes to the validity of the order adjudging the petitioners in contempt and committing them to jail

for their refusal to testify after having been directed so to do by the court.

[2] The Supreme Court has repeatedly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court. Jurisdiction under the writ is confined to determining from the record whether the petitioner is deprived of his liberty without authority of law. Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849. As was said by Mr. Chief Justice Fuller, speaking for the Supreme Court in the case of In re Chapman, 156 U. S. 211, 215, 15 Sup. Ct. 331, 332 (39 L. Ed. 401):

"The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors [citing cases]. Ordinarily the writ will not lie where there is a remedy by writ of error or appeal [citing cases], yet in rare and exceptional cases it may be issued although such remedy exists. Ex parte Royall, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868]; New York v. Eno, 155 U. S. 89 [15 Sup. Ct. 30, 39 L. Ed. 80]."

The case of Henry v. Henkel, 235 U. S. 219, 35 Sup. Ct. 54, 59 L. Ed. 203, decided by the Supreme Court in 1914, appears to the court to be decisive authority, under the circumstances of these cases, that the writs of habeas corpus should not be issued and the petitioners discharged from custody. In that case the petitioner, Henry, was summoned before the committee on banking and currency of the House of Representatives of the United States, which committee, under a resolution of the House, was then investigating the financial affairs and activities of national banks and other corporations. He answered many of the questions asked by the committee, but declined to answer certain other questions, not because the answers would tend to incriminate him, but because he "considered it dishonorable to reveal the names of his customers." He was reported to the House, and that body directed that the facts be laid before the grand jury for the District of Columbia. This was done, and Henry was indicted. He was arrested in New York, and when taken before the United States commissioner demanded an examination, and moved for his discharge upon the ground that the commissioner was without jurisdiction, since it appeared on the face of the complaint that he was not charged with any offense against the United States. The commissioner ordered him held for a removal warrant from the District Judge. Henry then applied to the District Judge for a writ of habeas corpus, and on the hearing introduced all the testimony that had been submitted to the commissioner, and asked for his discharge on grounds similar to those presented to the committing magistrate. The District Judge discharged the writ and held the petitioner. An appeal was taken to the Supreme Court, where the same contentions were made in Henry's behalf, and the insistence was made that the resolution of the House of Representatives did not authorize the inquiry in which Henry refused to testify; that the facts charged did not constitute an offense against the statute, or, if so, that the statute was void. Mr. Justice Lamar, speaking for the court, said (235 U. S. 227, 228, 35 Sup. Ct. 56, 59 L. Ed. 203):

"When a person under arrest applies for discharge on writ of habeas corpus the issue presented is whether he is unlawfully restrained of his liberty. Rev. Stat. § 752 [Comp. St. 1916, § 1280]. But there is no unlawful restraint where he is held under a valid order of commitment, so that in strict logic the inquiry might extend to the legal sufficiency of the order. In view, however, of the nature of the writ and of the character of the detention under a warrant, no hard and fast rule has been announced as to how far the court will go in passing upon questions raised in habeas corpus proceedings. In cases which involve a conflict of jurisdiction between state and federal authorities, or where the treaty rights and obligations of the United States are involved, and in that class of cases pointed out in Ex parte Royall, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868], Ex parte Lange, 18 Wall. 163 [21 L. Ed. 872], New York v. Eno, 155 U. S. 89 [15 Sup. Ct. 30, 39 L. Ed. 80], and In re Loney, 134 U. S. 372 [10 Sup. Ct. 584, 33 L. Ed. 949], the court hearing the application will carefully inquire into any matter involving the legality of the detention and remand or discharge as the facts may require. But, barring such exceptional cases, the general rule is that, on such applications, the hearing should be confined to the single question of jurisdiction and even that will not be decided in every case in which it is raised. For otherwise the 'habeas corpus courts could thereby draw to themselves, in the first instance, the control of all prosecutions in state and federal courts.' To establish a general rule that the courts on habeas corpus, and in advance of trial, should determine every jurisdictional question, would interfere with the administration of the criminal law and afford a means by which, with the existing right of appeal, delay could be secured when the Constitution contemplates that there shall be a speedy trial, both in the interest of the public and as a right to the defendant.

"The question has been before this court in many cases—some on original application and others on writ of error; in proceedings which began after arrest and before commitment; after commitment and before conviction; after conviction and before review. The applications were based on the ground of the insufficiency of the charge, the insufficiency of the evidence, or the unconstitutionality of the statute, state or federal, on which the charge was based. In some of the cases the applicants have advanced the same arguments that are here pressed, including that of the hardship of being taken to a distant state for trial upon an indictment alleged to be void.

"But in all these instances, and notwithstanding the variety of forms in which the question has been presented, the court, with the exceptions named, has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error nor is it intended as a substitute for the functions of the trial court. Manifestly, this is true as to disputed questions of fact, and it is equally so as to disputed matters of law, whether they relate to the sufficiency of the indictment or the validity of the statute on which the charge is based. These and all other controverted matters of law and fact are for the determination of the trial court. If the objections are sustained or if the defendant is acquitted he will be discharged. If they are overruled and he is convicted he has his right of review. Kaizo v. Henry, 211 U. S. 146, 148 [29 Sup. Ct. 41, 56 L. Ed. 125]. The rule is the same whether he is committed for trial in a court within the district or held under a warrant of removal to another state. He cannot, in either case, anticipate the regular course of proceeding by alleging a want of jurisdiction and demanding a ruling thereon in habeas corpus proceedings [citing many cases].

"The last of these decisions (Ex parte Royall, 117 U. S. 241 [6 Sup. Ct. 734, 29 L. Ed. 868]) is particularly in point, not only because of the applicability of its reasoning to the present case, but because of the fact that the writ was there denied even though the statute, on which the charge was based, was ultimately held to be void. Royall v. Virginia, 116 U. S. 572, 579, 583 [6 Sup. Ct. 510, 29 L. Ed. 735]; Same v. Same, 121 U. S. 102, 104 [7 Sup. Ct. 826, 30 L. Ed. 883]; In re Royall, 125 U. S. 696 [8 Sup. Ct. 1392, 31 L. Ed. 855]."

[3] But the present case is even stronger than the Henry Case, because here the question of the constitutionality of the act is sought to

be raised by a witness before the grand jury, and not by a defendant. Nor does the witness invoke the protection of the Fifth Amendment, which declares that "no person * * * shall be compelled in any criminal case to be a witness against himself." Unless the testimony sought to be elicited from the witness would tend to incriminate him and expose him to prosecution, he must answer the questions propounded. Hale v. Henkel, 201 U. S. 43, 66, 26 Sup. Ct. 370, 50 L. Ed. 652. Certainly, under the facts of these cases, the petitioners, the witnesses before the grand jury, cannot, as the sole ground for their refusal to answer the questions, be heard to say, after they have been advised of their rights and ordered by the court to answer the questions, in justification of their failure to answer, that they had been advised that the act, violations of which were being investigated by the grand jury, is unconstitutional. They can only justify their refusal to answer by showing that the answers would incriminate them. As was said by Mr. Justice McKenna in Nelson v. United States, 201 U. S. 92, 115, 26 Sup. Ct. 358, 365 (50 L. Ed. 673):

"These writs of error are not prosecuted by the parties in the original suit, but by witnesses, to review a judgment of contempt against them for disobeying orders to testify. Being witnesses merely, it is not open to them to make objections to the testimony. The tendency or effect of the testimony * * * is no concern of theirs. The basis of their privilege is different from that and entirely personal. * * *"

That is, they are protected against self-incrimination. It cannot be doubted that the decision of the Supreme Court in the Nelson Case would have been the same, had the witnesses based their refusal to testify on the ground of the unconstitutionality of the statute under which the investigation was being had.

It is not alleged or claimed that there is any irregularity in the organization of the grand jury, and its legality is not questioned.

Here we have a legal grand jury, proceeding in a lawful and orderly manner to make certain investigations. Witnesses are legally summoned, appear, and are duly sworn. They are advised as to the matter under investigation, the charge, and they are advised of their right to refuse to answer if the answers would tend to incriminate them. They do not claim any such privilege. The grand jury has presented them; the court has heard the matter and ordered that they testify; they have again refused to testify for the same reasons, and were committed for a contempt. Under these facts there can be no doubt that the order of commitment is valid, and that the petitioners are not unlawfully restrained of their liberty.

It may not be inappropriate to say that the court does not doubt the statement made in the argument that the witnesses are reputable bankers and business men, and that to require them to bring to New York from Detroit, Mich., where they reside, the numerous books and papers called for by the subpœnas duces tecum, would be to impose great hardship upon them. But this objection relates to the matter of inconvenience and hardship, to the wisdom or unwisdom of the acts of Congress having to do with the regulation of primary elections under the laws of a state. That the act of Congress may visit inconvenience and hardship upon the citizens, and that the act of Congress may be

unwise, suggest matters not to be dealt with by the courts. And, as I have held, the constitutionality of the act of Congress cannot be challenged in this proceeding. I may say, also, that it is not my province to make the law of habeas corpus. I cannot add to nor can I subtract from it. It is my duty to declare the law governing this trial as I find it.

It results, from what has been said, that the writ of habeas corpus in each case must be dismissed and discharged, and each petitioner be remanded to the custody of the marshal; and such order will accordingly be entered.

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## SWANN v. AUSTELL et al.

(District Court, N. D. Georgia. October 3, 1918.)

1. COURTS ⟸489(13)—FEDERAL COURTS—JURISDICTION.
   While the federal court will not interfere in the administration of estates of decedents, where it is necessary for the court to interfere with the actual administration, etc., *held*, the necessary diversity of citizenship and jurisdictional amount existing, that the federal court could entertain a suit looking to the determination of plaintiff's rights in the estate of a deceased person, where the management, etc., was not affected.

2. WILLS ⟸802(2)—ELECTION—ACCELERATION OF REMAINDER.
   Where a widow renounced the will, which gave her a life estate, etc., and was assigned dower, *held* that, as the husband's will providing that children in being at death of wife should take in remainder, etc., showed an intention that only those of the testator's blood should take, remainders in the dower cannot be deemed accelerated, so as to allow a spouse of a child dying before the widow to take.

3. WILLS ⟸853—ACCELERATION OF REMAINDER.
   To work an acceleration of a remainder, the particular estate as a whole must terminate, and even then the acceleration results only from the presumed intent of the testator, and will not take place, if contrary to such intent.

4. COURTS ⟸365—FEDERAL COURTS—STATE DECISIONS.
   In determining rights under a will, decisions of the courts of the state of the testator's residence, wherein the property was located, are controlling.

5. JUDGMENT ⟸743(2)—CONCLUSIVENESS—TITLE TO LAND.
   Where plaintiff claimed property on the ground that, as testator's widow renounced the will and dower was assigned, remainders to children were accelerated, *held*, that the record of a case to which the heirs and executors were parties, involving disposition of property in which the widow would otherwise have had a life interest, was not admissible.

In Equity. Bill by Alfred R. Swann against W. W. Austell, as executor, and others. Bill dismissed.

Turner, Kennerly & Cate, of Knoxville, Tenn., and Anderson, Rountree & Crenshaw, of Atlanta, Ga., for plaintiff.

C. T., L. C. & J. L. Hopkins and King & Spalding, all of Atlanta, Ga., for defendants.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

NEWMAN, District Judge. Alfred Austell, Sr., a resident of Fulton county, Ga., died on the 7th day of December, 1881, leaving a last will and testament dated February 1, 1878, which was duly probated in the court of ordinary, Fulton county, Ga., at the January term, 1882. At the time of his death there survived him, as heirs at law, his widow, Mrs. Francina C. Austell, and his four children, W. W. Austell, Mrs. Leila Austell Thornton, Mrs. Janie Austell Swann, and Alfred Austell, Jr., between whom, by the terms of the will, his property was divided.

After the probate of said will, Mrs. Francina C. Austell, the widow, filed her petitions in the superior courts of Fulton, Campbell, and Douglas counties, in each of which property belonging to the estate of the deceased was located, objecting to the will and renouncing her rights thereunder, and praying that dower be set apart to her in lands and tenements owned by the testator at the time of his death.

Upon her application, filed in the superior court of Fulton county, a decree was rendered on the 3d day of November, 1882, fixing the particular parcels of land which had been admeasured to her, and giving her as dower the home on Marietta street, and that part of the property known as the "Trout House lot," which was located on Line street, now Edgewood avenue, which was described to have approximately 100 feet frontage on North Pryor street and a like frontage on said Line street; and upon the petition filed in Campbell and Douglas counties, dower was also admeasured and decrees entered thereon, setting apart a part of the land in Campbell county, known as the "Latham plantation," and a part of the land in Douglas county, known as the "Gorman plantation." Subsequently an agreement was entered into between all parties at interest, under which the widow surrendered all of her claim of dower in the Douglas county plantation, which had been specially devised by the testator to Alfred Austell, Jr., and was granted, in lieu thereof, the remainder of the Campbell county plantation, which had not already been set apart as dower.

Immediately after the renunciation of the will and the taking of dower by the widow, the executors filed a bill in the superior court of Fulton county relating to the rights of the widow and the children in the "Trout House" property, under which a verdict and decree was rendered in November, 1886, referring in terms to the entire "Trout House lot," including that which had been theretofore set apart as dower, holding that the widow had no interest in this property, and that the executors should sell same at public auction and divide the proceeds among the four children. In pursuance of said decree, however, the executors sold only that part of the property referred to which was not set apart as dower; that is, that part which fronted on Decatur street and ran back along North Pryor street about 140 feet, to an alley which separated this part of the Trout House lot from that which had been set apart as dower.

No question is made here as to the residue of the estate, or any property belonging to the estate, except that set apart to the widow as her dower, as stated above.

On April 9, 1893, Mrs. Janie Austell Swann, one of the children of the testator, died testate, bequeathing her entire estate, of every char-

acter, except certain unimportant devises and bequests, to her husband, James Swann. James Swann died in April, 1903, also leaving a will, by which whatever interest he had acquired from his wife in and to any of the dower property was devised to his brother, Alfred R. Swann, who is the plaintiff here.

Mrs. Francina C. Austell, the widow, died in May, 1917, having held and enjoyed the dower lands up to the time of her death. Upon her death there still survived her three of the children of the testator, namely, W. W. Austell, Mrs. Leila A. Thornton, and Alfred Austell, Jr.

The contention here is that, when Mrs. Austell, the widow, renounced her right under the will and took dower, the rights of the remaindermen under the Austell will were accelerated, and that fee-simple title at once vested in the remaindermen to the property as to which there was a remainder, when the particular estate was in Mrs. Austell. The further contention then is that Mrs. Janie Austell Swann, by the terms of the will, took, by acceleration, a vested interest in the property in which the widow was given a life estate, which interest passed by her will to her husband, James Swann, who devised it to Alfred R. Swann, the plaintiff here.

The question of jurisdiction is raised in this case, on the ground that the estate is still being administered in the court of ordinary of Fulton county, and answers have been filed which make the questions hereinafter discussed.

[1] Of course, it is well understood that federal courts will not interfere in the administration of estates of decedents, where it is necessary for the court, through its officers, to lay its hands in any way upon the property, or to interfere with the actual administration of the estate. Where a case is made inter partes, the necessary diversity of citizenship and the jurisdictional amount existing, a federal court can hear a case looking to the determination of the rights of the plaintiff in and to the property of the estate of a deceased person, without interfering in any way with the possession of the property or the management of the estate. I have reached the conclusion that a decree could be entered in this case determining the rights of the plaintiff, in the event the court should agree with him about the same, and should conclude that he is entitled to recover against the defendants on the case here made by him.

Mrs. Janie Austell Swann died in 1893, and James Swann, her husband, died in 1903, and both died testate, as stated above.

[2-4] The question arising in this case is rather unusual, and quite interesting and important. The plaintiff claims an acceleration of the remainder interest of Gen. Austell's children by reason of the widow renouncing her rights under the will and electing to take dower in the estate. He has brought to the attention of the court a number of authorities which he claims support his position that there was such an acceleration in this case, and consequently that he has a one-fourth interest in the property, the title to which, it is contended, passed to Mrs. Swann, by reason of such acceleration.

Gen. Austell, by his will, disposed of the three pieces of property

which are for consideration here. One was the home place on Marietta street, in Atlanta, Ga., one was what was called the "Trout House lot," fronting on Decatur street, and running back along North Pryor street to Line street, and the third was a Campbell county farm, known as the Latham plantation.

As to his home place he said this, in the first item of his will:

"After the payment of all my just debts, I give, bequeath and devise, to my beloved wife, Francina, the dwelling house and lot, whereon and wherein I now reside, which fronts on Marietta street in the city of Atlanta, in said county and state, being on the south side of said street, and is bounded on the west by the lot of the First Presbyterian Church of Atlanta, on the east by the lot of C. Kontz, except that portion of said lot which fronts on the right of way of the Western & Atlantic Railroad, and extends back from said right of way to the back line of said lot of said First Presbyterian Church.

"To have, hold, use, and occupy, as a home for her and our children for and during the natural life of my said wife, or until she shall marry again.

"Upon the happening of either of which events said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead, at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent.

"And I expressly devise and direct that the said dwelling house and lot shall not be incumbered by, or subject to the payment of any debt or debts, she, my said wife, may contract, or any contracts she may make, but shall remain, during her life, or widowhood, a secure and unmolested home and residence for her and my said children, while they reside with her, and under her maternal care and protection; not meaning by this, however, that she shall be compelled to have any of our children live with her, unless she shall so desire."

The meaning of this item is very plain. The home place on Marietta street was to go to Mrs. Austell as a home for life, or widowhood, with remainder after her decease, or if she married, to their child or children then living—that is, living at the time of Mrs. Austell's death or marriage—or to the child or children of any deceased child or children.

Mrs. Austell renounced the will and elected to take dower, which was admeasured to her in the home place on Marietta street, the rear of the Trout House lot, that is, the part fronting on Line street, now Edgewood avenue, and running back along North Pryor street to an alley, and also in and to the farm in Campbell county, known as the Latham plantation.

Gen. Austell disposed of the Trout House property in the second item of his will, which, with the directions he gave as to this, is as follows:

"It is my will and desire, and I hereby devise and direct that my executors hereinafter named, shall not sell, during the life of my said wife, any of my store houses, or other houses, on the lot known as the 'Trout House' lot, on the corner of Decatur and Pryor streets, in said city of Atlanta, fronting on Decatur street one hundred feet, more or less, and extending back at right angles with Decatur street, and on Pryor street, to Line street, but they may build, out of any funds that may come into their hands, if they deem it best, other store houses on the part of said lot adjoining the building known as the Austell corner.

"I direct my said executors to collect the rents of the storehouses, or other houses, as may be on said 'Trout House' lot, and out of the rents so collected, that they pay my said wife the sum of two thousand dollars, payable in

equal quarterly payments, for each and every year of her natural life, whether she marries again or not.

"And my executors are directed to take the receipt for the same from herself alone and to pay it to no other person.

"My executors are further directed, after paying my said wife the sum of money aforesaid, to divide the balance equally between my said children, and after the death of my said wife to sell the said store houses and lot and divide the proceeds of such sale among my children, share and share alike, the child or children of any deceased child of mine to take the share of their deceased parent."

The Latham plantation is disposed of in the ninth item of the will, which is as follows:

"I further will and direct that all the residue of my estate, of whatever kind or nature, whether real, personal or mixed, not hereinbefore disposed of shall be sold, or converted into money, by my executors, at such time and place and under such circumstances, as they may deem best, by public sale, such reasonable notice of time and place of sale as they may deem best, to be given by publication and the proceeds to be equally divided between my children, share and share alike."

It appears from this that no life estate vested in Mrs. Austell by the will except her life estate in the home place on Marietta street. Both as to the "Trout House" lot and as to the farm in Campbell county, no life estate was created in any one. On the contrary, as to both of these places, the direction of the will was, first, as to the "Trout House" lot, that the rents should be collected and as much as $2,000 annually paid to his wife, and, as to the Latham plantation, it was to be converted into money, at the discretion of the executors, and the proceeds divided between his children. So I am unable to see how the doctrine of acceleration can affect at all the property covered by these two items of the will. The only property here to which his contention can apply, if it applies to that, is the home place on Marietta street.

In determining how far the doctrine of acceleration of remainder interest applies to this place, let us get first what was the intention of the testator as to this property. The Supreme Court of Georgia, in Toombs v. Spratlin, 127 Ga. 762, 773, 57 S. E. 59, 60, says this:

"To work an acceleration of a remainder, the particular estate as a whole must terminate. And even then the acceleration results, not from any arbitrary rule, but from the presumed intent of the testator, and will not take place if contrary to his expressed intent."

The provision of the will as to this home place is:

"Upon the happening of either of such events [that is, the death or marriage of Mrs. Austell] said property shall go to and belong to my children that may be living at the time of the death or marriage of my said wife, share and share alike, or if any of my children shall be dead, at that time, leaving children surviving them, such last mentioned children shall take the share of their deceased parent."

The tenth item of the will is as follows:

"In any item of my will, where a division of property is directed to be made, between my children, I hereby declare it to be my will and desire that if any of my children should be dead, at the time such division is to be made, leav-

ing any child or children surviving them, that such surviving child or children shall take the portion of their deceased parent.

"And in the event any of my children shall die, before the division of any part or the whole of my estate, as provided for in this, my will, leaving no issue, or surviving children, then it is my will and desire that the portion of my estate that would have otherwise gone to such deceased child or children, shall be divided between my other surviving child or children, share and share alike."

The latter part of this item is the important part here; that is, the portion which provides how the property shall go in the event any of his children should die leaving no child or children. It is perfectly clear from this, as to all of his property, Gen. Austell desired, as to a certain portion of the estate, that same should be sold and divided as provided in the will, and, as to property which would become available for distribution upon the death of his wife, it should be similarly divided, that is, among his children, and, if any child should die leaving descendants, to the descendants of such child in lieu of the parent, and, if any of his children should die leaving no child or children, then to the other children. This provision by Gen. Austell as to his desire with reference to his property and his intention runs all through the will and is too clear to be mistakable.

Construing the clause in the will with reference to the home place in the light of the rule I have stated from the case of Toombs v. Spratlin, supra, in which the Supreme Court of the state has said that acceleration results not from any "arbitrary rule," and will not take place contrary to the testator's express intent, it seems to me that the intention of Gen. Austell in this will is too plain to be questioned. Of course, it is a Georgia case, and Georgia property, and a Georgia administration, so that necessarily the views of the Supreme Court of the state are not only important and persuasive, but really controlling.

The view that I take of this clause of Gen. Austell's will is, I think, strengthened by the decision of the Supreme Court of the state in two cases where this will was before the court. The first of these is the case of J. M. High & Co. v. Austell, 133 Ga. 427, 65 S. E. 884, and the other is the case of City of Atlanta v. Austell, 146 Ga. 456, 91 S. E. 478. While not a great deal is shown as to what was decided in the report of the cases, from what seems to have been conceded by both counsel in their argument before this court, the question now before this court was argued in one of those cases at least, and must have been considered by the court.

Two other cases have been before the Supreme Court of Georgia in which this will was brought to the attention of the court. The first is the case of Swann v. Garrett, 71 Ga. 566, and the other is the case of Austell v. Swann, 74 Ga. 278. In the first case, Swann v. Garrett, I do not think it affects the question here, first, because the decision was made by a divided court; and, second, because the decision whether the fee in the property covered by the ninth item of this will vested at once in those who were to take under that item seems to me to be immaterial to a decision of the question then before the court, which was the distribution of the property covered by the ninth item of the will in kind, instead of by a sale of the property and a division of the

money arising from the sale. This is clearly borne out by an examination of Judge Jackson's dissenting opinion, because his dissent is based upon entirely different grounds; that is, on the ground of whether it is advisable to divide property in which an infant heir has a share in kind between the heirs, or whether it should be sold and the proceeds divided. That is all that Judge Jackson refers to in his dissenting opinion, and does not seem to have given any serious consideration to the other question, as to whether or not the estate vested under the ninth item of the will, but simply refers to the question, apparently, of the advisability of selling, instead of a division of the property in kind.

The case of Austell v. Swann, supra, it seems to me is wholly immaterial to anything before this court.

Counsel for the plaintiff here relies upon a case decided in this court some years ago, the Case of Haslett, 116 Fed. 680. It is claimed that the rule adopted and announced by the court in that case would control in their favor in this case. I do not think so. I think the Case of Haslett was an entirely different case from this. Haslett evidently intended, by the deed he made, that title should vest in his children, because he provided that his wife should be trustee for them during their minority, and should be authorized to sell, if necessary, and convey title to their remainder interest, as well as her own life estate. Gen. Austell evidently did not intend that his home should be molested in any way until after the death or possible marriage of his widow. He intended it to remain as a home for Mrs. Austell and such children as she might desire to live with her.

Quite a number of authorities have been cited by counsel for both sides in this case, and I have gone through them; but I do not see, in the view I take of the case, that a discussion of them by me would be essential in any way to a decision of the case. I concede the doctrine of acceleration of remainder interests in proper cases, but I do not think it is applicable here. I think the intention of Gen. Austell is too plain from this will to be ignored, and that should govern in its construction.

[5] Objection is made to the admission in evidence of so much of the record as is available in the case of W. J. Garrett et al. v. Alfred Austell et al. The pleadings in the case are lost, but the verdict of the jury has been obtained. It appears from what we have of the record that the executors were authorized to sell the front part of the Trout House property (that is, the Decatur street end), and divide the proceeds among the children, all being in life at that time, and it seems the property was sold under this decree. Apparently the verdict applied to the whole of the Trout House property, but it is conceded by all of the parties here that it was a mistake, and was never intended to apply, and never was actually applied, to anything except the Decatur street end of the lot.

The decree seems to recognize what was undoubtedly true; that is, that when Mrs. Austell had taken dower, and it had been admeasured to her in the property which has been heretofore referred to, there was no longer any reason why the front part of the Trout House lot, which was unaffected by her dower, should not go to the children at once.

Mrs. Austell had no interest, after she took dower, in the rents of the front part of the lot, and, indeed, had no interest of any kind, so it was perfectly legitimate, all parties being before the court, the executors, apparently, and all other parties at interest, that a verdict should be rendered and a decree entered, on a proper showing before the court that it was advantageous to sell the property and distribute the proceeds, that a sale should be made. I do not see how this affects in any way whatever the question now before the court.

Being entirely satisfied, after a thorough examination of this case and of the legal questions involved, that the plaintiff here has no rights in and to any part of this estate, because Gen. Austell's intention is perfectly clear, and that is that the property was to go, in any event, to the children of his own blood, no decree can be rendered in the plaintiff's favor, a decree may be entered dismissing the bill, with costs.

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UNITED STATES ex rel. ROMAN v. RAUCH et al.

(District Court, S. D. New York. September 18, 1918.)

CERTIORARI ⟸4, 9—SELECTIVE SERVICE ACT—CLASSIFICATION—REVIEW OF BOARD.

Certiorari, which, under Rev. St. § 716 (Comp. St. 1916, § 1239), a federal court may issue wherever appropriate, will not be issued to review classification by a local board under the Selective Service Act, because it is an executive body, because there is no power in the court to substitute its opinion on a question of fact for that of the board, and because there is remedy by habeas corpus, which is not a discretionary writ, as is certiorari.

Certiorari by the United States, on the relation of Isadore Roman, against Adolph Rauch and others, as members of the Local Board on Classification, under Selective Service Act May 18, 1917, for Division No. 157, City of New York. Denied.

Aaron A. Feinberg, of New York City, for relator.

Francis G. Caffey, U. S. Atty., of New York City, opposed.

HOUGH, Circuit Judge (orally). The question presented by this record is purely one of law. Whether rightly or wrongly an actual writ of certiorari has issued, and to that writ a return has been made, accompanied by an answer to the petition for the writ. In the United States court the questions that are presented by such a record are perhaps in my humble opinion somewhat different from what they would be or are in any and every state in the Union, because there is probably no state which has not enlarged, limited, or created judicial jurisdiction in the matter of certiorari by statute, which the United States has never done, except in so far as certiorari is used substantially as a method of appeal from various tribunals to the Supreme Court of the United States under the act of 1891 (Act March 3, 1891, c. 517, § 6, 26 Stat. 828 [Comp. St. 1916, § 1217]).

The sole source of general authority for the issuance and use of the writ of certiorari in the United States courts is section 716 of the Re-

vised Statutes (Comp. St. 1916, § 1239), which is still law. That section in substance gives to all federal courts of record—the well-known courts at the time of the passage being the Supreme, the Circuit, and District Courts—the right to issue the usual writs wherever the same should be appropriate. In other words, we have to look to the history of the common law for whatever general power in respect of certiorari we possess. I think it is rather curious that there are not more reported decisions and authorities on the subject, but there are enough and sufficiently recent for my purpose. I am frank to say that I was brought up, a considerable number of years ago now, to accept as final what was said, for example, in this respect by the Circuit Court of Appeals for the Third Circuit in Borden's Condensed Milk Co. v. Baker, 177 Fed. at page 911, 101 C. C. A. at page 191, where that court said:

"It only remains to add that the writ of certiorari is not available in the federal courts of law, except where it is necessary to be used in aid of their jurisdiction."

That, until recently, I had supposed was the accepted doctrine, thought to be based on the ruling of the Supreme Court in the Vallandigham Case, 68 U. S. (1 Wall.) 243, 17 L. Ed. 589. But I doubt whether the view that the writ in the federal court is only auxiliary to some other head of jurisdiction can now be fully accepted. I think the language I am about to read has been repeated several times by the Supreme Court. I read from McClellan v. Carland, 217 U. S. at page 278, 30 Sup. Ct. at page 503, 54 L. Ed. 762, where the court said:

"I think this writ [that is, the writ of certiorari] has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of * * * 1891, * * * had been ordinarily used as an auxiliary process merely; yet, whenever the circumstances imperatively demand that form of interposition, the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice"

—but without the slightest definition of what is meant by the expression "in furtherance of justice."

In my judgment this is the clearest remark on the subject that the Supreme Court has made, although since volume 217 the same language has been repeated several times. There can be no doubt that the writ of certiorari may, for instance, be granted by this court as an accompaniment to a writ of habeas corpus; this would be an example of the certiorari in aid of the jurisdiction in habeas corpus. But in this case, according to the record that is before me, the writ of certiorari is prayed for flatly as an original, independent process, upon the ground that it is an appropriate method of the District Court for exercising supervision over the local board under the Selective Draft Law. This attempt, in my judgment, suggests four points, as follows:

First. Is any original certiorari a possible thing in the District Court where it is not used in aid of another jurisdiction?

I do not find it necessary to record my opinion on this subject. I think it very doubtful.

Second. The inquiry is, assuming that there is any right to issue the writ other than as auxiliary to the exercise of another jurisdiction, is

there anything in the nature of the body or board proceeded against to forbid the exercise of such jurisdiction?

Here I may say that I do not think that anything in the decision of our Circuit Court of Appeals in Angelus v. Sullivan, 246 Fed. 54, 158 C. C. A. 280, deals with this subject. It was there said that in some appropriate manner the District Court might correct the local board; but I am not concerned about that. I am only concerned with the question whether the independent writ of certiorari is an appropriate method of exercising such supervision. In my judgment it is not a suitable method of proceeding against a local board created by the Selective Service Law (Act May 18, 1917, c. 15, 40 Stat. 76), and it is not for a reason which, with very abundant citations of authority, is set forth in the text-books as follows:

"In order to use the writ of certiorari, the question sought to be raised by the writ must relate to a judicial function. What is a judicial function," says the writer, "does not depend solely upon the mental operation by which it is performed or the importance of the act; regard must be had to the organic law and to the division of the powers of government. It is not enough to make a function judicial that it requires discussion, deliberation, thought, and judgment; it must be the exercise of discretion and judgment within that subdivision of the sovereign power which belongs to the judiciary or at least which does not belong to the legislative or executive departments."

In my judgment, it is perfectly true that the action of a local board in passing upon a question of fact as to whether a man is a citizen or an alien nondeclarant or an alien declarant is, after a fashion of speech, a judicial act. But that phrase is inaccurate. It is not an act which is within the power, function, or nature of the judicial department of any country; it is a function of the executive department; it is so by its nature, and it is so by the act of Congress.

But, even if I am in error about that, then the whole line of decisions growing out of the Chinese Exclusion Acts and the Immigration Laws are applicable. By those several statutes the power of ascertaining any questions of fact with regard to persons who were in or desired to enter this country was committed to administrative boards, and it has been uniformly held, not on certiorari, but on habeas corpus under the Immigration Law, and on appeal from the commissioners under the Chinese Exclusion Act, that it was perfectly proper for Congress to put this inquiry as to facts absolutely and conclusively in the hands of the executive to the exclusion of the judiciary. The lower courts have held that, where no facts appear supporting the executive conclusions, error of law was committed. That I apprehend is the point made here by the relator.

Assuming that that is the point, I do not think it advances the matter of jurisdiction, because I am inclined to hold and do hold that at common law—and it is by the common law that this matter must be decided—the writ of certiorari is ineffective to investigate any question of fact; the return is taken for absolute verity. Every petition in this case shows complete jurisdiction in the local board, and what is complained of is only a finding of fact on evidence which (like all evidence) includes the demeanor, behavior, and apparent credibility of witnesses.

The third thought suggested by this record is really a variant of the

second. Does this petition, plus the record, present any matter that is reviewable by certiorari, assuming that process to be applicable as against an executive board? I think this is substantially the same question as the second.

The fourth and last thought suggested is this: A writ of certiorari is by all the authorities and by the whole history of the common law a matter of last resort. This remark does not apply to a statutory writ. I am speaking about the common-law or customary writ in saying that it is applied when nothing else will do. It is an extraordinary writ; it is only justified when there is no other method of procuring justice to be done.

Is this such a case; that is, one of last resort? What is wanted now is but the transfer of a name from one list to another. Roman is not under any duress; he is not a soldier; he is not called for service; his status has not yet been changed. It is true he feels himself inconvenienced, because he is more likely to be called for service out of class 1 than out of class 5. If there is illegality in holding him to service, it can be shown on habeas corpus; but as the matter stands to-day the rule applies that the writ is discretionary and not of right; in this respect it wholly differs from a habeas corpus. Therefore, if I assumed or held, first, that there was clear power in the District Court to use a writ of certiorari as independent and original process; second, that such original process might be directed against an executive board; and, third, that this particular board had probably erred in a matter of law—I should decline to issue the writ as a matter of discretion.

In conclusion, it is held that no opinion is expressed as to the general right of the District Court to issue independent writs of certiorari for any purpose other than to test jurisdiction; second, that there is no jurisdiction to issue such a writ against a local board created by the selective draft statute, because it is an executive body; third, there is nothing in this record to show any error on the part of the board for division No. 157, except one of fact, and there is no power in this court to substitute its own opinion upon a question of fact for that of said local board; and, fourth, because under the circumstances shown the writ should be denied as a matter of discretion.

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Ex parte MIKELL.

(District Court, E. D. South Carolina. October 29, 1918.)

1. HABEAS CORPUS ⟸1, 53—NATURE—PETITION—SUFFICIENCY.
The writ of habeas corpus is of the highest remedial character, intended to summarily protect the liberty of the citizen from unlawful detention, and the petition is of informal character; a simple application, stating that the party is unlawfully confined, being in most cases sufficient.

2. HABEAS CORPUS ⟸53—PETITION—SUFFICIENCY.
A petition for habeas corpus, stating that petitioner was unlawfully and wrongfully confined under order of the commander of a military camp, etc., *held* sufficient.

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3. STATUTES ⟸219—CONSTRUCTION BY SECRETARY OF WAR.
The construction placed by the Secretary of War on article 2, Articles of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916 [Comp. St. 1916, § 2308a]), is not conclusive; but the construction is for the courts specially, in so far as it affects the relations between the armies and civilian population.

4. WAR ⟸32—MILITARY LAW—CIVILIAN EMPLOYÉS—"IN THE FIELD."
A civilian stenographer, employed as a clerk during war at a camp or cantonment in the United States, is not subject to military law, under article 2, Articles of War (Rev. St. § 1342, as amended by Act Aug. 29, 1916 [Comp. St. 1916, § 2308a]), for he is not serving with an army in the field, there being no hostilities in the United States; and this is true, despite the language of Act April 16, 1918.

[Ed. Note.—For other definitions, see Words and Phrases, In the Field.]

Application by William E. Mikell for habeas corpus. On rule to show cause. Application granted, and writ issued.

H. N. Edmunds, of Columbia, S. C., for petitioner.

Wm. L. Martin, Capt. F. A., Judge Advocate, M. J. Dougherty, 2d Lieut. F. A., Asst. Judge Advocate, and J. Waties Waring, of Charleston, S. C., Asst. U. S. Atty., for Maj. Hines.

SMITH, District Judge. In this matter an application was presented on behalf of the petitioner, William E. Mikell, on the 10th of October, 1918, stating that he was unlawfully and wrongfully confined in imprisonment under the orders of the commanding officer of Camp Jackson, near Columbia, in this district, of which camp the commanding officer was Brig. Gen. Robert M. Danford, and that the police department was in charge of Maj. F. H. Hines, under whose particular charge the applicant was.

On reading the petition, it appeared to the court that the better practice would be, in lieu of issuing a writ nisi at this time, to issue a rule, so it might appear whether the case was a proper one in which a writ should issue, without going to the expense at this time of having the applicant transported from the place of his confinement, and brought before the judge, in the city of Charleston, S. C.

An order to show cause was thereupon issued on the 10th day of October instant, requiring Brig. Gen. Robert M. Danford, in command at Camp Jackson, or Maj. F. H. Hines, in command of the police department of the camp wherein the applicant alleged that he was unlawfully confined, to show cause before the court on the 19th day of October, 1918, at 12 o'clock m., why a writ of peremptory habeas corpus should not issue forthwith from this court.

This rule and a copy of the application were duly served, and on the 19th day of October, at the appointed hour, Maj. F. H. Hines, as the party having possession of the body of the applicant, appeared before the court, and filed a demurrer, and return, and the cause was thereupon heard fully; counsel appearing both for the applicant and for the respondent, Maj. Hines.

[1] The demurrer interposed is hereby overruled. The petition for a writ of habeas corpus has always been of an informal character.

The writ of habeas corpus is a writ of the highest remedial kind, intended to summarily protect the liberty of the citizen from unlawful detention; and a simple application to the court, stating that the party is unlawfully confined, is in most cases sufficient.

[2] The petition in this case, in the opinion of the court, was ample to advise the respondents that the petitioner claimed that they had him in their physical possession and were unlawfully detaining him, and for the circumstances of this case that would seem to be sufficient. It appears from the admitted facts of the return of Maj. Hines and the statements made in open court, agreed to by the counsel for both sides, that the applicant, William E. Mikell, is not and never has been in the actual military service of the United States.

[3, 4] It appears that on July 22, 1917, he was employed by the military authorities at Camp Jackson, Columbia, S. C., in the capacity of a stenographer. Thereafter, about March, 1918, upon his application, he was employed by the constructing quartermaster of Camp Jackson in the position of field auditor. The scope of that employment was that he was to audit or check up the vouchers and accounts of a contractor, or contractors, engaged in the construction of work of a constructive kind, at Camp Jackson. On September 25, 1918, he was discharged from the employment of the government, and arrested by the military authorities on charges that he had rendered false and fraudulent claims against the United States, or connived and colluded with the rendering of false and fraudulent claims against the United States. Thereupon, by the military authorities, he was arrested and placed in confinement in the military prison stockade at Camp Jackson, and the said authorities refused to release him, and propose to try him by court-martial.

The question therefore is: Is he subject to trial by court-martial, or is he entitled to a trial in the courts of the land of competent jurisdiction for any crime that he may have committed? The contention of the counsel for the respondents is that he is subject to the jurisdiction of the military authorities and trial by court-martial.

This is based upon the language of section 1342 of the United States Revised Statutes, as amended by Act August 29, 1916, c. 418, § 3 (Comp. St. 1916, § 2308a), declaring what shall be the Articles of War, at all times and in all places governing the armies of the United States (39 Statutes at Large, p. 650). Article 2 of the Articles of War thereby enacted refers to persons subject to military law; and subdivision (d) of that article is as follows:

"All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles."

The position of the counsel for the respondents is that William E. Mikell is a person serving with the armies of the United States "in the field," and as such is subject to military law. For this respondents cite the construction claimed to have been put upon this clause by the Secretary of War, and maintain that such construction is con-

clusive. Such a contention could not be admitted by this court for a moment. The construction of the meaning of a statute of Congress is for the courts of the land, especially in so far as it affects the relation of the armies of the United States, with the rest of the people of the United States. The construction of the Secretary of War may be held as applicable in all matters among persons controlled by the Articles of War, or regulations thereunder, within the scope of the authority given him; perhaps it may be said, also, in matters where third persons are concerned, where the matter is limited to the question of what is the rule under the Articles of War among persons admittedly subject to the Articles of War. In all matters, however, pertaining to the people at large and to the effect of the language contained in the statute with relation to people who are not admittedly subject to military law, any construction put by the Secretary of War on the statute has no more effect than the opinion or the construction given by an individual. It may be persuasive in argument to the court as the construction given by a person acquainted with the subject, but it has no controlling effect whatsoever.

Were the authority given to the President himself to make rules and regulations upon any subject, he might conclusively construe his own rules and regulations; but the question whether the subject-matter was within the scope of his authority, or subject to his rules and regulations, would still be a judicial one. Under the Constitution of the United States, the departments are wholly distinct, and the question as to what is the law is a distinctively judicial one.

The construction of the language of an act of Congress is for the courts of law, and where a lower court may err in its construction, this is to be corrected by an appeal to the higher. Were it otherwise, the mere construction of the Secretary of War might render the provisions of the Articles of War applicable to the entire people of the United States, upon the theory that his construction is to govern.

The question, thus, for the court to determine upon this investigation, is whether William E. Mikell is, under the language of the statute in subdivision (d), just quoted, a person subject to military law, and therefore to be tried by court-martial. This is to be ascertained by the ordinary rules of construction, adopted and followed by courts of competent jurisdiction; and a glance at the language of the article will show that practically the whole question depends upon the meaning of the words "in the field"; that is to say, whether "in the field" means in the field of war or hostilities, or whether it means anywhere in the United States, at which there may be a military camp or post of the armies of the United States.

An examination of the language of this subdivision alone is instructive. The first clause covers a period when the country may be at peace. It provides that all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States shall be subject to the Articles of War. Then comes the next clause, which is limited to a period when the country may be at war, and declares that in time of war all such retainers and persons accompanying or serving

with the armies of the United States "in the field," both within and without the territorial jurisdiction of the United States, are subject to those articles.

There is no doubt that the present is a time when this country is at war. Now, is a camp or cantonment of the United States, within the state of South Carolina, a place where the armies can be said to be "in the field"?

The ordinary meaning of the words "field," or "in the field," with regard to military operations, mean in the actual field of operations against the enemy; not necessarily the immediate battle front, nor necessarily the immediate field of battle, but the field of operations, so to say; the field of war; the territory so closely connected with the absolute struggle with the enemy that it is a part of the field of contest.

The word "field" is sometimes figuratively and poetically used to mean the actual struggle itself; as you would say, a man exerted himself stoutly "in the field," which would mean that he did so in the actual conflict. It is sometimes used, also, to denote the wider sphere or area of strategy, where you speak of "strategy of the field," but always in connection with some direct antagonistic effort against the adversary. It would never be used ordinarily, so to say, to mean the territory of either warring party, wholly and entirely removed from the scene of hostilities. The British armies in South Africa during the Boer war were trained and prepared in Great Britain, but, whilst in preparation in Great Britain, no one would have spoken of them as "in the field."

In case of internecine conflict, such as the late War between the States, or of an armed rebellion, then there might be an actual field of combat, or of hostile operations, within the territorial jurisdiction of the United States and in such case, as to all persons serving with the armies of the United States, within its territorial jurisdiction, in close enough contiguity to its armies to be a part of the general war operations, they might be said to be serving in the field.

Even, however, within the territorial jurisdiction of the United States, it has never been maintained that during the War between the States, when the battle field extended from Virginia to Louisiana, a person on the Pacific Slope could be said to be serving "in the field." To so hold would be to mean that the entire United States—that is to say, its entire territorial jurisdiction—was "in the field," for camps and cantonments may be scattered over the entire United States.

The operations of furnishing to and serving in those camps are coextensive with the territorial limits of the United States. A train full of soldiers may leave a distant point in Idaho or Montana for a training camp in Maine or Florida. Is the engineer or the trainmen who conduct that train in the position of persons or retainers serving "in the field"? Manifestly not.

The court cannot but hold the conclusion unreasonable that, with a battle front 3,000 miles away, separated by an immense ocean from the United States, with peace within all the territorial limits of the United States, with martial law nowhere prevailing therein, and with all of the courts of the country open for the administration of public

justice, all people in any way connected with or doing work for a military official or camp of the United States in this country may be claimed to be serving "in the field."

For the construction of the language of the act of August, 1916, as presumptively furnishing a guide to the court as a statute passed in pari materia, reference is made by counsel for respondents to Act April 16, 1918, c. 53, entitled "An act to provide quarters or commutation thereof to commissioned officers in certain cases." This last act would not strictly be an act in pari materia, as to aid in the construction of the words "in the field." The act of August, 1916, is one which regulates the relations of citizens generally with regard to the Articles of War. The act of April, 1918, was simply to make suitable provision for officers by allowing certain commutations. Even so, the language leaves the matter wholly unaffected. The last act reads:

"During the present emergency every commissioned officer of the army of the United States, on duty in the field, or on active duty without the territorial jurisdiction of the United States, who maintains a place of abode for a wife, child, or dependent parent," etc.

It is at least ambiguous whether the words "in the field" there are not to be used in connection with the words "or on active duty," so as to mean in the field within the territorial jurisdiction of the United States, or in the field, which now imports being without the United States as well as being on active duty (although not in the field) without the United States. In the printed copy of the statute, there is no comma after the words "or on active duty"; so it may be said this is ambiguous, but in any event it would leave it as it stood before. It is definite neither way.

This act, as quoted by respondents in their brief filed, appears to be quoted erroneously, as it has the words "on active duty *within* the territorial jurisdiction of the United States"; whereas the printed statute has it "*without* the territorial jurisdiction of the United States."

The respondents further cite and rely upon the case of Ex parte Gerlach (D. C.) 247 Fed. 616. In that case, Gerlach, an employé of the United States Shipping Board, went to Europe as mate on the steamship McClellan, a vessel in use as a military transport. He was discharged in Europe and sent back on the vessel El Occidente, an army transport, to New York, but volunteered to stand watch and for several days did this, but finally refused to continue. For this disobedience to the order of the army officer in command of the transport, he was tried by court-martial and sentenced to five years' imprisonment.

In the first place, the Gerlach Case was very different in the facts from this case. Gerlach was on the ship, which was a ship of the United States, in command of an officer of the United States, and had volunteered to act in the performance of military service of a naval character while on board of that ship. In the present case, the applicant, Mikell, is admittedly a civilian. He has never occupied any military position, or expressly entered into any military service. The duty he was performing was of a purely civil character. He was simply acting as an auditing clerk to check up the vouchers and accounts of a civilian

contractor, who was employed by the government to do construction work. He was no more in the military service than was the contractor who might be employed to do the construction work. He was working for the United States, perhaps; but his connection with the military forces of the United States was only under the military department of the United States, which was used in this construction work by the government for the purpose of attending to the supervision of that construction and the disbursement of the moneys to be paid for it.

The military department was acting on behalf of the government for this purpose only as an agent, and the constructive work itself was not necessarily of a military character, although intended for the military purposes of an encampment character.

In the present case, martial law has not been proclaimed, all the courts of the country are open, the field of actual war is thousands of miles removed from this district, and peace prevails wholly within the territorial jurisdiction of the United States. There is military preparation there, but no military conflict.

Furthermore, upon consideration of the Gerlach Case, the captain of the ship would, if necessary, under general maritime law, have been authorized to require the services of Gerlach to save the ship, for such service as he could reasonably perform. In exigencies threatening the destruction of a ship, every one on board is subject to the master's discipline and orders, and must obey; and if the exigency requires it, the vessel being within the area of submarine menace, and a watch being necessary for its preservation, the master in command of the vessel might have required the services of Gerlach, and have punished him for disobedience.

It appears, however, from the report of the case, that he was not punished for these reasons, but he was undertaken to be tried by a court-martial, and was punished as a person accompanying or serving with the armies of the United States, in the field, upon the ground that the words "in the field" do not refer to land only, but to any place, on land or water, apart from permanent cantonments or fortifications, where military operations are being conducted; that in this case Gerlach was on an army transport and peril from submarines existed when he refused to stand watch; that the captain in charge of the vessel had, in the opinion of the court, the right to call upon all persons on board, to protect the transport in any way that seemed best, in view of the danger. As to this last, that would seem to be entirely the case that the captain of the transport had the right to call upon all persons on board to protect the transport in any way that would seem best, in view of the danger; but that would not follow from the fact that Gerlach was subject to the Articles of War, but from the general maritime law.

The circumstances in the Gerlach Case are very much stronger than the present, but even in that case, as a matter of reasoning, this court is not prepared to say that it would regard the reasoning or the result of that case as controlling.

Under all the circumstances of the present case, it appears to the court that the applicant, William E. Mikell, is not a person serving

with the armies of the United States "in the field," within the terms and scope of the act of August 29, 1916; nor is he subject to trial by court-martial for the crime that he is alleged to have committed. That crime is one under the laws of the United States, for which he could be tried in the civil tribunals of the United States, and there is no reason why he should not be there tried.

It is therefore ordered and adjudged that the return to the rule to show cause in this case is insufficient, and it is overruled. It is further ordered and adjudged that a writ of peremptory habeas corpus do forthwith issue from this court, directing the respondent Maj. F. H. Hines to have and produce the body of William E. Mikell before this court, in Charleston, at the United States courthouse, on the 4th day of November, 1918, at 12 m., then to be released and discharged from military confinement without day, unless good cause be on that date and time to the contrary shown to the court.

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## SMYTHE v. INHABITANTS OF NEW PROVIDENCE TP.

## SAMMIS v. SAME.

(District Court, D. New Jersey. October 28, 1918.)

1. LIMITATION OF ACTIONS ⟸22(5)—STATUTE APPLICABLE—ACTION ON INTEREST COUPONS.

   Actions upon interest coupons attached to negotiable bonds are governed by the statute of limitations applicable to the bonds to which they are, or were, attached, except that limitation begins to run from the maturity of the coupon, and not of the bond.

2. LIMITATION OF ACTIONS ⟸34(1)—ACTION ON MUNICIPAL BONDS.

   The rule that a general statute of limitations does not apply to an action on a liability created by statute is limited to cases where the liability rests directly upon a statute, and not on any contract of the parties, and is not applicable to an action on municipal bonds, although issued under statutory authority.

3. LIMITATION OF ACTIONS ⟸48(6)—ACCRUAL OF RIGHT OF ACTION—ACTION ON MUNICIPAL BONDS.

   The rule that, where municipal bonds are payable from a particular fund to be created by the debtor, limitation does not begin to run against an action thereon until the fund has been provided, does not apply to bonds payable by general taxation, although the statute requires the creation of a sinking fund.

4. LIMITATION OF ACTIONS ⟸22(7)—BONDS—EFFECT OF OMISSION OF SEALS—"SEALED INSTRUMENTS."

   Municipal bonds, which the statute, under authority of which they were issued, required should be under the seals of those directed to execute them on behalf of the municipality, and which recite that such seals were affixed, although in fact they were not, being valid, notwithstanding the omission, are, for the purpose of the application of the statute of limitations, "sealed instruments."

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sealed Instrument.]

At Law. Actions by Roland M. Smythe and by Elinor G. Sammis against the Inhabitants of the Township of New Providence. On demurrers to twelfth, thirteenth, sixteenth, and seventeenth pleas in

the Smythe suit, and to twelfth, thirteenth, and sixteenth pleas in the Sammis suit. Sustained in part, and overruled in part.

Erwin & Erwin, of Jersey City, N. J., and Albert Massey and Carroll Sprigg, both of New York City, for plaintiffs.

McCarter & English, of Newark, N. J., for defendant.

HAIGHT, District Judge. The main questions raised by the demurrers are: (1) Whether any of the provisions of the New Jersey statute of limitations (3 Comp. Stat. p. 3162 et seq.) are applicable to these suits; and (2) if so, whether it is the first or the sixth section thereof, or both. In reaching a solution of these, certain subsidiary questions arise, which will appear as they are hereafter discussed.

[1] 1. As it is sought to recover both the amount due on the bonds and the coupons attached thereto, a primary question arises—whether the statute of limitations affects the suits, so far as the coupons are concerned, differently than it does so far as the bonds are concerned. It has been settled by a line of decisions of the United States Supreme Court that, as respects the usual statutes of limitations, ordinary interest coupons (such as those upon which this suit is partly based), attached to negotiable bonds, are to be considered as the same grade of contract as the bonds, or, in other words, that the same provision of the statute of limitations as is applicable to the bonds is applicable to the coupons, except that the statute begins to run from the date of the maturity of the coupons, respectively, and not from the date of the maturity of the bonds to which they have been respectively attached, and this irrespective of whether the coupons have been detached from the bonds or remain attached thereto. City v. Lamson, 9 Wall. 477, 483, 19 L. Ed. 725; Lexington v. Butler, 14 Wall. 282, 296, 20 L. Ed. 809; Clark v. Iowa City, 20 Wall. 583, 586, 22 L. Ed. 427; Amy v. Dubuque, 98 U. S. 470, 25 L. Ed. 228; Koshkonong v. Burton, 104 U. S. 668, 673, 26 L. Ed. 886.

The contention of counsel for the defendant that the case last cited has varied the rule clearly announced in the preceding cases—that coupons are controlled by the same statute of limitations as the bonds to which they were or are attached—is based on a misapprehension of what was held in that case. It was specifically stated by Mr. Justice Harlan, on page 673 of 104 U. S. (26 L. Ed. 886), that, at the time of the passage of an act of 1872 (which limited actions on municipal bonds and coupons to six years after they became due, respectively), the suit as respects the coupons was not barred, because 20 years (the time limited in the previous statute for beginning actions on sealed instruments) had not then expired. The action on certain of the coupons was held to be barred solely by virtue of the act of 1872. It follows, therefore, that, if either of the before-mentioned provisions of the New Jersey statute of limitations is applicable to the bonds, the same provision applies to the coupons; that, if neither is applicable to the bonds, neither applies to the coupons; and that the times when the statute begins to run against the coupons are the dates that they matured or were payable, respectively.

[2] 2. It is insisted by the plaintiff that neither of the before-mentioned provisions of the statute of limitations is applicable to these suits, for two reasons. It is first urged that these suits are based on a liability created by statute, and consequently that the statute of limitations does not apply. It is undoubtedly well settled, and has been long established, that where a liability is created, not merely by the act of the parties, but by the positive provisions of the statute, a statute of limitations framed, as is the New Jersey act, after the original statute of 21 James I, is not applicable. Angell on Limitations, § 80, and cases to be hereafter referred to. The defendant does not question the rule, but denies that it is applicable to these cases. A short analysis of the decisions upon which the plaintiffs rely, and a comparison of the facts upon which they were based with the facts in this case, will, I think, clearly demonstrate that defendants' contention is correct.

In Robertson v. Blaine County, 90 Fed. 63, 32 C. C. A. 512, 47 L. R. A. 459 (C. C. A. 9th Cir.), the bonds upon which the suit was brought had been issued by Alturas county. Subsequently the Legislature of Idaho abolished that county and another, and consolidated the two, giving to the consolidated county the name of Blaine, and provided that the latter county should be responsible for all of the debts of the original counties. It was held in a well-considered opinion, where all of the leading authorities are referred to, that the Idaho statute of limitations did not apply, because the liability of the defendant (Blaine county), or the cause of action against it, had been created by statute; that independently of the statute there was no obligation upon Blaine county to pay the debt of its predecessor, Alturas county, nor, independently of the statute, could any action be maintained thereon against Blaine county. Hence it will be seen that the liability, so far as the defendant in that action was concerned, was one created distinctly by statute, and the act of the parties was merely incidental.

Bullard v. Bell, Fed. Cas. No. 2,121, 1 Mason, 243 (C. C. N. H.), was a suit by the holder of a dishonored bank note against a stockholder of the bank. The liability of the stockholder to answer for the debts of the bank was created by statute. No act of the parties had created the liability.

In Cowenhoven v. Freeholders, 44 N. J. Law, 232, the plaintiff sued to recover fees due him, under a statute, as county judge of Middlesex county. The inapplicability of the statute of limitations was placed expressly on the ground that the action was founded on the statute, and not on a contract of any kind; there never having been any contract whatever between the defendant and the plaintiff.

The plaintiff, in Outwater v. Passaic, 51 N. J. Law, 345, 18 Atl. 164, sued for salary due him, as city treasurer, by an ordinance passed in pursuance of a statute. His claim was held not to be barred by the statute of limitations, for, as Chief Justice Beasley said:

"The plain reason that it is not a debt which has arisen under a contract, either express or implied. The obligation to pay these moneys is the creation of the statute directing the election of the officer, and the admeasurement of his salary by ordinance."

The suit in Smith v. Jersey City, 52 N. J. Law, 184, 18 Atl. 1050, was to recover excess moneys paid on an assessment for local improvements, and the liability was expressly held to rest upon a statute, and hence that the statute of limitations was not applicable. To the same effect were the decisions in McFarlan v. Morris, etc., Banking Co., 44 N. J. Law, 471, and Lehigh Valley Railroad Co. v. McFarlan, 43 N. J. Law, 605.

In Parisen v. N. Y. & Long Branch R. R. Co., 65 N. J. Law, 413, 47 Atl. 477, the suit was to recover an amount which had been awarded by commissioners appointed to fix the value of lands taken for the right of way of the defendant. The cause of action was expressly given by the statute. It was held that the award was not such a one as was contemplated by that provision of the sixth section of the New Jersey statute of limitations, which mentions suits based upon awards under the hands and seals of arbitrators.

It is thus apparent that in all of these cases the liability or cause of action was given by, or rests exclusively upon, a statute, independent of any act of the parties. In the cases at bar the suits are based upon the bonds of the defendants. It is true that they were executed by virtue of statutory authority, but the statute does not impose the liability. Without the action of the commissioners, no bonds could have come into existence, and no liability or cause of action could have arisen against the defendants. It was only after certain things had been done that the bonds could be issued, but the liability was created by the act of the commissioners in issuing the bonds.

If the plaintiffs' argument were sound, none of the ordinary statutes of limitations would run against any municipal bonds, because all such bonds are issued pursuant to statutory authority. It needs no argument to demonstrate the fallacy of any such contention, because municipal bonds are subject to the statute of limitations, a rule which is recognized in all of the cases of which I have ever heard. See, for instance, the United States Supreme Court cases before cited, the cases to be hereafter referred to in discussing the plaintiffs' second point, and the cases collected in volume 2 of the fifth edition of Dillon's Work on Municipal Corporations, p. 1325.

The Supreme Court of New Jersey, in Morrison v. Township of Bernards, 36 N. J. Law, 219, has held that a suit may be maintained on bonds issued pursuant to the same statute as that under which the bonds in this case were issued, thus recognizing, I think, considering the circumstances under which the question arose, that it is the act of the parties that creates the liability, and not the statute. If strength is to be found for plaintiffs' contention in his argument that it will be necessary, before the suit on the bonds can succeed, to show that the statute was complied with in all its respects prior to the issue of the bonds (which I am not ready to admit), it is sufficient at this time to refer to the opinion of the Supreme Court of the United States in Bernards Township v. Morrison, 133 U. S. 523, 526, 10 Sup. Ct. 333, 33 L. Ed. 766, the effect of which is to clearly demonstrate that the cause of action on bonds issued, pursuant to this statute, rests upon the bonds, and not upon the statute which authorized their issuance. I

conclude, therefore, that the plaintiffs' causes of action do not rest upon a statute, in any such sense as to bring them without the provisions of the New Jersey statute of limitations.

[3] 3. It is next urged on behalf of the plaintiffs that the act under which the bonds in suit were issued provides for the creation of a particular fund for the payment and retirement of the bonds and the interest coupons, and there is invoked the rule, stated in Lincoln County v. Luning, 133 U. S. 529, 533, 10 Sup. Ct. 363, 364 (33 L. Ed. 766), that—

"When payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided."

To demonstrate the applicability of that rule to this case, plaintiffs rely solely upon the authority of Robertson v. Blaine County, supra. It appears from the statement of facts in that case that the statute authorizing the issuance of the bonds provided that—

"The board of county commissioners of said county shall, at the time of levy of county taxes, include therein a levy of sufficient tax to meet the interest and principal of said bonds as the same shall become due, and the tax so levied shall be known as the 'Courthouse Bond Tax,' and shall be collected as other taxes are collected, and shall constitute a separate fund, and shall be used for no other purpose. And for the payment of said bonds, principal and interest, all of the taxable property of said county is hereby pledged."

It must be admitted that if the "particular fund" referred to in that case was that created by the above-quoted act, then that decision is an authority for the plaintiffs' contention, because if that statute created, within the meaning of the rule before mentioned, "a particular fund," then the statute under which the bonds in suit in this case were issued likewise created a "particular fund." The latter provided for reporting annually by the commissioners, who executed and issued the bonds, to the township committee the amount required to pay the principal and interest, if any, due or to become due and payable during the next ensuing year, and required that the township committee should levy and collect, at the same time and in the same manner as other taxes are collected, such sums of money as should be reported to the township committee by the commissioners, and should pay the same to the latter, which should apply them to the payment of the principal and interest on the bonds, or so much thereof as should remain unpaid after the commissioners had applied the dividends arising from the stock which the bonds were issued to purchase. It further required the commissioners to provide, within five years from the issuing of the bonds, for the annual payment of at least 5 per cent. of the same, so as to insure their final liquidation within 25 years, and for that purpose directed that they should annually apply the surplus dividends on the stock over and above the amount necessary to pay the interest on the bonds, and if the amount of surplus dividends and the amount received by the commissioners for the sale of the stock, which they were authorized to sell, should not be sufficient for the annual payment of the 5 per cent., that then the deficiency should be reported by the commissioners to the township committee, to be levied and raised annually, in the manner provided for "paying the interest" on the bonds. It

also provided that at the expiration of 25 years it should be the duty of the board of assessors of the township, unless the payment for the bonds was otherwise provided for, to cause to be assessed, levied, and collected, on the real estate in the township, at the time and in the manner as other taxes were assessed and levied, the sum due on the bonds issued pursuant to the act, together with interest, or so much thereof as should remain unpaid, "by reason of the deficiency of the dividends and sale of said stock," and that the amount to be so raised should be determined by the report of the commissioners to the township committee, as before authorized.

It is necessary to consider, therefore, if the decision in Robertson v. Blaine County is based on the statute above quoted, and not on another statute which is not specifically set forth in the report of the case (which latter would seem to be the fact from the remarks of the court on page 71 of 90 Fed., 32 C. C. A. 512, 47 L. R. A. 459), whether Robertson v. Blaine County can be sustained on principle or authority, or both. If it can be, then it would seem to follow, under the rule announced in Lincoln County v. Luning, supra, that the defendant should have coupled with its pleas of the statute of limitations an allegation that the fund provided by the statute for the payment of the bonds and the interest had been created. By reference to Lincoln County v. Luning, and the discussion in that case of Underhill v. Sonora, 17 Cal. 173, and Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. 646, it will be seen that the "particular funds" out of which the bonds were to be paid were quite different from those out of which the bonds were to be paid either in this case or in Robertson v. Blaine County.

In Lincoln County v. Luning, the county having defaulted in the payment of its interest coupons, the Legislature passed another act, providing for the registration of overdue coupons, and imposed upon the treasurer the duty of thereafter paying the coupons "as money came into his possession applicable thereto, in the order of their registration." The coupons in suit, which, the court remarks, "by the general limitation law would have been barred," were presented as they fell due to the treasurer for payment, and payment was refused, because the interest fund was exhausted. Thereupon the treasurer registered them, in accordance with the later act. Mr. Justice Brewer said that the later act, coupled with what was done by the treasurer pursuant thereto,

"amounted to a promise on the part of the county to pay such coupons as were registered, in the order of their registration, as fast as the money came into the interest fund, and such promise was by the debtor accepted."

It was held in Freehill v. Chamberlain, as Mr. Justice Brewer says, that—

"Where the statute provides for the issuing of bonds of a city, with interest coupons payable as fast as the money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act."

To the same effect was the decision in Underhill v. Sonora. The underlying principle, I think, upon which it was decided in those cases, and others which hold the same (they are very few), that the stat-

ute of limitations would not run until the fund had been provided, was that the cause of action would not exist until the fund had been created.

Further support is found for this view in Schoenhoeft v. Board of Commissioners, 76 Kan. 883, 92 Pac. 1097, 16 L. R. A. (N. S.) 803, 14 Ann. Cas. 100, where the distinction between suits on ordinary municipal bonds which are to be paid out of money raised from taxes, and suits on municipal warrants, payable out of certain funds, only when a treasurer has sufficient money in the fund to pay them, is pointed out, as well as is the distinction between most of the cases relied upon in Robertson v. Blaine County and the case which was then before that court. The fundamental difference is, as I gather it from that decision, whether a cause of action exists before the particular fund has been created. That was the basis of the decision in King Iron Bridge Co. v. Otoe County, 124 U. S. 459, 463, 8 Sup. Ct. 582, 31 L. Ed. 514.

In Bodman v. Johnson County, 115 Iowa, 296, 88 N. W. 331, it was held that, where there was statutory authority to make additional assessments to pay for the cost of county ditches, the statute of limitations ran against warrants payable out of the "ditch fund," from the date of their issue, and not from the date when there were assets actually in the fund from which they were payable; that, as it was the duty of the county to raise the necessary funds, and as it had the authority to do so, the plaintiff was not justified in postponing the bringing of his action until the funds were actually on hand. Of course the statute of limitations has never been held to begin to run until the cause of action accrues, but the moment it does accrue the statute begins to run.

The broad rule stated by the Supreme Court in Lincoln County v. Luning, must therefore, I think, be read in the light of the facts of that case, and be considered to mean that the statute does not begin to run until the "particular fund" has been provided, when the existence of that fund creates the cause of action. If the decision in Robertson v. Blaine County is broader than that, then I do not think it is supported by authority, nor does reason justify it. This is manifest, I think, from a consideration of the act under which the bonds in suit were issued, taken in connection with the general rules to be hereafter referred to. It is true that the act provided for the creation of a fund to pay the principal and interest out of the dividends accruing from the stock which the bonds were issued to purchase, as well as from a sale of the stock itself. But it further provided for the raising of any deficiency by general taxation.

There is no pretense in this case that payment of these bonds or coupons was refused on account of lack of funds to pay them. If it can be said that these bonds and coupons were to be paid out of a "particular fund," within the meaning which plaintiffs seek to ascribe to the remarks of the Supreme Court in Lincoln County v. Luning, then it can be said with equal force that any municipal bond, for the payment of which the statute provides for the creation of a sinking fund or other fund to be raised by general taxation, without limiting the right to sue on the bonds before the fund is created, is a "particular

fund," and hence, in any such case, the statute of limitations would not apply to a suit on the bonds, where the municipality had neglected to assess the taxes necessary to meet the bonds. But that would be contrary to the general rules that suit may be instituted on municipal bonds and coupons when they mature, and that the statute of limitations begins to run from the date when the cause of action accrues; it would also seem to be at variance with that line of federal authorities which hold that, before mandamus will issue to compel the assessment of a tax, a bondholder must obtain a judgment on the bonds. See Heine v. Levee Commissioners, 19 Wall. 655, 657, 22 L. Ed. 223 and cases there cited. As the bonds and coupons in suit were payable at stated times, and as the statute which authorized their issuance provided, as the ultimate means for their payment, for the raising of money in the ordinary way, by the levying and collection of taxes, I am unable to perceive any reason why the general rule that a cause of action arises on such bonds and coupons at the dates of their maturity respectively, does not apply.

[4] 4. The next question is whether section 1 or section 6 of the New Jersey statute of limitations applies. Section 1 limits actions to 6 years, and section 6 to 16 years. The former embraces actions founded on contracts "without specialty," as did the original act of James I, and the latter actions, among others, "upon any single or penal bill for the payment of money only, or upon any obligation with condition for the payment of money only." While the quoted clause of the last-mentioned section does not in so many words refer to instruments under seal, the courts of New Jersey have given to the terms used their well-recognized legal significance, and have construed that clause to cover actions "upon sealed instruments for the payment of money only." Elsasser v. Haines, 52 N. J. Law, 10, 22, 18 Atl. 1095, 1100. Therefore bonds under seal are within the provisions of the sixth section, and if the seals hereinafter mentioned had been affixed to the bonds upon which these suits are based, there would be no doubt as to the applicability of that section. However, while the bonds are in the usual form, and recite that the persons who executed them (commissioners appointed pursuant to the statute which authorized their issuance [P. L. N. J. 1868, p. 915]), "have hereunto set our hands and seals," they do not in fact bear such seals. The statute directed that they should be "under their [the commissioners'] hands and seals," not under the seal of the municipality whose obligations they were.

I have already held on the authority of Draper v. Springport, 104 U. S. 501, 26 L. Ed. 812, when the question was raised by demurrers to the declarations, that the absence of the seals of the commissioners did not invalidate the bonds. The question to be decided, therefore, is whether municipal bonds, which the statute, under the authority of which they were issued, required should be under the seals of those who were directed to execute them on behalf of the municipality, and which recite that such seals were affixed, although in fact they were not, and which notwithstanding are valid and binding obligations of the municipality, are to be considered, for purposes of the application of the statute of limitations, as contracts "without specialty" (simple

contracts), or as obligations under seals (specialties). I think that, if the bonds in suit were those of an individual or a private corporation (not issued pursuant to express legislative authority, defining the form in which they should be issued), they could not, under the weight of authority, be considered as sealed instruments, notwithstanding that they recited that they were given under the seal of the obligee. Overseers of Hopewell v. Overseers of Amwell, 6 N. J. Law, 169; Perrine v. Cheeseman, 11 N. J. Law, 174, 19 Am. Dec. 388; Taylor v. Glaser, 2 Serg. & R. (Pa.) 502, 503; Comley v. Ford, 65 W. Va. 429, 64 S. E. 447, 450; Bouvier's Law Dictionary, page 1020; and by inference Corlies v. Vannote, 16 N. J. Law, 324. See, contra, Slade v. Bennett, 133 App. Div. 666, 118 N. Y. Supp. 278, 280, and Oconto County v. MacAllister, 155 Wis. 286, 295, 143 N. W. 702, 704.

But these are municipal bonds, issued pursuant to a statute which expressly directed the manner in which they should be executed, and they are valid obligations, notwithstanding the omission of one of the statutory requirements. The Legislature contemplated that they should be specialties, and in every respect, save the seals of the individual commissioners, they are such in form. It was said by Mr. Justice Bradley in Draper v. Springport that "the seals could have added nothing to the solemnity of the instruments." If that be so, if the instruments are as solemn as they could have been had the seals been affixed, it is difficult to perceive why they are not, to all intents and purposes, sealed instruments. To say that the seals could have added nothing to the solemnity of the bonds, but that the bonds are, nevertheless, simple contracts, is, I think, to express an irreconcilable contradiction. A simple contract is never spoken of in legal parlance as a "solemn instrument," while a contract under seal—a specialty—is. In view of the before-mentioned decision of the Supreme Court, I think that it must be held that the statute which authorized the bonds to be issued has fixed their grade or character, to the same extent as if the statute had specifically said that the bonds to be issued should be considered for all purposes as specialties, and that the omission of the individual seals of the commissioners, who executed them on behalf of the municipality, has not changed that grade or character.

To hold otherwise would be to permit those charged with the execution of a statutory duty, by dispensing with what the Supreme Court has held to be an unessential requirement, so far as the validity of the bonds is concerned, to transform what the Legislature contemplated should be a specialty into a simple contract. Such a result should not be permitted, if it can be avoided. Of course, it was as fully within the power of the Legislature to prescribe the grade of contract which the bonds should be as it was to define the formality with which they should be executed. I apprehend that, had the statute required that the bonds should be under the seal of the municipality, rather than the individual seals of the commissioners, the Supreme Court's decision in Draper v. Springport in respect to the validity of the bonds would have been different than it was. In such a case a suit could not have been maintained on the bonds, and the question now presented could not have arisen. Some support for the views above expressed is found,

I think, in the remarks of the Supreme Court of Wisconsin, in Oconto Co. v. MacAllister, supra, to the effect that—

"The mere omission of a scroll or flourish after the names of the signers would be quite a flimsy ground of distinction, and cannot outweigh the consideration that the statute required a bond which imports a sealed instrument, that the instrument is in the form of a bond, and that it is expressly stated to be sealed with the seals of the signers."

My conclusion, therefore, is that the suits, so far as they are based on the bonds and coupons which did not mature within 16 years from the beginning of these actions, are barred by the statute of limitations, and that the suits, so far as they are based on those which did mature within that period are not barred. This results in the sustaining of some of the demurrers and the overruling of the others. An order drawn in accordance with these conclusions will be signed.

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## In re WEISBERG.

(District Court. E. D. Michigan, S. D. October, 1918.)

No. 2405.

1. BANKRUPTCY ⟸418(1)—EFFECT OF DISCHARGE.
   A discharge in bankruptcy does not automatically relieve the bankrupt from a debt, even if scheduled and provable, but may be pleaded by him in defense to an action thereon; its effect in the particular case to be determined by the court in which the action is brought.
2. BANKRUPTCY ⟸391(1)—POWERS OF COURT—STAY OF ACTIONS AGAINST BANKRUPT.
   The power of the bankruptcy court to protect a bankrupt against claims in another court is limited to the period before the question of his discharge has been decided.
3. BANKRUPTCY ⟸391(1)—CONTEMPT OF BANKRUPTCY COURT—LEGAL PROCEEDINGS AGAINST BANKRUPT.
   A creditor of a bankrupt, though having a dischargeable claim, does not become guilty of contempt of the bankruptcy court merely by taking proceedings in another court to enforce his claim, where no order forbidding such action has been made, and especially when the creditor had no knowledge of the bankruptcy proceedings.

In Bankruptcy, in the matter of Julius Weisberg, bankrupt. On petition of bankrupt to punish a creditor for contempt. Petition denied.

Benjamin & Betzoldt, of Detroit, Mich., for petitioner.
C. Lucian Bancroft, of Detroit, Mich., for respondent.

TUTTLE, District Judge. This is a petition by the bankrupt, asking that the respondent, one of his creditors, be punished for contempt of court in ignoring a discharge in bankruptcy granted to the bankrupt by this court, and garnishing certain money belonging to petitioner and on deposit in a bank, and praying that respondent be ordered to return such money to petitioner.

The petitioner was duly adjudicated a voluntary bankrupt herein, in August, 1916. Among the debts owing by the bankrupt was an indebtedness to one Frank Majuchowsky, the respondent, on a judgment

rendered by one of the justices of the peace for the city of Detroit against the bankrupt as indorser on a worthless check, amounting to $41.75. This debt, with the name and address of the creditor, was duly scheduled. It appears that the proper notices of the bankruptcy proceedings were mailed to respondent; but there is no proof or sworn statement that they or any of them were received by him, and he swears in his affidavit that he never received any of such notices, or knew of such bankruptcy proceedings. Respondent duly obtained his discharge from this court in November, 1916.

In June, 1917, respondent caused to be filed in the justice's court in which he had obtained the judgment mentioned an affidavit of garnishment under the state practice, showing the recovery by him of said judgment, and stating that he had not received payment thereof, and that the garnishee defendant, the Wayne County & Home Savings Bank, had in its hands, money belonging to the petitioner herein, and was indebted to said petitioner, in an amount equal to the sum due to respondent on such judgment. Thereupon, in accordance with the practice in the state court, the garnishee defendant paid to the said justice's court this amount, which was thereafter paid over by the court to respondent. No notice of these bankruptcy proceedings was given to said bank or justice of the peace prior to the receipt and payment of such money, nor was any such notice filed in the justice's court. It does not appear, nor is it claimed, that petitioner received notice of the garnishment proceedings, or had any knowledge thereof, until after this money had been paid to the respondent. It was not necessary, under the state practice, that he should have received such notice; garnishment proceedings of this kind, based on judgment, being ex parte. It appears to be conceded that the claim of respondent against petitioner, represented by said judgment and scheduled as already indicated, was a provable debt, subject to discharge by the bankruptcy proceedings.

The question presented is whether the action of the respondent in collecting his judgment against the petitioner by these garnishment proceedings constituted, under all the circumstances, a contempt of this court, in view of the fact that the petitioner had previously obtained his discharge in bankruptcy herein. No case has been cited, and I have discovered none, involving precisely the same question. After careful consideration, however, of the situation and of the rights and duties of the parties in the premises, I am of the opinion that petitioner has not sustained the burden of showing that respondent has been guilty of the contempt of court alleged.

[1] In the first place, the discharge in bankruptcy granted to petitioner did not automatically relieve him from even the provable debts previously owed by him and duly scheduled. It is true that such discharge afforded him a complete defense to an action brought to recover any such debt, but in order to avail himself thereof it would be necessary for him to plead the discharge in such action, and failure to do so would render him amenable to whatever judgment the court might render against him in that action. Dimock v. Revere Copper Co., 117 U. S. 559, 6 Sup. Ct. 855, 29 L. Ed. 994; Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985.

Nor has the bankruptcy court, in which such discharge has been granted, jurisdiction to determine the effect thereof in a state court in which an action against the former bankrupt is pending, or to interfere with the proceedings in that court. Questions as to the effect therein of such discharge must be left to the decision of the court in which the action is pending. In re Rosenthal (D. C.) 108 Fed. 368; Hellman v. Goldstone, 161 Fed. 913, 88 C. C. A. 604; In re Lockwood (D. C.) 240 Fed. 161.

[2] The power of the bankruptcy court to protect a bankrupt against claims in another court is limited to the period before the question of his discharge has been decided. Section 11a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 549 [Comp. St. 1916, § 9595]) provides as follows:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

If the bankrupt desires to obtain the benefit of his discharge in an action brought against him for the recovery of a debt affected by such discharge, he may, by properly pleading and proving the discharge, in the court where the action against him is pending, secure a permanent stay of proceedings in such action, even after judgment therein. Boynton v. Ball, supra.

[3] Considering, therefore, the nature and effect of a discharge in bankruptcy, and bearing in mind that such discharge does not release the bankrupt from any of his debts, unless it be expressly pleaded as a defense in an action for the recovery of such a debt, I am of the opinion that a creditor of the bankrupt, though having a dischargeable claim against the latter, does not become guilty of contempt of the bankruptcy court merely by taking proceedings in another court to enforce such claim, even with knowledge that the bankrupt has obtained his discharge. The bankruptcy court not having forbidden such creditor to institute and carry out such proceedings, it cannot be said that a creditor who takes such action has committed a contempt.

Furthermore, even if it be assumed that such action on the part of a creditor of a discharged bankrupt might, if taken with full knowledge of all of the bankruptcy proceedings, constitute such contempt of court, yet, in the present case, there is no evidence, beyond the mailing of the proper notices, to show that the respondent knew of the granting of this discharge, or of any other of the proceedings herein, or understood the nature thereof.

Certainly he would not be guilty of contempt of this court in disregarding its orders or proceedings of which he was without knowledge. Garrigan v. United States, 163 Fed. 16, 89 C. C. A. 494, 23 L. R. A. (N. S.) 1295 (C. C. A. 7). Before the respondent in such a case can properly be punished for contempt of court, the evidence relied on to prove him guilty thereof should be positive, clear, and convincing. General Electric Co. v. McLaren (C. C.) 140 Fed. 876; Hanley v.

Pacific Live Stock Co., 234 Fed. 522, 148 C. C. A. 288. The showing by petitioner in the present case is not of that character.

The petition must be denied.

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In re BALDWIN.

(District Court, S. D. New York. April, 1918.)

BANKRUPTCY ⊂=407(1)—GROUNDS FOR REFUSAL OF DISCHARGE—FALSE STATEMENT.

Objections to the discharge of a bankrupt sustained, on the grounds that he made a materially false statement in writing as a basis for credit and knowingly concealed property.

In Bankruptcy. In the matter of Willard C. Baldwin, bankrupt. On motion to confirm report of special master on objections to discharge. Confirmed in part, and discharge denied.

Saul S. Myers, of New York City, for Broadway Trust Co.

Smith & Bowman, of New York City (Harold H. Bowman, of New York City, of counsel), for objecting creditor.

H. Howard Babcock, of New York City (Wm. S. Bennet, of New York City, of counsel), for bankrupt.

AUGUSTUS N. HAND, District Judge. This case comes before me on a motion to confirm the report of the special master in so far as it sustains the first, third, and fourth specifications of objections to a discharge, and to reject it in so far as it finds that the second specification has not been established. The principal question argued is whether a statement in writing furnished by the bankrupt on September 13, 1912, was false. The financial statement was as follows:

Assets.

| | | |
|---|---|---|
| Cash on hand and in bank | $ 4,781 22 | |
| Accounts receivable | 12,344 38 | |
| Bills receivable | 2,677 66 | |
| Merchandise, cash value | 20,945 00 | |
| Fixtures | 1,000 00 | |
| Liabilities. | | |
| Accounts payable | | $ 3,985 73 |
| Bills payable | | 7,552 14 |
| | | $11,537 87 |
| Net worth | | 30,210 39 |
| | $41,748 26 | $41,748 26 |

Willard C. Baldwin.

On the back of the paper containing the foregoing statement is this indorsement:

September 13, 1912.

My financial condition is as good this day as it was at the time of making statement within. Willard C. Baldwin.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

The original statement, which was given December 31, 1911, and was reaffirmed September 13, 1912, did not include the claim to any surplus which there might be arising out of certain property which had been transferred many years before to L. J. Callanan to secure certain creditors of a firm in which the bankrupt had an interest. The latter knew of this claim at all times, but says he did not realize that his interest was worth about $30,000 until he was told by Mr. Callanan in the summer of 1912 that it would yield that amount. The bankrupt had met with losses since the original statement of December 31, 1911, was rendered to about the amount of this claim so that he had no net worth on September 13, 1912, upon the basis of the former statement; but if the Callanan claim, which was omitted December 31, 1911, was included September 13, 1912, it would be sufficient to bring his assets up to the worth appearing in the old statement.

The bankrupt's counsel urges that his creditors were not interested in anything except what was his net worth, and that he correctly stated on September 13, 1912, that his financial condition was as good as it was at the time of making the former statement, because the Callanan claim would just about offset the shrinkage. If in his written indorsement of September 13, 1912, he meant that his actual financial condition was as good on that day as when he had rendered the original statement, that was obviously untrue, because the Callanan claim existed at all times, and the bankrupt had lost over $30,000 in business between the rendering of the original statement and September 13, 1912. Therefore his actual financial condition was worse to that extent. If the bankrupt meant that his financial condition was as good on September 13, 1912, as it was set forth in the former statement, even that was quite problematical, and the statement could not be regarded as a truthful disclosure by the bankrupt of the real situation. That an equity in security transferred 10 years before to pay creditors—an equity which has never up to this time yielded anything—could be regarded by the bankrupt as a proper substitute for the liquid assets mentioned in the original statement is most unreasonable. Mr. Callanan was a well-known, responsible merchant. If there was any such equity, or if anybody believed there was any such equity, in the property in the hands of Mr. Callanan, the proof of it would be more clear. As I have said above, nothing has been realized to this very day. I think the argument that the statement of September 13, 1912, was not false, while plausible, is without real substance.

Moreover, it is perfectly evident that the bankrupt's original financial statement of December 31, 1911, was false in respect to bills payable. It was apparently only based on bills payable for merchandise, and omitted both the Gatti-McQuade notes, aggregating $9,539.12, and notes held by Mrs. Harte amounting to $2,000. The statement of accounts payable was apparently equally untrue. The first specification, that the bankrupt made a materially false statement in writing, is, for the foregoing reasons, fully sustained.

The second specification, which the master did not regard as established, should likewise be sustained, namely, that the bankrupt made a false oath before Commissioner Gilchrist when he testified that his

indorsement, dated September 13, 1912, on the back of the financial statement was true. The foregoing reasoning seems clearly to establish that the second specification was well taken.

The third specification should also be sustained, namely, that the bankrupt, with intent to conceal his financial condition, failed to keep books of account. He not only kept a sort of record which a man doing a large business could hardly keep in a way consistent with honesty, but there is no pretense that he did not omit from his regular books the checks held by Mrs. Harte.

The master likewise appears to have been correct in sustaining the fourth specification of knowingly concealing property. The net worth of the bankrupt, according to the statement of September 13, 1912, was $30,210.39. This net worth must be taken to be exclusive of any consideration of the old and worthless Callanan claim. In other words, while the confirmatory statement of September 13, 1912, may give the bankrupt reasonable latitude as to the amount of assets and liabilities, provided the net worth is the same, yet the assets must, I think, be regarded as of the same general nature as those set forth in the statement of December 31, 1911. Irrespective of this, I do not think that such a vague asset as the Callanan claim, which never realized anything, can be seriously taken into account. If that be so, then the bankrupt on September 13, 1912, had a net worth of $30,000, representing the value of comparatively quick assets over liabilities. All the trustee finally realized was $4,581.33, while the liabilities at the time of bankruptcy, which was only five months later than September 13, 1912, when the financial statement was made, amounted to $55,406.09; in other words, his financial condition had changed for the worse by about $80,000. This is in no reasonable way accounted for, and indicates, if the financial statement is to be believed, a fraudulent concealment of assets.

The report of the master is sustained as to objections 1, 3, and 4, and reversed as to objection 2, and the bankrupt's discharge is denied.

Ex parte SHORT.

(District Court, N. D. California, First Division. September 5, 1918.)

No. 16417.

1. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—CLASSIFICATION—POWERS OF BOARD.

While the action of the local board becomes final against a registrant under the Selective Draft Act (40 Stat. 76), unless appealed from in five days, a local board, having given a registrant a classification to which his questionnaire showed he was not entitled, may correct the error some months later.

2. ARMY AND NAVY ⟸20—SELECTIVE DRAFT ACT—"ORDAINED OR REGULAR MINISTER."

Registrant, whose questionnaire showed his ministerial work ended shortly after registration and before filing the questionnaire, *held* not entitled to deferred classification under the regulations defining an "ordained or regular minister" as a person who has been ordained, etc., or one who as his customary vocation preaches, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First Series, Ordained Minister.]

In the matter of the application of the wife of William Short for a writ of habeas corpus to secure his discharge from the custody of military authorities. Writ denied, and Short remanded to the custody of military authorities.

Wm. T. Kearney, of San Francisco, Cal., for petitioner.

John W. Preston, Sp. Assist. Atty. Gen., and Casper A. Ornbaun, both of San Francisco, Cal., for respondent.

DOOLING, District Judge. The wife of William Short seeks his discharge on habeas corpus from the custody of the military authorities. The record shows that Short, who will be designated herein as the registrant, on January 14, 1918, returned to his local exemption board his questionnaire, in and by which he claimed exemption as "a regular or ordained minister of religion." In support of such claim he stated:

That "he had been admitted to Unitarian ministerial fellowship in January, 1916, at Palo Alto, Cal., and that on June 5, 1917, he was minister of Palo Alto Unitarian Church."

To the question, "State place and nature of your religious labors now," he returned no answer; but in response to the question, "Give all occupations at which you have worked during the last 10 years, including your occupation on May 18, 1917, and since that date, and the length of time you have served in each occupation," he answered:

"Unitarian minister 1 year and 10 months. From May 18 to June 25, Unitarian minister, time included above. Chairman Northern California branch Peoples' Council (temporarily) 5 months. Student for balance of time during 10 years."

Upon these answers he was placed in class VB; that is to say, in the class of a regular or duly ordained minister of religion.

On June 6, 1918, a letter was sent to the local exemption board by the United States attorney, stating that registrant—

"registered for the draft at Palo Alto on June 5, 1917. At that time he was acting as a minister in the Unitarian Church of that town, but shortly thereafter resigned from the church and has not been connected in any way with any church since, but has, on the contrary, devoted his time to the activities of the Peoples' Council, which organization is decidedly unpatriotic in my opinion. I believe that Short should be reclassified and compelled to do military service, other things being equal."

Also the intelligence officer of the War Department advised the board by letter as follows:

"This is to advise you that investigation of Wm. Short discloses that he has not practiced his profession as a minister since July 1, 1917, and his classification should therefore be changed."

Upon receipt of these letters the local board on June 6, 1918, reclassified him placing him in class 1A, and duly notified him of that fact.

From this reclassification he appealed to the district board, which on June 15th denied the appeal.

Thereafter, and on July 19, 1918, he was arrested and on July 20, was by the local board for division No. 1 in San Francisco, certified as a deserter, and delivered to the commanding officer of the United States army, and now is in the custody and under the control of such officer. These are the facts as disclosed by the record. The only questions of any importance which they present are: (I) As to the power of the local board to change its ruling upon registrant's classification practically five months after such classification was made; and (II) was such change made arbitrarily and in disregard of the evidence presented and of the registrant's rights?

[1] The action of the local board becomes final as against the registrant under the regulations, unless appealed from within five days, but does not become final as against the government at any time. If the local board has made an error in a registrant's favor, and awarded him a deferred classification to which his questionnaire shows he was not entitled, I find nothing in the law or the regulations which would prevent the board from correcting that error, if and when it is called to its attention. The result of such procedure would only be that for the period of time during which the error remained uncorrected the registrant would enjoy a deferred classification and an exemption from duty to which he was not entitled, a situation about which he could not be heard to complain.

[2] An examination of registrant's questionnaire shows that that is exactly what happened here. It shows that on June 5, 1917, when he registered he was a regular minister of religion, had become such by being admitted to Unitarian ministerial fellowship in January, 1916, at Palo Alto; that the place and nature of his religious labors on June 5, 1917, was minister of Palo Alto Unitarian Church.

As to the place and nature of his religious labors on January 13, 1918, the date of his questionnaire, no statement is made; but it ap-

pears that the whole period of his activities as a Unitarian minister was 1 year and 10 months, and that a portion of that period was from May 18 to June 25, 1917, or, in other words, that he was engaged in his ministerial work for only 38 days after the passage of the Selective Service Law; that for 5 months, presumably the 5 months immediately preceding January 13, 1918, his occupation was chairman of the Northern California branch of the Peoples' Council, which work apparently he took up within 2 months after June 25, 1917, the last date that his questionnaire shows him to have been engaged in a ministerial occupation.

The law exempts "regular or duly ordained ministers of religion," and the regulations define a duly ordained minister of religion as:

"A person who has been ordained, in accordance with the ceremonial, ritual, or discipline of a church, religious sect, or organization established on the basis of a community of faith and belief, doctrines and practices of a religious character, to preach and teach the doctrines of such church, sect, etc."

Registrant at no time came within this definition. A regular minister of religion is defined to be:

"One who as his customary vocation preaches and teaches the principles of religion of a church, a religious sect, or organization of which he is a member, without having been formally ordained as a minister of religion, and who is recognized by such church, sect, or organization as a regular minister."

Nor did registrant, at the time he filed his questionnaire in January, 1918, bring himself within this definition. His last service as a minister had been in June, 1917, and since then his occupation was not that of a minister, but chairman of the Peoples' Council. Nor did his affidavit, presented on June 10, 1918, to the local board, show that he had again taken up the occupation of a minister, so that the most that appears from the record here is that registrant from January 21 to June 6, 1918, enjoyed an exemption to which he was not at all entitled. It is my opinion that it was not only well within the power of the local board, but that it was also its plain duty, properly to classify registrant when its attention was called to the error which it had made, and particularly when the facts upon which the correction was based appeared of record in registrant's own statement.

Registrant has suffered no injury at the hands of the local board, and the writ of habeas corpus is therefore discharged, and he is remanded to the custody of the military authorities.

## THE NEW LONDON.

## THE EGERTON.

(District Court, E. D. New York. October 19, 1918.)

COLLISION ⊂=82(2)—STEAM VESSELS IN FOG—EXCESSIVE SPEED.

A steamer, which was out of her course in Long Island Sound in a fog, *held* solely in fault for a collision with a tug and her tow, on the ground that she was running at excessive speed.

In Admiralty. Suit for collision by the Egerton Towing Company against the steamer New London, with cross-libel by the Central Vermont Transportation Company against the steam tug Egerton. Decree for libelant.

Foley & Martin, of New York City (W. J. Martin, of New York City, of counsel), for Egerton Towing Co.

Haight, Sandford & Smith, of New York City (Henry M. Hewitt, of New York City, of counsel), for the New London.

CHATFIELD, District Judge. On the morning of September 9, 1915, the New London, a steamer 270 feet long, struck the Egerton, a tug 73 feet long, somewhat aft of amidships on the starboard side. The New London ground along, with her guard and the supports breaking down the house of the Egerton, until the New London and the Egerton were clear. Then the New London, backing, but at the same time apparently still having way, came in contact with the barges in tow of the Egerton, which were on a short hawser of 10 or 15 fathoms, and by the backing of the New London's engines these scows swung around to the other side of the New London and got in difficulties under the guard, from which the force of extricating one of the scows broke the windlass attachments of the New London.

According to the testimony, the New London gave a signal to reverse just before striking the Egerton, and the Egerton, which just before collision had stopped her engines and had then not much way, gave a signal to go ahead, so as to throw her stern out of the reach of the New London, and then again stopped, but by so doing she obtained headway enough to help in actually passing the New London.

There is one point of difference between the witnesses, in that the Egerton's witnesses testify that the New London struck nearly head on, and by so doing they place the Egerton more nearly across the course of the New London. This must be taken into account in considering the testimony that the New London was over close to the Old Hen buoy and the Sands Point shore, for a boat of her length could not have been coming on a course straight out, so as to strike the Egerton at this angle, unless she had been substantially on shore just before. It is apparent from the testimony that the New London had been running on a course from Captain's Island. She had held this course, which was S. W. by W. ½ W., for over 45 minutes. This should have brought her to a point where the siren on Execution Rocks would be

heard, and she should pass this siren about a quarter of a mile to the south.

After the collision, and when the fog lifted, the New London (which had anchored) and the Egerton were actually about one-quarter of a mile further to the south, and not far from the Sands Point buoy. The witnesses differ somewhat as to just how far to the north and east of this buoy the boats were at the time; but it seems to be quite apparent that, if the New London had not anchored at this spot, they would have drifted onto the buoy, and they were then very close to it, and very nearly on a line between Sands Point and the Old Hen buoy.

The examination of a large chart showing this compass course from Captain's Island to Execution Rocks makes it also plain that the Edgerton, in following her course from the Gangway buoy to the Sands Point buoy, would be more or less on a parallel course to that of the Sound steamers, and less than a quarter of a mile to the south. It is also settled by the testimony that the Egerton did pass the Sands Point buoy at a short distance, not more than 100 feet, on her starboard. She then took a course which should have brought her about the same distance north of the Old Hen buoy, and the issue on the testimony of the witnesses in the case is whether the Egerton pursued this course, or whether in some way she deviated to the north, so as to meet the New London, which was somewhat to the south of her compass course. In fact, the captain of the New London says she was a little south of where she should have been. The New London claims she had not changed her wheel, and had been following a compass course ever since she ran into the fog. She had been running under one bell for some minutes after the fog shut in, and had been moving in the beginning of the flood tide since something like half past 5, when the tide turned, at the point where she then was further to the east. It seems to be apparent that the effect of the tide, which sets to the westward and to the south, would carry the New London to the south of her course, unless allowance were made therefor, and that this allowance was customarily made by moving the helm so as to hold true, on the range as well as on the course, until Execution Rock and the horn thereon were located; but, if there was an excess drift to the south in the fog, and no allowance made therefor, the New London would be nearly to the Old Hen buoy.

The issue, therefore, is one of fact. The New London was off her course, and seems to have been hunting for the horn on Execution Rock, when the Egerton was heard close at hand. Both boats were sounding fog signals, but the New London had not stopped when doubt as to her course and position became apparent. In fact, she did not reverse until close to the Egerton.

The New London had run some time longer than usual before getting opposite Execution Rock, and this is explained by the longer course which she must have followed, and by her reduced speed after the fog shut down. She was therefore lost in the fog, and should have navigated accordingly. Instead of so doing, she proceeded as if she had heard the Execution Rock horn, and the libelant claims that she had changed her course to run past Gangway Rocks. The horn was

never heard on the New London, and the evidence does not justify a finding that the collision was far enough to the eastward to explain that fact. On the contrary, the tide had not changed long before the collision at this point and the New London anchored soon after the collision. Thus the boats could not have drifted far to the west, and the witness who rowed out in a boat from the Old Hen buoy went in the direction of Sands Point buoy for 10 or 15 minutes. This witness started about 7:30, when he heard a crash in the fog, and his testimony corroborates that of the master of the Sagamore, who passed before 7:35 a boat close on his starboard hand, and, as he recollects, within 100 feet or so east of the Sands Point buoy. He heard nothing of the collision, and his attention was not called to the matter until he saw the Egerton later in the day. But his testimony is definite enough to locate the Egerton near the Sands Point buoy and to fix the approximate time of collision as later than that given by the New London.

On the other hand, the Egerton had proceeded some 8 minutes from the Sands Point buoy. She ordinarily took 15 minutes to run to the Old Hen buoy, and had been running 5 minutes under one bell after passing the Sagamore. This would bring the Egerton well over toward the Old Hen buoy, and considerably to the east of the point where the boats were anchored when the fog lifted. Thus, in accord with all the other testimony, the Egerton must have been further east than the point marked by her captain on the chart, and she may, in passing the Sagamore, have changed her course, so as to be further to the north than her usual path. She was on a compass course N. E. ½ E., and could not have been out in the ordinary path of the New London.

It will be found, therefore, that the New London was out of her course, and in a position where she should not have proceeded as if her location had been clearly ascertained. She approached the Egerton at a speed which, even if the Egerton was then to the north of her usual course, made the New London the burdened vessel, and did not stop, when moving with the flood tide, until collision was inevitable. The Egerton was moving against the tide, and was evidently going slowly until hooked up to avoid collision, and was sounding fog signals which should have warned the New London, if that boat had realized her position.

Fault must therefore be placed upon the New London, and the libelant may have a decree.

## In re LILLER.

(District Court, N. D. West Virginia. November 21, 1918.)

BANKRUPTCY ⊂=186(1)—FRAUDULENT TRANSFER OF PROPERTY—SUBROGATION.
A family corporation, organized by a bankrupt when insolvent, to which he transferred his property in an attempt to place it beyond the reach of creditors, and which borrowed money and paid off certain judgment liens on the property, occupies no better position with respect to the property than the bankrupt, and is not entitled to subrogation to such liens.

In the matter of W. A. Liller, bankrupt. On petition of the W. A. Liller Building Company to revise order of referee. Affirmed.

Charles N. Finnell, of Keyser, W. Va., and Horace P. Whitworth, of Western Port, Md., for petitioner.
Harry G. Fisher, of Keyser, W. Va., for trustees.

DAYTON, District Judge. Upon a former hearing in this matter I adjudged the W. A. Liller Building Company to be a colorable holder only for the bankrupt, Liller, and not an "adverse claimant" of his property—this for the reason that this corporation had been formed by Liller, when insolvent, for the purpose of conveying to it his property, with design to hinder, delay, and defraud his creditors; it being admitted that the stock of said corporation was largely subscribed and held by Liller, and nominal shares only by his near relatives. I held the referee rightly, by summary order, directed the trustee to take possession of the property from such corporation and sell it. This ruling of mine was affirmed by the Circuit Court of Appeals (247 Fed. 90, 159 C. C. A. 308), upon the opinion filed by me. In the opinion, among other things, it was said:

"The contention made, that in order to take over this property the corporation went into bank, and borrowed $2,500, and paid off outstanding executions issued upon judgments rendered more than four months before bankruptcy proceedings, whereby this property became exempt, does not strike me as sound under the rulings of New River Coal Land Co. v. Ruffner Bros. (two cases) 165 Fed. 881, 91 C. C. A. 559 (C. C. A. 4th Ct.), and Graham Mfg. Co. v. Davy-Pocahontas Coal Co., 238 Fed. 488, 151 C. C. A. 424 (C. C. A. 4th Ct.), to the effect that the bankruptcy court's jurisdiction is exclusive; and I think they exclude the idea that the bankrupt and a corporation formed by him to purchase the property, as this one was, shall be permitted to determine whether such sale shall stand or not. It is for the bankruptcy court to determine that question, and, where creditors demand a sale of it, I cannot see how it can be well refused. The question as to whether the bank making this loan, or a surety paying it, is entitled to subrogation to the liens of the executions, and entitled to payment out of the proceeds of sale, as I understand, by the referee's decree, is not determined, but reserved, and therefore I make no expression as to that, only determining that, if he should sustain such subrogation, the common creditors are entitled to have the property sold, in order that it may be determined whether it will bring a surplus for their benefit, and in order that the property itself will not suffer dissipation, deterioration, and loss pending the determination of their contest against the right to subrogation in case they determine to contest it."

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

When the case went back to the referee, the W. A. Liller Building Company filed its petition, alleging it had borrowed $2,500 of The People's Bank of Keyser, and had with the money so borrowed paid off execution liens existing more than four months before Liller's bankruptcy, and praying subrogation to such liens as against the proceeds arising from the sale of the property.

The referee has held it not entitled to such subrogation, and to revise his ruling and order to this effect the company has filed this petition. Although the bank does not join therein, it is admitted the sum of $2,500 borrowed from it has not been repaid it, and tender is made in its petition by the company that subrogation may be made in the name and favor of the bank.

Subrogation originally was limited to transactions between principals and sureties, and while the modern tendency is to broaden its application, yet it is only applicable in cases wherein a party has been compelled to pay a debt for which another is primarily answerable. It is never allowed one who would thereby reap advantage in any way from his own wrongdoing, nor to relieve a party from the consequences of his own unlawful act. As against creditors of the grantor, a fraudulent grantee stands in the grantor's place, and has no right, by way of subrogation or otherwise, superior to that possessed by his grantor. The doctrine of subrogation is an equitable one, and he who seeks it must come into court with clean hands. McNeil v. Miller, 29 W. Va. 480, 2 S. E. 335; Clevenger v. Miller, 27 Grat. (Va.) 740; Bates v. Swiger, 40 W. Va. 420, 21 S. E. 874; German Bank v. United States, 148 U. S. 573, 13 Sup. Ct. 702, 37 L. Ed. 564; Railroad Co. v. Soutter, 13 Wall. (80 U. S.) 517, 20 L. Ed. 543; In re Mead, 16 Fed. Cas. 1274, No. 9,365.

Applying those principles to the facts in this case, it seems clear the referee rightly denied subrogation. The former adjudication held this corporation to have been formed by Liller in combination with near relatives as nominal stockholders, for the purpose of putting his property out of his hands, but not without his control, in fraud of the rights of his creditors. This former adjudication, affirmed by the appellate court, is conclusive of the fact; and the charge in this petition that a new issue of fact is raised, requiring additional evidence to be heard by the referee, is without merit. This crucial fact having been thus judicially ascertained, it inevitably follows that to allow this corporation to be subrogated to the execution liens paid off by it before Liller was adjudged bankrupt would be, in practical effect, to allow Liller to be reimbursed for debts he was legally and morally bound to pay, and of which the law at the time was compelling payment.

No one would contend that if Liller, in personam, before proceedings in bankruptcy instituted against him, had borrowed the money and paid off these execution liens, he would subsequently, out of his bankrupt assets, be entitled to reimbursement. It inevitably follows that his fraudulent alter ego, the corporation, can be in no better position than he himself could be. This would be true in case the corporation's stock, instead of being practically all owned by him, had been held by

independent parties, provided it had engaged in the scheme to defraud his creditors. When any one, with such unlawful purpose in view, buys the property of a debtor, he does so at his peril. If his fraudulent purpose is exposed, he must lose his money invested in the transaction, or at least be postponed in payment thereof out of the purchased property, until the debts of all other creditors are satisfied. This is the penalty he must pay for his moral turpitude. He cannot with clean hands come into a court of equity, asking either reimbursement or subrogation. Equity, good conscience, and public policy all demand this be so.

But it is insisted that the bank, loaning the money, was entirely innocent of all fraudulent design or purpose, and therefore the rule should not be enforced against it. That it was so innocent is fully conceded. That it is entitled to subrogation, either upon the prayer of Liller, the building corporation, or itself (if it saw fit to make it), is not true—this for the reason that its loan to the corporation was a wholly independent transaction, in no way connected with Liller, his debts, or his property. There was no obligation upon it at the time to either pay or see paid these execution liens. It was neither a purchaser of the property incumbered by them nor even, so far as disclosed, a junior lien holder against it. Its transaction was solely with the corporation, whereby it loaned to it its money with such surety as was satisfactory. It took no lien upon the corporation's property, and no assignment of the execution liens, and because the corporation in fact had no property, but that which it claimed was in fact Liller's, gives it no such connection or right thereto as would supersede the rights of Liller's creditors. As stated heretofore herein, subrogation is only an inherent right to one who has been required to pay a debt for which another is primarily answerable.

Upon argument, the suggestion was made that, inasmuch as the building company was only the "colorable holder" of the property for Liller—in other words, Liller's other self—that the bank would be entitled itself, or any sureties bound for the loan, to prove its debt and have it participate in the distribution of assets as an unsecured creditor. This question has not been presented, or at least has not been passed upon by the referee, and therefore I do not pass upon it. It may depend upon facts not before me, such as whether proof of claim to this end was filed within the time required, and, if not, whether such grounds for not doing so exist that would permit the filing thereof now.

The ruling and order of the referee complained of must be affirmed.

## DE PAUW UNIVERSITY et al. v. PUBLIC SERVICE COMMISSION OF OREGON et al.

(District Court, D. Oregon. July 8, 1918.)

1. WATERS AND WATER COURSES ⟸217—COMPANIES SUBJECT TO REGULATION AS PRIVATE CORPORATIONS—"PUBLIC UTILITY."

A private corporation owning an irrigation system, though authorized by its articles of incorporation to engage in the business of selling water to the public, does not thereby become a "public utility," subject to regulation by the Public Service Commission, organized under Laws Or. 1911, p. 483, where such company has never in fact either sold, or held itself out to sell, water to the public generally, but only to purchasers of irrigable land from it, in fulfillment of private contracts, at a specified contract price.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Public Utility.]

2. CORPORATIONS ⟸394 — PUBLIC UTILITY—REGULATION—CHARTER AUTHORITY.

The charter authority of a corporation to become a public utility is a mere naked authority to do business as such, and until its business is so pursued such charter does not make the corporation a public utility subject to regulation.

3. WATERS AND WATER COURSES ⟸217 — APPROPRIATION — DEDICATION TO PUBLIC.

That a private corporation appropriated water for "general rental, sale, and disposition for the purpose of irrigation, etc.," did not make the appropriating corporation or its successors in interest a public utility, without a subsequent act of dedication of the water so appropriated to public use.

In Equity. Suit by the De Pauw University and others against the Public Service Commission of Oregon and Frank J. Miller and others, as members of said Commission and as individuals. On its merits, decree for complainants.

See, also, 247 Fed. 183.

This is a suit by the plaintiffs, as bondholders, and by the trustees under a mortgage securing an issue of $100,000 of bonds by the J. F. Luse Company, an Oregon corporation, against the Public Service Commission of Oregon and the individual members thereof, to secure an injunction restraining the commission and its members from enforcing an order of the commission reducing the rates charged by the J. F. Luse Company for water furnished to persons who had purchased land from it, with certain rights to water guaranteed to it by the contracts and deeds for the land so sold, from $3.50 per acre to $1 per acre, on the ground that such order of the commission was and is void for want of jurisdiction, in that the J. F. Luse Company is not a public utility and that the rate fixed by the commission is confiscatory.

In September, 1908, the Sutherlin Land & Water Company acquired a large tract of irrigable land in Douglas county, with the intention of subdividing and selling the same. Both this company and its successor, the J. F. Luse Company, were authorized by their several charters to sell water to the public; but there was no evidence that either of said companies ever sold or contracted to sell any water to the public generally, nor did either of said companies ever sell any of such water to any person other than purchasers of land from them, except that the J. F. Luse Company made a contract with the city of Sutherlin to permit it to use certain of the surplus water of its

system for a consideration of $500 a year while the city was engaged in securing a different supply for itself. In order to irrigate the land, the Sutherlin Company acquired by purchase and appropriation the right to divert water from the Calipooia river and other sources, and during the years 1908 to 1912 constructed an irrigation system and carried the water to and upon these lands.

Thereafter, and in November, 1912, the Sutherlin Land & Water Company conveyed to the J. F. Luse Company all of the land then remaining unsold, and also its interest in uncompleted contracts of sale and the water rights and irrigation system, and the Luse Company agreed to and did assume all of the obligations of the Sutherlin Company, especially with respect to providing water for the parcels of land so theretofore sold. The Luse Company thereupon, in order to fund its indebtedness for the money expended in the construction of the system and otherwise, issued a series of bonds, amounting to $100,000, secured by a mortgage on the irrigation system and on the charges for water under the deeds and contracts that it had made with land purchasers; the mortgage being made to the Northwestern Trust Company of St. Paul and Ira C. Oehler, as trustees, after which the bonds were sold to the plaintiffs, De Pauw University, Luse Land & Development Company, Limited, and others.

Thereafter certain of the purchasers of land from the J. F. Luse Company, who had contracted for water, and by their contracts of sale, or their deeds, as the case might be, had agreed to pay an amount equal to $3.50 per acre for water from the irrigation system, filed a petition with the Public Service Commission, alleging that the J. F. Luse Company was a public utility, and that such rates were unreasonable, discriminatory, and illegal, and asking the commission for a hearing to fix and establish a reasonable rate. In this proceeding, the Trust Company, as trustee, and certain of the bondholders, applied for and were granted leave to intervene, and did intervene, denying that the J. F. Luse Company, or its predecessor, the Sutherlin Company, was a public utility, and alleging that the commission had no jurisdiction to fix rates to be charged by the Luse Company for the water, or to interfere with the rates specified in the purchasers' deeds and contracts of sale.

Hearings were had before the commission, and it finally overruled the contention of interveners and entered an order reducing the rate that the J. F. Luse Company might charge for water from $3.50 to $1 per acre. Whereupon this suit was instituted to restrain the enforcement of that order. The evidence taken at the trial was uncontradicted to the effect that the J. F. Luse Company, though authorized by its charter to sell water to the public, never in fact had done so, and that it had never sold any water from its system, except the surplus water sold to the city of Sutherlin, to any one except those entitled to water under and by virtue of the sales contracts and deeds.

Edgerton & Dohs, of St. Paul, Minn., and Carey & Kerr and Charles A. Hart, all of Portland, Or., for plaintiffs.

George M. Brown, Atty. Gen., and J. O. Bailey, Asst. Atty. Gen., of Salem, Or., and B. L. Eddy, of Roseburg, Or., for defendants.

BEAN, District Judge (after stating the facts as above). [1] The evidence as taken on the trial shows clearly that neither the plaintiff nor its predecessors in interest were ever engaged in the business of selling or furnishing water to all who might apply within a given area, nor did either of them ever hold themselves out as ready and willing to do so. They were engaged in selling their own land, agreeing to furnish water on certain terms and conditions to the purchasers, and no others. They merely undertook to furnish water in fulfillment of a private contract with certain individuals selected by them, and not to

the public generally, and therefore were not public utilities, and subject to the jurisdiction of the Public Service Commission. See opinion on motion to dismiss (247 Fed. 183).

[2, 3] The fact that under their articles of incorporation the several companies might have engaged in the business of a public utility does not ipso facto make them so. The chartered authority did not mark the nature of the operating companies. It is merely a naked authority to do business, but until it is pursued in a certain way it did not make the companies public utilities. Del Mar Water, Light & Power Co. v. Eshleman, 167 Cal. 666, 140 Pac. 593. Nor does the fact that the notice of appropriation of the water states that it was appropriated for "general rental, sale and disposition for the purposes of irrigation, etc.," alone make the appropriating corporation or its successor in interest a public utility. For, as stated by the Supreme Court of California in a similar case (Thayer v. Cal. Development Co., 164 Cal. 117, 128 Pac. 21):

"The property does not become impressed with a public use or trust until after the owner has first acquired it and then dedicated it to the use. The acts of acquisition and of dedication, respectively, are distinct from each other. Technically the latter must follow the former, and cannot precede or accompany it. An 'appropriation of water,' under the Code, is therefore not ipso facto a dedication or appropriation to public use. The additional act of dedication is as necessary to the creation of a public use in a water right so acquired as it would be if the right was acquired by conveyance or in any other manner, or as in the case of any other property dedicated to public use."

It follows, therefore, that the Public Service Commission was without jurisdiction to fix the rates to be charged by the plaintiff, and plaintiff is entitled to decree as prayed for in the complaint.

## THE CHEROKEE. THE HUGO. THE SUSAN A. MORAN.

(District Court, S. D. New York. October, 1918.)

1. COLLISION ⊂⊃64—STEAMER WITH TOW—CROSSING COURSES—FAULT OF STEAMER AND TUG—COURSE AND SPEED.
   For collision of steamer with tow of tug, on crossing courses, steamer and tug *held* at fault; the steamer, the privileged vessel, for failing to hold her course and speed, and the tug for failing to keep out of the way.
2. COLLISION ⊂⊃57—FAULT—FAILURE TO MAKE OUT LIGHT.
   The responsibility for failure of steamer, colliding, on clear night, with tow of tug, on crossing courses, to make out the side light, of regulation size and properly trimmed, on tug, *held*, as between steamer and tug, with steamer, whatever the reason for the failure.
3. COLLISION ⊂⊃61—STEAMER WITH TOW—FAULT OF TOW—SIDE LIGHTS—CUSTOM.
   Tow of outgoing tug, with which steamer collided, *held* at fault in not having side lights outside of harbor limits, as required by statute, notwithstanding custom not to change lanterns on staffs at ends to side lights, on crossing harbor line.
4. COLLISION ⊂⊃65—CONTRIBUTING FAULT—VIOLATION OF STATUTE—BENEFIT OF DOUBT.
   As to whether fault of tow, with which steamer collided, in not having side lights as required by statutory rule, contributed, the benefit of the doubt must be given the steamer.

In Admiralty. Suit by the Cherokee against the Hugo; the Susan A. Moran being impleaded. Decree for libelant.

Libel in rem by the scow Cherokee against the Danish steamer Hugo for a collision at sea, about three miles south of a line drawn between Ambrose Light and the Scotland Lightship. The Hugo impleaded the tug Susan A. Moran, which was towing the scow.

The Hugo was bound for New York on the evening of December 5, 1916. She passed Seagirt, about seven miles off shore, on a course north by east three-quarters east, and continued for a time not stated, later changing to a course due north, until about 4 miles from the line between the lightships, where she was bound to pick up a Sandy Hook pilot. At that time her master, Hansen, came upon the bridge and changed her course one point east, north by east. Not long thereafter he made out, about two points on his port bow, the three towing lights of the Moran, bound from the Scotland Lightship south-southeast for the dumping grounds, with two scows in tow, of which the first was the Cherokee, on about 200 fathoms of hawser. The men on the Hugo did not, and perhaps could not, make out the starboard side light of the Moran, though they say they looked for it a number of times. They therefore concluded that the towing lights were of a tug inbound, which had dropped its tow, which they could also not make out. The Hugo ported one point, so as to lay a course north-northeast; her idea being to go to starboard of the tug, thus passing under her stem.

Meanwhile the Moran and her tow were in fact constantly drawing nearer, and her lights crossed the bows of the Hugo and bore on her starboard bow. Still the Hugo failed to make out the Cherokee, which carried no side lights, as required by the International Rules, but only two hand lanterns on staffs forward and aft. Having the Moran abeam, the Huge finally, and too late, made out the Cherokee about 300 feet off her port bow, and collided with her, doing the damage in question.

As the Moran began to draw nearer, the Hugo reduced to half speed, and shortly thereafter to slow. She continued at each of these speeds for about

three or four minutes, and a short time before the collision, and upon seeing the Cherokee, reversed, but not soon enough to check her speed altogether. Her explanation for failing to see the side lights of the Moran is that the pilot boat had been playing the searchlight upon her in the hope of getting a call for a pilot.

The Moran's story is that she saw the Hugo some miles off on her starboard bow, first making out only her red light. Thinking to go under her stem she ported slightly, but not long enough to change the direction of the tow. At that time the Hugo shut out her red light and showed her green, at which the Moran starboarded back upon her original course till the time of the collision. The Hugo, she says, held her course clear of the tow, starboard to starboard, until abaft her beam, when with a sheer to starboard she turned into the Cherokee.

Pierre Brown, of New York City, for the Cherokee.
D. Roger Englar, of New York City, for the Hugo.
Samuel Park, of New York City, for the Moran.

LEARNED HAND, District Judge (after stating the facts as above). [1] It is clear that both steamers are at fault; the Hugo for failing to hold her course and speed, and the Moran for failing to keep out of the way. I attach no value to the Moran's testimony of the Hugo's change to port and then to starboard. She attributed her own movement across the Hugo's bows to changes in the latter's course, a natural enough mistake at night. At first she saw the red light, which warned her of her duty to keep out of the way, and this duty she did not observe. Her porting I question, in view of the Cerberus' testimony, which was in her wake, and whose master says that she made no change whatever. If there was any change, it was not noticeable, and altogether insufficient. Once across the Hugo's bow, she naturally saw only her green light thereafter.

[2] The Hugo's first change from north to north by east I do not charge her with; the vessels had not at that time begun to navigate with regard to each other, but all her subsequent movements were wrong; that is, her further change to north-northeast and her changes of speed. Confessedly these were not on the theory that she was the privileged vessel on crossing courses, as was the fact. She did not make out the Moran's green light, and I am ready to take her explanation that the searchlight blinded her, a most reprehensible feature to the whole affair. Still I do not understand that this is urged as an excuse for her. The Moran's light was there; it was of regulation size and properly trimmed. If the Hugo was blinded, she should have stopped dead at once. Whatever the reason for failing to make out the side light on a clear night, the responsibility as between the two vessels is hers.

[3] There remains, therefore the fault of the Cherokee, which carried no side lights as prescribed. Some argument is made of the long custom not to change lights after crossing the harbor line. I need hardly say that no custom can avail against the statute. Deep sea mariners need not charge themselves with local regulations outside of harbors. That is one reason for taking on pilots. They are not to be held to a knowledge that hand lanterns upon staffs indicate a tow in

the wake of a tug. Looking for side lights, they will almost certainly be confused by the appearance of great numbers of tiny lanterns on the surface of the water, as was the case here, for a number of tows were following the Moran down. Whether the requirement to carry only side lights be onerous or not, it must be observed outside harbor limits; else entering vessels cannot possibly navigate to the harbor limits with safety. I cannot understand how this universal rule of the sea can be for a moment questioned.

[4] Hence the scow can escape only on the assumption that her fault did not contribute. This position appears to me to be speculative. I do not believe that the scow was blanketed by the Cerberus, as the Hugo supposes; but, if she had carried regulation side lights, the steamer might have seen them, or might not. Who can say beyond a a reasonable doubt that she would not? Mr. Brown seizes upon certain passages in Hansen's deposition to show that he said it would have made no difference. These do not give a fair understanding of his meaning. What he said was that lights like the hand lanterns, if carried as sidelights, would have been worse than the lanterns themselves. That I can well believe, but it does not follow, and he is careful to insist that it did not follow, that regulation side lights could not have helped. It is true that he did not see the Moran's green light, and the chances, perhaps, are that he would not have done better with the Cherokee's, if she had carried one; but how can it be asserted beyond peradventure? Under the accepted test for violations of statutory rules, I must give the Hugo the benefit of the doubt, and hold the Cherokee at fault with the tugs. Certainly the Hugo was looking for a green light on the possible tow, as well as on the tug.

The libelant will take a decree for one-third damages against each steamer, and without costs.

SAN FRANCISCO & P. S. S. CO. v. SCOTT, Collector of Internal Revenue, et al.

(District Court, N. D. California, Second Division. September 3, 1918.)

No. 15782.

1. INTERNAL REVENUE ⟸9—INCOME TAXES—"DEPRECIATION"—DEDUCTIONS.
Under Act Aug. 5, 1909, § 38, imposing excise taxes to be computed on the net income of corporations, and providing for deduction from the gross income of expenses for maintenance, etc., and losses, etc., including a reasonable allowance for depreciation, a corporate shipowner is entitled to deduct necessary repairs; that item not being included in "depreciation," which means the lessening in value due to obsolescence, etc.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Depreciate.]

2. WORDS AND PHRASES—"MAINTENANCE."
"Maintenance" of a business means the upkeep, or preserving the condition of the property to be operated, and includes the cost of ordinary repairs.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maintenance.]

At Law. Action by the San Francisco & Portland Steamship Company against John J. Scott, Collector of Internal revenue, etc., and another. Judgment for plaintiff.

Charles J. Heggerty, of San Francisco, Cal., for plaintiff.

Ed. F. Jared, Asst. U. S. Atty., of San Francisco, Cal., for defendants.

BEAN, District Judge (sitting by special assignment). This action is to recover certain amounts paid by the plaintiff under protest as excise taxes levied under Act Cong. Aug. 5, 1909, § 38 (36 Stat. 112, c. 6), for the years 1910 and 1912.

In its returns plaintiff included in its deductions for ordinary and necessary expenses, paid out for the maintenance and operation of its business and property, for the year 1910 $17,088.77, and for the year 1912 $25,371.40, being amount expended in each of such years for making "ordinary and necessary" repairs to the deck department, engine department, and commissary department of its steamers, and also $59,642.11 for 1910 and $79,350.96 for 1912, for depreciation of such steamers, being 5 per cent. of the book value thereof.

It is admitted that the deductions for depreciation are reasonable and should be allowed, but the commissioner ruled that the cost of making ordinary and necessary repairs was not a proper item to be included in the operation and maintenance expenses, but was covered by the deductions for depreciation, and required plaintiff to pay taxes thereon, which it did under protest, and hence this suit.

[1, 2] The question thus raised does not seem to have been directly decided in any reported case to which my attention has been called, or which I have been able to find, although the cost of repairs and

upkeep was assumed in Grand Rapids & I. Ry. v. Doyle (D. C.) 245 Fed. 792, to be an item properly included in operating and maintenance expense. Under the law the tax is to be laid on net income and such net income is to be ascertained by deducting from the gross income (1) all the ordinary and necessary expenses actually paid within the year out of income in the "maintenance and operation" of the business and property; (2) losses actually suffered, not covered by insurance, including a reasonable allowance for depreciation, if any. (3), (4), and (5) are items not material here. It will thus be seen that the deductions allowed are to include, not only ordinary and necessary amounts actually paid out in the operation of the property, but also the amounts paid out in the maintenance thereof, and in addition a reasonable sum for depreciation, if any. Now, the operation of a business or property includes payment for labor and materials which go into the actual operation thereof, while maintenance means the upkeep or preserving the condition of the property to be operated, and therefore, in my judgment, includes the cost of ordinary repairs necessary and proper from time to time for that purpose. "Depreciation," as used in the statute is not to be confused with ordinary repairs. It is intended to cover the estimated lessening in value of the original property, if any, due to wear and tear, decay, or gradual decline from natural causes, inadequacy, obsolescence, etc., which at some time in the future will require the abandonment or replacement of the property, in spite of ordinary current repairs.

It follows that the tax complained of was illegally exacted, and the plaintiff is entitled to judgment for its recovery. Findings may be prepared accordingly.

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## THE O'BRIEN BROTHERS.

Petition of O'BRIEN BROS., Inc.

(District Court, E. D. New York. October 19, 1918.)

1. DEATH ⊂=85—DAMAGES—PECUNIARY LOSS.
   Code Civ. Proc. N. Y. § 1904, providing for recovery of damages for pecuniary injury from death, does not limit the damages to a loss of revenue, but provides for damages for such loss as can be reduced to a pecuniary basis, which is peculiarly the province of the jury.
2. DEATH ⊂=95(2)—HUSBAND AND WIFE ⊂=209(3)—INJURY OR DEATH OF WIFE—HUSBAND'S RECOVERY.
   A husband's recovery for injury to or death of his wife is not limited to the amount the wife would be prevented from earning, but must be estimated from the standpoint of the deprivation which the husband suffers, as estimated in cash.
3. ACTION ⊂=53(2)—INJURIES TO WIFE—ACTION BY HUSBAND AND WIFE.
   A husband's suit for loss of services of his wife through physical injury may be maintained at the same time with that of the wife for injury sustained by her.
4. ADMIRALTY ⊂=118—APPEAL—REVIEW—DAMAGES.
   A verdict of the jury, assessing damages for the death of a married woman, should not be disturbed, when there is any evidence on which

it can be supported; and the same rule should be applied when the damages are assessed by a commissioner in a shipowner's proceeding to limit liability.

In Admiralty. In the matter of the libel and petition of O'Brien Bros., Incorporated, owners of the steamtug O'Brien Brothers, for limitation of liability. On exceptions to awards for damages caused by the death of two married women. Report of commissioner confirmed.

See, also, 252 Fed. 185.

Foley & Martin, of New York City, for petitioner.

Uterhart & Graham and Charles A. Ludlow, all of New York City, for claimants.

CHATFIELD, District Judge. Exception has been taken to awards of $5,000 and $6,000, respectively, for damages caused by the death of two women who lost their lives in the accident out of which this limitation of liability proceeding has grown. The claim in each case was made by the husband as administrator.

This form of action is established by the provisions of the New York Code of Civil Procedure, giving to the administrator the entire cause of action, and including therein the damages suffered by the husband, where he survives.

The claimants by exceptions seek to present the rule set forth in Mitchell v. N. Y. Central & H. R. R. Co., 2 Hun (N. Y.) 535, affirmed on the ground of contributory negligence in 64 N. Y. 655, and in Austin v. Metropolitan Street Railway Co., 108 App. Div. 249, 95 N. Y. Supp. 740, in each of which cases the court held that, in the absence of all proof of earning capacity or pecuniary value, lost through the death of the deceased, a jury was not empowered to award more than nominal damages.

It may be assumed that where there is no proof of any sort, there would be nothing upon which to base an award. But it is difficult to think of a case which could get to a jury, without some evidence from which the jury could determine whether or not the death was a loss which could be estimated in pecuniary terms.

[1] The New York statutes provide for damages for the pecuniary injury. This does not mean simply loss of revenue; it means, on the contrary, loss reduced to a pecuniary basis, and this is particularly the province of the jury. Section 1904, Code of Civil Proc. N. Y.

[2-4] When a husband sues for loss of services of a wife, through physical injury, the action may be maintained at the same time with that of the wife for injury sustained by her. Both suits would be left to the jury to determine the pecuniary damage suffered. But this does not limit the loss of the husband to the amount which the wife is prevented from earning. In most instances the wife has been earning nothing, except as she assisted the husband, and the measure of damage in that sense is frequently represented by the cost of hiring some one to take her place. In the case of death, the husband's damage cannot be measured by the loss of his wife's earning capacity, but

must be estimated from the standpoint of the deprivation which he suffers, as estimated or valued in cash. If the jury fix this value, then the damage suffered is a pecuniary damage. In other words, the statute gives the right to recover the actual monetary damage which the jury finds represents in their opinion the pecuniary value of the injury. If there is any evidence on which this can be based, it is within the jury's province to fix the amount and the verdict should not be disturbed. When this amount is fixed by a commissioner, the result is the same.

The present case shows ample evidence to support the finding that the lives of these two wives were of value, and that their loss resulted in actual damage, which has been estimated in pecuniary terms in the amounts stated.

The report of the commissioner will be confirmed.

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DEUEL v. CHICAGO, B. & Q. R. CO.

(District Court, S. D. California, S. D. October 18, 1918.)

No. 97.

1. REMOVAL OF CAUSES ⟸3—ACTION FOR INJURY TO RAILROAD EMPLOYÉ—EMPLOYERS' LIABILITY ACT.

An action for injury to a railroad employé, while assisting in raising an engine, which had fallen into the pit of a turntable used by defendant in turning its engines employed in interstate traffic, one purpose of the work being to clear the track for such traffic, is one arising under the federal Employers' Liability Act (Comp. St. 1916, §§ 8657–8665), and under section 6 of said act, as amended by Act April 5, 1910, § 1 (Comp. St. 1916, § 8662), is not removable from a state court.

2. REMOVAL OF CAUSES ⟸102—MOTION TO REMAND—EFFECT OF DECISION OF STATE COURT.

That a state court granted a petition for removal of an action for injury to a railroad employé does not affect the duty of the federal court to remand the cause, where it appears that it is one arising under the federal Employers' Liability Act (Comp. St. 1916, §§ 8657–8665), and not removable.

At Law. Action by Hiram P. Deuel against the Chicago, Burlington & Quincy Railroad Company. On motion to remand to state court. Motion granted.

Thos. Scott and Thos. Scott, Jr., both of Bakersfield, Cal., for plaintiff.

James E. Kelby, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. [1] The motion to remand to the state court in this case I believe to be well taken. The plaintiff was injured while assisting in the raising of one of defendant's engines, which had fallen into a pit in which a turntable of defendant, "used for the purpose of turning its engines and locomotives used by it in interstate traffic," was situated and operated.

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In this view of the case, the labor of plaintiff in the removal of the engine from the pit was a clearing of a part of defendant's track used for interstate traffic, or it was the repair of an instrumentality of defendant used in interstate traffic. Under such circumstances, the case falls within the decisions in Southern Railway Co. v. Puckett, 244 U. S. 571, 37 Sup. Ct. 703, 61 L. Ed. 1321, Ann. Cas. 1918B, 69, and Pedersen v. Delaware, Lackawanna & Western Railway Co., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153.

If the labors of plaintiff had been confined to a repair or raising of the engine merely, and had not had to do with the ultimate task and purpose of clearing a portion of its track permanently devoted to interstate commerce, the decision in Minneapolis & St. Louis Railway v. Winters, 242 U. S. 353, 37 Sup. Ct. 170, 61 L. Ed. 358, Ann. Cas. 1918B, 54, would have been controlling. However, I am of the opinion that that case is clearly distinguishable, for the reasons hereinabove adverted to.

[2] Defendant makes the point that since, under the act of Congress (Compiled Statutes 1916, §§ 8657–8665), the state courts and the federal courts have concurrent jurisdiction in actions arising under the Federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65), the action of a state court in removing a case to a federal court on the ground of diversity of citizenship, presumptively thereby determining that the action is not one prosecuted or prosecutable under the federal act, is conclusive, and that this court may not, in any wise, sit in appellate judgment, so to speak, upon the state court's conclusions. No authority is cited in support of this contention, and apparently it is in direct opposition to the uniform practice obtaining in such proceedings. I am persuaded it is the duty of the federal courts to remand cases arising under this particular statute no less than in other instances, where they have been erroneously removed. See Kansas City Southern Railway v. Leslie, 238 U. S. 599, and the cases cited therein with approval, appearing on page 602 et seq., 35 Sup. Ct. 844, 59 L. Ed. 1478.

The motion to remand to the superior court of Kern county is hereby granted.

## WATERSON, BERLIN & SNYDER CO. v. TOLLEFSON.

(District Court, S. D. California, S. D. October 23, 1918.)

No. D-78.

COPYRIGHTS ⟸87—DAMAGES FOR INFRINGEMENT—MUSICAL COMPOSITION.

Damages recoverable for infringement of a copyright for a musical composition are governed by the provision of Copyright Act, § 25b (Comp. St. 1916, § 9546), that "damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250." The provision of subdivision 4, fixing the damages in such case at "$10 for every infringing performance," is intended to apply, within the above limits, where a large number of infringing performances are shown, and no actual damages are proven.

In Equity. Suit by the Waterson, Berlin & Snyder Company against Chris Tollefson. Decree for complainant.

Philip Cohen, of Los Angeles, Cal., for plaintiff.
Thomas A. Sanson, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. Plaintiff sued for an infringement of its copyright arising out of the performance of the musical selection known as "Joan of Arc, They are Calling You." Defendant was the owner and operator of a motion picture house in Los Angeles, and the selection above named was performed by his pianist in his house on at least one occasion in the month of March of this year.

An answer was filed containing allegations which the court concluded at the hearing raised no issue, and, the defendant not appearing, judgment was ordered as if by default. The only question in the case is as to the amount of damages to be awarded to the plaintiff for the single infringement alleged and shown. No actual damages were proven.

As before stated, the infringement complained of concerns the performance of a "musical composition," as distinguished from other infringements referred to in section 25 of the Act of March 4, 1909 (35 Stat. 1081, c. 320 [section 9546, Compiled Statutes 1916]). I confess that, on the first reading of this statute, I was of the opinion that $10, being the sum specifically mentioned in clause "fourth" of the section cited as recoverable for such an infringement, should be the amount allowed as liquidated damages, in the absence of proof of actual damage. However, upon more careful study of the section and consideration of its various terms, and more particularly upon considering and reading the section as it appeared previous to its amendment in 1909, I am of the opinion that this is one of the "other cases" referred to in clause "b" of section 25, supra, and that the minimum damages to be awarded for the infringement shown should be $250.

The provision for an allowance of "ten dollars" must be held to apply where a large number of infringements have been shown; this figure may be used by the court as a basis for its computation of the entire damages by assessing each infringement at $10, if such method

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of computation, under all the circumstances, "shall appear to be just"; but in the event the total number of infringements, computed on the $10 basis, do not amount to $250, nevertheless, pursuant to the mandatory terms of the statute contained in the provision last above referred to relating to "other cases," the court may not award damages in a sum less than $250. So, also, no matter how many separate infringements may be proved, no "actual" damages being shown, the court may not mulct the defendant in damages in excess of the maximum sum mentioned, to wit, $5,000.

This construction of the statute is supported by the well-considered opinion in Westermann v. Dispatch Printing Co., 233 Fed. 609, 147 C. C. A. 417, and finds support, also, in the decision of the United States Supreme Court in Brady v. Daly, 175 U. S. 148, 20 Sup. Ct. 62, 44 L. Ed. 109.

Plaintiff's counsel will therefore prepare a decree awarding damages in the sum of $250, the minimum amount named in the statute, and for attorney's fees in the sum of $100.

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LEO FEIST, Inc., v. AMERICAN MUSIC ROLL CO.

(District Court, E. D. Pennsylvania. October 18, 1918.)

No. 1637.

COPYRIGHTS ⊂=87—SUIT FOR ROYALTIES—DAMAGES.

In fixing punitive damages, which under Copyright Act, § 1 (e) (Comp. St. 1916, § 9517), may be awarded in a suit to recover royalties from the user of a copyrighted musical work who fails to pay or report as therein required, the intent and acts of defendant should be considered.

In Equity. Suit by Leo Feist, Incorporated, against the American Music Roll Company. On proceedings after remand, concerning allowance of counsel fees and punitive damages.

Sundheim & Sundheim, of Philadelphia, Pa., and Gilbert & Gilbert, of New York City, for plaintiff.

Leighton P. Stradley and Howard M. Long, both of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The decree in this case was reversed (251 Fed. 245, — C. C. A. —), with direction to this court to exercise its discretion concerning the allowance of a reasonable counsel fee and punitive damages under section 1, clause (e), Act March 4, 1909, c. 320, 35 Stat. 1075.

The controversy in the case has been upon the question whether the use by the defendant of the plaintiff's copyrighted musical compositions was under the compulsory license provisions of the act, as contended by the plaintiff, or under a voluntary license, as contended

by the defendant. That question has now been decided in favor of the plaintiff.

I am of the opinion that the plaintiff should be allowed a reasonable counsel fee. If the fee asked by plaintiff's counsel, $750, were awarded, the court would be applying, in fixing the amount of the fee, the punitive provisions of the act, which apply only to damages. The fee, to be a reasonable one, must be based upon the professional services rendered in the preparation and trial of the case and in the appellate proceedings.

The amount of royalties due, as fixed by the former decree, is $373.-74. The amount in controversy has its bearing upon the amount of the fee. No complicated questions of law or fact were involved. In my judgment, a fee of $150 is adequate and reasonable.

Passing to the question of damages, they may be imposed in case of failure to pay within 30 days after demand. The court may, no doubt, take into consideration the intent and acts of the defendant in failing to make payment and its willful disregard of the provisions of the act. The defendant was in default in failing to render monthly reports and to make payment within 30 days after demand. There was nothing in these features of the case indicating an intention of concealment or piracy in the use of the copyrighted works. In fact, the liability of the defendant for the statutory 2 cents royalty was consistently admitted throughout the transactions. Moreover, there is nothing upon the record to show bad faith of the defendant in defending against the application of the compulsory license provision, and, if punitive damages were based upon the resistance of the defendant to liability to punitive damages, the court would be punishing the defendant for setting up what the court, in its former decision, considered to be a good defense against such liability, but which has been held to be error in law.

Punitive damages will therefore be awarded, based upon failure to make payment within 30 days after demand, and, in aggravation thereof, failure to make monthly reports. The sum of $100 is, in my judgment, an ample allowance for damages, and will be awarded.

## UNITED STATES v. ECHOLS.

(District Court, S. D. Texas, Houston Division. October 29, 1918.)

No. 609.

CRIMINAL LAW ⊂=37—CRIME INDUCED BY OFFICER.

A defendant cannot be convicted of a crime which he was incited and induced to commit by a government officer for his entrapment.

Criminal prosecution by the United States against F. A. Echols. Dismissed.

John E. Green, Jr., U. S. Atty., of Houston, Tex.

HUTCHESON, District Judge. In this case it appears to the court, upon inquiry, both of the defendant and of the government witnesses, that the offense charged was committed by the defendant as a result of an entrapment planned and carried out by an officer of the law for the purpose of inducing the defendant to commit an offense, so that he might be prosecuted therefor.

The point involved in this case is simple, and is settled by the authorities. It is clearly the law that, while it may be true that the mere aiding of one in the commission of a criminal act by a government officer, or agent, does not preclude the conviction of the party committing the crime, yet, where the officers of the law have incited or induced the commitment of the crime, and lured the defendant on to its commission, the law will not authorize a verdict of guilty.

This case presents a most flagrant violation of that rule. Here the defendant, while in a state of partial intoxication, was accosted by a military police officer, who, in return for the friendly salutation of the defendant, asked the defendant to procure him a drink, and this with the purpose and design on the part of the officer that a crime should be committed, in order that he might arrest the defendant therefor. A simple statement of the circumstances is sufficient to rebut any claim of responsible criminality on the part of the defendant, even were authorities lacking to sustain the rule. Sam Yick et al. v. United States, 240 Fed. 65, 153 C. C. A. 96; Woo Wai et al. v. United States, 223 Fed. 412, 137 C. C. A. 604.

This rule does not proceed from or rest on any limitation of the right of the officers of the law to obtain evidence of crime in any manner possible, nor is it a defense to a prosecution that the officer participated in the commission of a crime, if the genesis of the idea, or the real origin of the criminal act, sprang from the defendant, and not from the officer; or, as the differentiation is well stated in 12 Cyc. 160:

"The fact that a detective or other person suspected that the defendant was about to commit a crime, and prepared for his detection, as a result of which he was entrapped in its commission, is no excuse, if the defendant alone conceived the original criminal design."

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But this statement in no manner authorizes government officers, employed to prevent crime and apprehend criminals, to thus conceive and set on foot the commission of an offense merely in order to make an arrest. The Circuit Court of Appeals for the Ninth Circuit has well stated the matter in Woo Wai v. United States, 223 Fed. 415, 137 C. C. A. 607:

"We are of the opinion that it is against public policy to sustain a conviction obtained in the manner which is disclosed by the evidence in this case, taking the testimony of the defendants to be true, and that a sound public policy can be upheld only by denying the criminality of those who are thus induced to commit acts which infringe the letter of the criminal statutes. Some of the courts have gone far in sustaining convictions of crimes induced by detectives and by state officers. * * * But it is to be said, by way of distinguishing such cases from the case at bar, that in all of those cases the criminal intention to commit the offense had its origin in the mind of the defendant. * * * In the case at bar, the suggestion of the criminal act came from the officer of the government."

In what is here stated there is no intention to excuse persons who yield to temptation, or to hamper or limit the acts of officers of the law in detecting crime by any means or device; but the zeal to detect crime ought not to be so vigorous as to induce officers to originate and procure the commission of the very offenses which they are enjoined to prevent. No faithful officer of the law will be hampered, nor will any criminal be aided, by the observance of this rule. Its disregard, however, may, and likely will, subject to persecution and conviction weak and spineless persons, who find it hard to resist temptation; and the government, through the zeal for conviction on the part of the arresting officer, may become the means of the ruin of its citizens, instead of their safeguard and protection. Such a possible result at once establishes the unimpeachable wisdom of the rule of public policy here enunciated, and requires that the plea of guilty, which the defendant offered to make, be by the court refused, and the case dismissed, which is accordingly now done.

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## ROSENBLUM v. ROSENBLUM.

(District Court, E. D. New York. October 22, 1918.)

TRADE-MARKS AND TRADE-NAMES ⇐58—INFRINGEMENT—IMITATION OF MARK.
A trade-mark for use on bags of onions, consisting of a red R, *held* infringed by a mark in all respects the same, except that the R and a blue S were put together in a monogram; the R being the prominent feature, and both parties inclosing the R in a red diamond.

In Equity. Suit by Abraham Rosenblum against Samuel Rosenblum. Decree for complainant.

Hamilton Anderson and Conrad A. Dieterich, both of New York City, for plaintiff.

Munn, Anderson & Munn, of New York City, for defendant.

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CHATFIELD, District Judge. Plaintiff owns registered trade-mark R in red for use on bags of onions. Defendant uses and has applied for registration of a trade-mark, with R in red and S in blue, put together in a monogram, for similar bags of onions.

Both use, as do many others, a red diamond inclosing the trade-mark. This narrows the scope of the trade-mark, for if the plaintiff was entitled to sole use of the diamond and the letter R, there would be little doubt that the defendant's mark infringed. But the defendant uses a similar red diamond and thereby gives the plaintiff the right to claim that the design as a whole is apt to deceive and obscures what little difference there is from the trade-mark proper. The defendant also uses lettering and words almost exactly like that of the plaintiff on other parts of the bag. Intent to imitate can therefore be inferred, and as the red R is the outstanding part of the monogram on his bags, it must be held that he is using the plaintiff's design.

The dominant feature of each design is the same R in red. Johnson & Johnson v. Bauer & Black, 82 Fed. 662, 27 C. C. A. 374; Omo Mfg. Co. v. Mystic Rubber Co. (D. C.) 225 Fed. 92; Cartier v. Carlisle, 3 Beav. 292.

There are other features of the plaintiff's case which substantiate his claim of unfair imitation and competition, and on the whole application a temporary injunction should issue.

## HALLOWELL et al. v. UNITED STATES.*

(Circuit Court of Appeals, Ninth Circuit. December 2, 1918.)

No. 3141.

1. CONSPIRACY ⊂⊃43(12), 45—PROSECUTION FOR USING MAILS TO DEFRAUD—EVIDENCE.
   In a prosecution for conspiracy to use the mails to defraud, letters written by defendants to persons charged to have been defrauded, asking further remittances, *held* admissible in evidence under the charge in the indictment, and as showing intent.
2. CRIMINAL LAW ⊂⊃824(8)—TRIAL—INSTRUCTIONS.
   The failure to give an instruction limiting the purpose for which particular evidence may be considered is not error, where such instruction is not specially requested.
3. CRIMINAL LAW ⊂⊃423(1)—ACTS OF CONSPIRATORS—EVIDENCE.
   In a prosecution for conspiracy to use the mails in furtherance of a scheme to defraud, where a conspiracy between defendants to carry out such scheme is shown, evidence of acts of one defendant in its execution is admissible against the others.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Criminal prosecution by the United States against W. F. Hallowell and W. F. Lick. Judgment of conviction, and defendants bring error. Affirmed.

The plaintiffs in error were convicted under a charge of conspiracy to use the mails in furtherance of a scheme to defraud. The scheme involved a pretended location of claimants upon lands in Oregon represented to be included in what was known as the Oregon & California Railroad land grant, and which were then in litigation in a suit brought by the United States against the railroad company to forfeit the grant. The indictment charged that the defendants conspired to devise a scheme to defraud various named persons, and the public generally, through the use of the United States mails, by inducing them to pay over to the defendants certain sums of money, with the intention of defrauding them "out of all sums of money that such persons would pay over to the defendants, or either of them," and that the scheme contemplated making in substance the following representations:

That in the above-mentioned suit then pending the United States was seeking to compel the railroad company to sell and convey the lands of the grant to persons making application therefor through the defendants, in quantities not to exceed 160 acres to each applicant, and for a price not to exceed $2.50 per acre; that the defendants were the agents of the railroad company, and authorized by it to solicit persons to make applications to purchase lands; that the railroad company, conceding that it could not prevail in the suit, desired to procure a large number of persons to make application to purchase the land, and that it would require all persons making application to purchase to enter into a written option obliging themselves, upon procuring title, to convey the timber on the land to the railroad company; that every applicant would receive title within six months from the date of his application, and would make a large sum of money thereby; that all of the tracts of land for which applications were to be made through the defendants were portions of the land involved in the suit then pending.

The indictment then charged that all the representations were false, and known to the defendants to be false, and were made by them for the purpose of executing the fraudulent scheme; that it was the purpose of the United States in said suit to acquire for itself all of said lands, and it was the purpose of the railroad company to retain title to itself for all of said



*Rehearing denied February 10, 1919.

lands; that none of the defendants was ever authorized by the railroad company to make any of said representations; that many of the applications so induced were located upon the same tract of land; that many of the applications were made upon lands that never belonged to the railroad company and were not affected by the suit; that many of said tracts had no timber, and many of them were absolutely worthless. The indictment then set forth the commission of certain overt acts, which consisted in the mailing of certain letters through the United States mails.

The plaintiffs in error were convicted as charged, and they bring separate writs of error. They both assign error to the ruling of the court below in admitting certain letters in evidence, written by Hallowell, and signed "Hallowell & Co.," and sent to various persons who had made applications to purchase the lands at the instance of the defendants. The letters were all similar in general purport. The letters showed that demand was made in the name of Hallowell & Co., for payment by certain of the applicants of the sum of $2.50 per acre, the purchase price of the lands. Their admission in evidence was objected to as incompetent, irrelevant, and immaterial, and because entirely outside of the scope of the charge made in the indictment.

Thomas J. Cleeton and James H. McMenamin, of Portland, Or., for plaintiff in error Lick.

Edwin E. Heckbert and Samuel White, of Portland, Or., for plaintiff in error Hallowell.

Bert E. Haney, U. S. Atty., and Robert R. Rankin and Barnett H. Goldstein, Asst. U. S. Attys., all of Portland, Or.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The plaintiffs in error contend that, inasmuch as the indictment charges that it was the purpose of the scheme to induce each of the victims thereof to pay to the defendants named in the indictment the sum of $150 for their services in receiving and presenting to the railroad company the applications to purchase lands, it was error to admit the letters written to certain of the applicants demanding the further sum of $2.50 per acre; the purpose to demand said further sum not having been specified in the indictment, and proof of demand therefor being without the scope of the indictment. From the letters so admitted it appears that Hallowell & Co. informed the applicants that a decision was expected "any day now," that the money was demanded to meet the emergency of being required to pay it to obtain the deeds, and that it would be to the interest of the applicants to arrange to have the money on hand at once, "as in case they call for the money, and we are not ready to put it up, they wouldn't wait a minute."

To the contention of the plaintiffs in error it is to be said, first, that the indictment goes further than to charge that the scheme was only to obtain from each of the applicants the sum of $150 for the services of the defendants. It alleges further, as a portion of the scheme, that the defendants, upon receiving the applications, would thereupon pretend to tender to the said defendant railroad company, on behalf of each of said victims, the sum of $2.50 per acre for said respective tracts of 160 acres each, so by the said victims and various other persons to be applied for. It does not follow, from this language of the indictment, that the tender so contemplated was to be made with the funds of the defendants, and the demand upon the applicants to advance the money

wherewith to make the tender, or to make the payments, was clearly not foreign to the scheme so charged. The letters contain intimations that, if the money therein applied for should not be needed for the purpose indicated, it would be returned to the applicants.

It is clear, also, that the letters were admissible for the statements they contain, aside from inducements to the applicants to advance the $2.50 per acre. Thus one of the letters states that the writers "have been told to file more applications as soon as possible, which we take to mean that they would wish to use up, or in other words get applications for, all of their land," and states further, "There is not a claim we have filed on worth less than $5,000." Another letter says: "We have been reliably informed that, before the 90 days is up, we will be notified to call for our deeds." Another falsely states: "The government suit was only brought with the intention of compelling the R. R. Co. to sell the land according to the terms of the grant." Two other letters state: "We have been advised that it would be advisable for us to be prepared to get our deeds." These statements all tend to prove the criminal conspiracy charged in the indictment, and they were admissible in evidence, notwithstanding the fact that before they were made the defendants had obtained from each of the applicants to whom they were addressed the sum of $150, in accordance with the general scheme.

[2] Again, the letters were admissible to show intent. Allis v. United States, 155 U. S. 117, 119, 15 Sup. Ct. 36, 39 L. Ed. 91; Dillard v. United States, 141 Fed. 303, 72 C. C. A. 451; Gould v. United States, 209 Fed. 730, 739, 126 C. C. A. 454; Moffatt v. United States, 232 Fed. 522, 526, 146 C. C. A. 480; Farmer v. United States, 223 Fed. 903, 911, 139 C. C. A. 341; Linn v. United States, 234 Fed. 543; Shea v. United States, 251 Fed. 440, 442, — C. C. A. —. The plaintiffs in error admit that such evidence is admissible to establish intent or motive, but contend that it was error to admit it in the present case, for the reason that the court, in admitting it and in instructing the jury, failed to limit the evidence to the question of motive and intent. There was no motion or request, however, that the evidence be thus limited, nor was the court requested so to instruct the jury. The failure to give an instruction limiting the purpose for which particular evidence may be considered is not error, where such instruction is not specially requested. 16 C. J. § 2500; Ball v. United States, 147 Fed. 32, 41, 78 C. C. A. 126; Schultz v. United States, 200 Fed. 234, 118 C. C. A. 420; Moffatt v. United States, 232 Fed. 522, 533, 146 C. C. A. 480.

[3] The plaintiff in error Lick contends that the trial court erred in failing to instruct the jury that they could not consider as against him the letters above referred to, nor the evidence in regard to the money obtained by Hallowell for the alleged purpose of paying the railroad company for the lands. In answer to this it is sufficient to say that no such request for an instruction was made, and that, if such a request had been made, it would not have been error to deny it. None of the evidence is brought here in the bill of exceptions, except that which relates to the letters, and the said payments of money to Hallowell. It is certified in the bill of exceptions that competent evidence was in-

troduced to establish the fact that Hallowell, Lick, and others had entered into the conspiracy charged in the indictment, and that the overt acts charged in the indictment were performed; and although it is certified further that there was absence of evidence that Lick had knowledge of Hallowell's acts in writing the letters or receiving the money therein referred to, there is nothing in the record to show that at the time when these acts were done by Hallowell the conspiracy had been abandoned, or that it was not then being actively prosecuted. The general rule of evidence in such cases was therefore applicable, and it was proper for the jury to consider, as against Lick, the acts and declarations of his co-conspirator, made during the pendency of the conspiracy, and in furtherance of the common design, although he may have had no knowledge of those acts or declarations. Lick might have been entitled to an instruction that such evidence should not be considered against him, unless the jury were satisfied that a conspiracy existed, and that he was a party to it; but that is a question not here involved.

We find no error. The judgment is affirmed.

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## METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. CHICAGO & E. I. R. CO. et al.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918.)

No. 2530.

1. RAILROADS ⟸167—MORTGAGES—AFTER-ACQUIRED PROPERTY.
Ordinarily the lien of a railroad mortgage having the usual after-acquired provisions does not, on the consolidation of the mortgagor corporation with another, spread to the property contributed by the other constituent, or to after-acquired property of the consolidated company.

2. RAILROADS ⟸171(2)—MORTGAGE—REGISTRATION—AFTER-ACQUIRED PROPERTY—CONSOLIDATION OF RAILROAD CORPORATIONS.
A provision in a consolidation agreement that a mortgage on the property of one constituent railroad company, which contained after-acquired provisions, should have the force and effect of first mortgages executed by the consolidated company, *held*, in view of the failure of the mortgagee to record such mortgage in accordance with statute in counties where the consolidated company extended its lines, not to extend the security of the mortgage to the after-acquired property of the consolidated company, or the property contributed by the other constituent company to the consolidation.

3. RAILROADS ⟸167—MORTGAGES—CONSOLIDATION—PROPERTY INCLUDED.
A mortgage on the property of one railroad company, which was thereafter consolidated with another, *held* not to extend the lien to equipment acquired after the consolidation, etc.

4. RAILROADS ⟸167 — MORTGAGE — AFTER-ACQUIRED PROPERTY — CONSTRUCTION OF MORTGAGE.
A mortgage on the property of one constituent railroad company, which was thereafter consolidated with another, *held* not to apply by virtue of the replacement covenants to equipment purchased by the consolidated company to replace equipment originally owned by such constituent company.

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5. RAILROADS ⊂⊃167 — MORTGAGE — AFTER-ACQUIRED PROPERTY — REPLACEMENT COVENANTS.
A mortgagor's breach of a covenant for the maintenance and replacement of railroad equipment covered by the mortgage *held* to create no lien as to after-acquired equipment.

6. RAILROADS ⊂⊃167—MORTGAGE—PROPERTY COVERED.
Where a consolidated company, which succeeded the original mortgagor, disposed of equipment subject to the mortgage, and such sums went into the general coffers of the company and became mingled with its general funds, *held*, that the mortgagee could not establish a lien thereon after receivership.

7. RAILROADS ⊂⊃192—MORTGAGE—FORECLOSURE—SALE.
Where receivers were appointed for a consolidated railroad company, and mortgages foreclosed, *held*, that property, being susceptible of division into several systems, might be divided for sale, if for the benefit of creditors, and a mortgagee holding a mortgage on the property of that constituent company which had been run at a loss cannot complain of the severance.

8. RAILROADS ⊂⊃192—MORTGAGE—FORECLOSURE—SEVERANCE FOR SALE.
In the separation of a railroad into parcels for sale under the foreclosure of divisional mortgages, a court of equity is not bound by any hard and fast rule to fix the division to correspond absolutely with the several mortgage grants, but the division should be made so as to leave each parcel as nearly as may be in a situation to be operated as a railroad.

9. RAILROADS ⊂⊃192—MORTGAGE—FORECLOSURE—SEVERANCE FOR FORECLOSURE.
On foreclosure of constituent mortgages on the property of a consolidated railroad company, *held*, that the division should be made so that each portion might be operated as a railroad system, and for that purpose the division located in Indiana should be given a line to Chicago, etc.

10. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—SALE.
Where there were separate mortgages on the property of the constituent railroad companies, which were consolidated, *held* that, on division for sale it was proper, other creditors and lienholders being protected, to sell, with one of the constituent parcels, equipment used for the operation of that parcel, though it was not subject to the mortgage on the lien.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the Metropolitan Trust Company of the City of New York, as trustee, etc., against the Chicago & Eastern Illinois Railroad Company and others, which was consolidated with a creditors' bill, upon which receivers were appointed. From the decree, complainant appeals. Remanded, with instructions to modify.

Under a creditors' bill brought against the Chicago & Eastern Illinois Railroad Company, receivers were appointed who took and retain possession of its property. Bills were then brought in the same court for the foreclosure of mortgages as follows: Chicago & Indiana Coal Railway Company to the Metropolitan Trust Company et al., dated December 1, 1885; Chicago & Eastern Illinois Railroad Company to Central Trust Company, November 1, 1887; Chicago & Eastern Illinois Railroad Company to Bankers' Trust Company, July 1, 1905; Evansville & Terre Haute Railroad Company to Farmers' Loan & Trust Company, April 1, 1892. These suits were all consolidated with the first-named action.

The Chicago & Eastern Illinois Railroad Company is the result of successive consolidations, one of the constituents being a former corporation of

the same name, itself a consolidated corporation, which was the mortgagor of the Central Trust mortgage. Another constituent was the Chicago & Indiana Coal Railway Company, likewise a consolidated corporation, one of whose constituents by the same name was the mortgagor of the Metropolitan Trust mortgage. The Bankers' Trust mortgage was given by the company as consolidated in 1894. The Farmers' Loan & Trust mortgage was given by the Evansville & Terre Haute Railroad Company, which on July 20, 1911, consolidated with the Chicago & Eastern Illinois under the latter name. June 6, 1894, occurred the consolidation between the former Chicago & Eastern Illinois Railroad Company, an Illinois corporation, having substantially all its property in Illinois, and the said consolidated Chicago & Indiana Coal Railway Company, an Indiana corporation, having all its property in Indiana.

The record sets forth at great length the various steps in the organization, consolidation, etc., eventuating in the present company, and of the giving of the several mortgages by the company or by its constituent corporations. These are sufficiently stated in the statement of facts which precedes the opinion of Judge Carpenter of the District Court, as reported in Railway Steel Springs Co. v. Chicago & E. I. R. Co., 246 Fed. 338, to which statement we refer in order to avoid repetition.

The appeals are by the Metropolitan Trust Company alone, and are from three decrees, or rather there are three appeals from decrees concerning the same subject-matter; all the appeals having been heard as one.

The first decree of May 22, 1917, found, inter alia, that under the Metropolitan mortgage there were issued and outstanding bonds of the Indiana Coal Railway Company to the amount of $4,626,000, which with accrued interest, constituted a lien on the property of the Coal Railway Company in the mortgage described and by it owned at the time of the consolidation of 1894; that under the Central Trust mortgage there were issued and outstanding bonds to the amount of $21,343,000, which, with accrued interest, were a lien on practically all the property of the company excepting the said Coal Railway property and the Evansville & Terre Haute property; that the Bankers' Trust mortgage, to the amount of the bonds issued thereunder, viz. $18,019,000, with accrued interest, was a lien on the property of the Chicago & Eastern Illinois Company, except the Coal Railway property and the Evansville & Terre Haute property; and that the Farmers' Loan & Trust mortgage, to the extent of the bonds issued thereunder, viz. $3,175,000, was, with accrued interest, a lien on the property formerly owned by the Evansville & Terre Haute Railroad Company. As to the findings respecting the Farmers' Loan & Trust mortgage, no question is raised. It ordered that the property of the company be sold, being first offered in certain parcels as fixed in the decree, and that there be reserved for further adjudication (1) questions of the extent of the liens of the several mortgages as between themselves, and the allocation between the mortgage estates of the expenses of the receivership and the payment of outstanding receiver's certificates; (2) for the benefit of the Metropolitan mortgage bondholders, all questions as to legality and effect of the consolidation agreement of 1894 as affecting the distribution of the proceeds of sale under the decree, and all questions as to the right of the Metropolitan bondholders to share in the proceeds of sale of various parcels decreed to be sold.

The second decree, bearing same date, merely fixed a time for the sale to take place.

The third decree, entered July 2, 1917, so far as it concerns the Metropolitan bondholders, disposed of the questions reserved by the first decree for further adjudication, and found that the Metropolitan mortgage was not a lien on any other property of the Consolidated Company than that owned by the Coal Railway at the time of the consolidation of 1894, and denied the petition of the Metropolitan Trust Company, which asked the court to set apart certain of the equipment for the benefit of its bondholders, and to decree that the lien of the Metropolitan mortgage be extended to such equipment, and found that no party to the actions was in position to dispute the validity of the consolidation of 1894, and that the Metropolitan bonds were a valid debt of the company.

Charles Evans Hughes, of New York City, and Frank H. Scott, of Chicago, Ill., for appellant.

Arthur H. Van Brunt, of New York City, for Central Trust Co.

Roberts Walker, of Scarsdale, N. Y., and Samuel Adams and Mitchell D. Follansbee, both of Chicago, Ill., for Bankers' Trust Co.

John S. Miller, of Chicago, Ill., for appellees.

Before ALSCHULER and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The questions presented and considered in the exhaustive briefs and arguments are mainly and in substance: (1) Was the lien of the Metropolitan mortgage extended by virtue of the consolidation agreement of 1894 to any property of the Consolidated Company thereafter acquired? (2) Does the lien of the Metropolitan mortgage attach to any equipment acquired after the consolidation of 1894, apart from the effect to be given specific provisions of the consolidation agreement? (3) In the enumeration of the property to be included in the various parcels to be separately offered for sale, should certain parts have been included with the Coal Railway property which by the decree of sale are not therewith included?

[1] Preceding the consideration of the first and main question we may state as a legal principle, applicable to railroad mortgages having the usual after-acquired provisions, the following from the first brief filed for appellant, that—

"Ordinarily on the consolidation of two corporations the lien of the mortgage of the constituent does not spread to the property contributed by the other constituent, or to the after-acquired property of the consolidated company"—citing in support New York Security Co. v. Louisville, etc., R. Co. (C. C.) 102 Fed. 382; Hinchman v. Point Defiance R. R. Co., 14 Wash. 349, 44 Pac. 867; Gibert v. Washington City R. R., 33 Grat. (Va.) 586; Compton v. Jesup, 68 Fed. 263, 15 C. C. A. 397.

[2] To maintain that the Metropolitan mortgage lien was extended to all the property thus passing to and afterwards acquired by the Consolidated Company, there must therefore appear conditions effective to that end, aside from the mere fact of the consolidation itself. Appellant's counsel assume to find ample authority for the contention in 14 words of article VII of the consolidation agreement of 1894, which words are, referring to the Metropolitan and the Central Trust mortgages: "Shall have the force and effect of first mortgages executed by this consolidated company." It is contended that these words constituted the Metropolitan mortgage for all intents and purposes the mortgage of the Consolidated Company, and under the after-acquired property provisions of that mortgage subjected to its lien all the property of the Consolidated Company then or at any time thereafter owned or acquired.

The dominating influence of these words as bearing upon this question is thus stated in the brief for appellant:

"The determinative question (aside from questions relating to certain equipment and to the method of sale decreed) is nothing more or less than the proper construction and legal effect of 14 words in a written instrument, namely, the articles of consolidation whereby in 1894 the Chicago & Eastern

Illinois Railroad Company (itself a consolidated company of Illinois and Indiana) and the Chicago & Indiana Coal Railway Company (an Indiana corporation and also a consolidated company) consolidated to form the Chicago & Eastern Illinois Railroad Company, a corporation of Illinois and Indiana."

The context of these words is shown in the entire article VII, reproduced as a footnote [1] with the fourteen words italicized.

If these words must ultimately determine whether or not the lien of the Metropolitan mortgage was extended to property acquired by the company at and after the consolidation of 1894, we must in construing them, consider not only the words themselves, but their relation to other parts of the same instrument, and the situation of the parties and the property as well, and in case of any doubt, such construction, if any, as all concerned gave to them before any controversy arose.

It appears that long before the formal consolidation of 1894 the constituent Chicago & Eastern Illinois Railroad Company was an Illinois corporation, with its lines of railroad practically all in Illinois. It had theretofore acquired *all* the capital stock of the Coal Railway Company in exchange for its own stock, and it had in addition a 999-year lease of all of the Coal Railway property, and was operating that road as a part of its general system, although the separate corporate existence of the two was being formally maintained. After some years of such management it was deemed advisable that there be a consolidation of the corporation, already under the same ownership and direction, and this was undertaken. Thus managed, there was no occasion for careful weighing of the terms or expressions to be employed in effecting the consolidation. One legal repre-

[1] "Article VII.

"The mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, trustee, also the mortgage or deed of trust made and entered into on the 1st day of December, in the year A. D. 1885, by and between the Chicago & Indiana Coal Railway Company and the Metropolitan Trust Company of the City of New York, a corporation created and existing under the laws of the state of New York, and R. B. F. Pierce, of Crawfordsville, in the state of Indiana, trustees, *shall have the force and effect of first mortgages executed by this consolidated company*, and shall equally secure the payment of all bonds which have been issued under either of said mortgages or deeds of trust by the Chicago & Eastern Illinois Railroad Company, as well as all bonds which may be hereafter issued by this consolidated company, pursuant to and in accordance with the provisions of said mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and said Central Trust Company of New York, trustee.

"No bonds shall be hereafter issued under or pursuant to said mortgage or deed of trust made and entered into on the 1st day of December, in the year A. D. 1885, by and between the Chicago & Indiana Coal Railway Company and said Metropolitan Trust Company of the City of New York and said R. B. F. Pierce, trustees; but nothing in this article contained shall be construed in such manner as to limit or restrict the powers of this consolidated company to execute other mortgages or deeds of trust conveying its property, or any part thereof, to secure the principal or interest of any other debt or debts which it may create."

sentative acted for both parties to the agreement, and there was not to be expected that degree of circumspection in the selection of words and phrases as would probably have been the case had there been contracting parties with interests in conflict. The mortgagees of the divisional mortgages were in no manner represented, and the several liens under their mortgages on property existent were not and could not have been affected by that transaction. The claim is that the fourteen words of the agreement made the Metropolitan and the Central Trust divisional mortgages both first mortgages of the Consolidated Company, with the practical effect, so far as concerns the present action, of extending each of the mortgages to all of the property of the company covered by the other, and under the after-acquired provisions of the mortgages, giving each a lien on all property thereafter acquired by the newly consolidated company.

If this is the purpose of the 14 words, they could not in fact have effected this end. Concededly neither these nor any other words which the two mortgagors might in the agreement for consolidation have employed could have given the Metropolitan bondholders a first mortgage on the already mortgaged property of the constituent Chicago & Eastern Illinois Company, nor could the Central Trust bondholders have thus secured a first mortgage on the already mortgaged property of the constituent Coal Railway Company. The stockholders might consolidate the corporations, but they could not consolidate the separate mortgages given on the distinct properties of the separate corporations. By their very terms the 14 words, if purporting to make of each of these mortgages a new first mortgage of the Consolidated Company, would give to each of the mortgagees a first mortgage on all its then existing property, and on all it might thereafter acquire—a result clearly impossible, and which it is not at all likely it was any more intended than it could have been effected.

Nor can it with reason be contended that by these words it was intended that each mortgagee, retaining its lien upon the property mortgaged, was granted a second mortgage on the other's property, subject to the prior lien of the other mortgage. The 14 words do not purport to have such effect, nor is such construction warranted by any other part of the article or the instrument.

It is insisted that the immediately following words of the article further appellant's contention. They are:

"And shall equally secure the payment of all bonds which have been issued under either of said mortgages or deeds of trust by the Chicago & Eastern Illinois Railroad Company or the Chicago & Indiana Coal Railway Company, as well as all bonds which may be hereafter issued by this consolidated company, pursuant to and in accordance with the provisions of said mortgage or deed of trust made and entered into on the 1st day of November, in the year A. D. 1887, by and between the Chicago & Eastern Illinois Railroad Company and said Central Trust Company of New York, trustee."

These words also, taken at their face, show a further want of exactness of expression on the part of the draftsman of the instrument. They purport to secure equally the holders of the bonds of both mortgages. If intending to equally secure the payment of all bonds which have already been issued under both of said mortgages, as well as those

which may thereafter be issued under one of them, it again undertook what could not be performed. The literal carrying out of this condition would require wiping out all distinction between the two mortgages, and letting in the bondholders of both on the same footing as to the properties which severally secured the two mortgages, and letting in on the same basis and with like parity of security the holders of bonds to be subsequently issued under one of the mortgages. Although the words themselves might bear this construction, this could not have been done and was evidently not intended. No act of these mortgagors, whether dealing at arm's length or in perfect unison, could have had the effect of combining the securities under the two mortgages, or of subjecting the security of one to equality of lien with bonds which might subsequently be issued under the other mortgage.

Article VII was evidently not first conceived to meet this particular situation. It follows article VII of an earlier consolidation agreement of the former Chicago & Eastern Illinois Railroad with other corporations, and therein are found these significantly similar words:

"The mortgage or deed of trust made and entered into on the 1st day of November, in the year 1887, by and between the Chicago & Eastern Illinois Railroad Company, party of the first part hereto, and the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, trustee, shall have the force and effect of a first mortgage executed by the consolidated company, and shall equally secure the payment of all bonds which have been issued under it by the Chicago & Eastern Illinois Railroad Company, as well as pursuant to, and in accordance with its provisions by the Consolidated Company."

The object of the employment of this language in the earlier instrument of consolidation is to be gathered from a peculiar clause in the Central Trust mortgage which is as follows:

"If the railroad company shall hereafter consolidate its property and franchises, by sale or otherwise, with the property and franchises of any other railroad company or companies, the several parties to such consolidation may, by apt words expressed in the agreement, give to this indenture the force and effect of a mortgage conveying to the trustee, above named, or its successor, all of the railroads and appurtenant property of the several parties, at the date of such agreement, and all railroads and appurtenant property which may be thereafter acquired, by construction or otherwise, by such consolidated company, to secure upon terms of equality the bonds which may have then been issued hereunder by the railroad company, as well as all bonds which may be thereafter issued by such consolidated company, in substantial compliance with the provisions hereof. In case such agreement shall be made, bonds issued by such consolidated company, shall be substantially in the forms above set forth, but in the name of the consolidated company, and shall be executed under its corporate seal and attested by the signatures of its president and secretary. It is the intent of this provision to invest such consolidated company with power to issue bonds for the purposes expressed, and subject to the conditions named in this mortgage or deed of trust, to the same extent as they could be issued by the railroad company if no such consolidation had been made, thereby giving to the holders of all bonds issued hereunder, whether by the railroad company or its successors, equality and security."

Under this clause of that mortgage the bondholders agreed that, if future consolidating companies shall provide in their articles of

consolidation that the mortgage shall be the mortgage of the consolidating company, bonds may continue to be issued thereunder, and that all holders of bonds thereunder, whether issued before or after the consolidation, shall have equal security with each other on all the property upon which at any time the mortgage becomes the lien.

The agreement between the then consolidating companies thus became a necessary step to render effective this provision of the mortgage by which the bondholders thereunder were bound respecting equal security of then existing bonds and such as were issued under the same mortgage after the consolidation. That mortgage was the same Central Trust mortgage now under consideration, and when in 1894 the consolidation in question occurred, in order to render effective in this consolidation the same provision in the same mortgage, so it would remain an open mortgage under which the Consolidated Company might raise funds for further extensions, etc., it was properly deemed essential that the agreement of consolidation of 1894 should, as in the prior consolidation, make provision that the Central Trust mortgage be kept open to admit of future bond issues thereunder, with equality of security between all bonds theretofore, and all those subsequently issued thereunder. The agreement to that effect between the consolidators was just as essential in 1894 as it was in 1887, the year of the former consolidation. And so it is not strange that in 1894 practically the same language was employed to this end as was by the same persons employed a few years before, in respect to the same mortgage, to effect the same general purpose.

It being deemed necessary, or at least proper, in 1894 to deal specifically with the Metropolitan Trust mortgage in order that no further bonds should be issued thereunder, the language of the earlier provision was somewhat changed. But we do not regard the general intent and purport to have been different in the one transaction than in the other respecting the mortgage which was to remain the active open mortgage of the Consolidated Company.

The two mortgages were unlimited in the bonds issuable thereunder. But the Metropolitan mortgage contained no such broad authorization as the Central Trust mortgage, whereunder the mortgage might continue effective for the issuance of further bonds by a consolidated corporation if the consolidators should by "apt words" so declare in their articles of consolidation. It was evidently conceived that with the broad authorization and power of that clause, the Central Trust mortgage was better adapted for future bond issues to provide for growth and extension after the consolidation, than was the Metropolitan mortgage. It is evident to us that the consolidators of 1894 appreciated the situation, and that article VII of the consolidation agreement was designed to meet it. It provided not only "apt words" for giving effect to the quoted clause of the Central Trust mortgage, but it definitely specified that the Metropolitan mortgage should thenceforth be closed, and that no further bonds be issued thereunder, and that the Central Trust mortgage should remain open so that further bonds thereunder might be issued to pay for further exten-

sions and improvements in accordance with the terms of the mortgage, with equal security to both new and old bondholders thereunder.

Conceding that in the absence of provisions to the contrary the consolidation would of itself have closed the Metropolitan mortgage and prevented the extension of its lien to further acquired property of the Consolidated Company, appellant's counsel insist that the provision in article VII with reference to the Metropolitan Company manifested an intention to make provision respecting the Metropolitan mortgage different from what would have been the case if it had not been mentioned at all. We do not think that such intention to make some different provision necessarily appears. Draftsmen of instruments frequently express definitely that which, if omitted, would, through operation of the law have produced the same result, so that the expression is in a sense a redundancy. This is often out of an abundance of caution, and to avoid, so far as possible, leaving the desired conclusion to construction or inference. It is quite probable that the draftsman was not content to leave the matter of the closing of the Metropolitan mortgage to the inferences to be drawn from such cases as New York Security Co. v. Louisville, etc., R. Co., and the others cited supra, but chose rather to express definitely the purpose and intent to close the Metropolitan mortgage and issue no further bonds thereunder in contradistinction to the intended course as to the Central Trust mortgage, viz. to continue it as the mortgage of the Consolidated Company, for the purpose of raising thereunder further funds for the large extensions which evidently were in contemplation.

Another instance in the same consolidation agreement of the distinct expression of that which in any event the law would impose is found in article X, whereby the Consolidated Company assumes all the debts and obligations of the constituent companies. The definite expression of this obligation does not suggest that one should seek in it a significance or meaning beyond or different from the general obligation of a consolidated corporation to discharge the debts of its constituents.

The inclusion of the Metropolitan in article VII had no essential significance beyond the definite recognition by the Consolidated Company of the mortgage as a lien upon part of the property so about to pass to the Consolidated Company, and of the purpose to close the mortgage to the further issue of bonds thereunder. Under the law as it is stated in the above quotation from brief for appellant, the situation of the Metropolitan mortgage is not materially different from what it would have been had all reference to it been omitted from article VII. In such case it would plainly not have been contended that any lien thereunder was extended to any future acquisitions or extensions of the Consolidated Company.

That no further or different obligations or rights as now contended for were created or imposed by article VII was evidently long the view of all of those who had any duty or function concerning these matters. For 20 years following this consolidation important extensions were being made to the lines of the company, and large sums of

money raised to pay for them and for equipment through further bond issues under the Central Trust mortgage and the subsequent Bankers' Trust mortgage—$13,950,000 Central Trust, and $18,019,000 Bankers' Trust, bonds. No further money was raised under the Metropolitan mortgage. The extensions were made largely in the state of Illinois, running into many counties thereof not theretofore entered by this system. While the fact of making these extensions was of necessity open and notorious, nowhere in Illinois was the Metropolitan mortgage ever recorded, notwithstanding the statutory provision in Illinois that railroad mortgages shall be recorded in every county in the state through which they run. Section 4, Act May 7, 1873 (Acts 1873, p. 142). We are not considering this as bearing on any question of the validity of the Metropolitan mortgage as a lien in Illinois, but as significant of the intent and purpose and understanding of the parties; for it is not likely that this mortgage, if considered by the mortgagor a lien on the railway extensions in Illinois, would long have remained unrecorded in that state.

The fact that during all these years the Consolidated Company paid the interest on the Metropolitan bonds does not materially minimize or change the inference of fact to be drawn from the omission to record the mortgage in the many counties in Illinois into which the lines were extended with the funds raised under the Central Trust and Bankers' Trust mortgages.

On the part of the consolidators no reason or motive is apparent wherefore they would undertake by the consolidation agreement to extend the lien of the Metropolitan mortgage to property other than that which it covered at the time of the consolidation. The mortgage was to be closed so that no further bonds would be marketed thereunder. The bonds already issued were disposed of, and there appears no reason why the consolidators should have wished to make the Metropolitan bonds more attractive as an investment. But having determined to employ the Central Trust mortgage to raise money for the contemplated extensions, there was every reason why bonds thereunder, to be placed upon the market for raising large sums, should be made as attractive as possible in order to invite investment in them. But the inevitable result of making the Metropolitan bonds a lien upon extensions would have been an impairment of the company's further borrowing power under the Central Trust mortgage, as well as under the subsequently issued Bankers' Trust mortgage. It is to be noted that under these mortgages bonds for extensions could be issued for the amount of $18,000 per mile of main track including any prior liens thereon, and that in the many certificates issued for the certification of bonds for extensions, the Metropolitan mortgage was never mentioned as an existing lien.

It would in our judgment require more than the construction undertaken to be given these 14 words to warrant the conclusion that the consolidators thereby intended to or did undertake to bind the Consolidated Company, as well as the Central Trust mortgage, to an extension of the lien of the Metropolitan mortgage to the Central Trust security then on hand, and to the lines of the Consolidated Com-

pany thereafter acquired, and we conclude on this question that the district court did not err in holding the lien of the Metropolitan mortgage on the railway to the lines of the Coal Railway Company at time of the consolidation of 1894.

[3] As to claim of lien on equipment, in so far as the claim is for a lien on all existing equipment acquired after the consolidation of 1894, arising through the said 14 words of article VII of the consolidation agreement, and the after-acquired property provisions of the Metropolitan mortgage, what has already been said respecting the operation of these provisions as bearing on the railroad lines constructed or acquired after the consolidation, applies likewise to equipment, and with like effect; necessitating the finding against appellant upon such contention.

[4, 5] Of the original 3,065 units of Coal Railway equipment subject to the lien of the Metropolitan mortgage, which passed to the Consolidated Company in 1894, all have disappeared save 114 thereof, which the receiver disposed of and the proceeds were decreed to be applied on appellant's mortgage debt. It is contended for appellant that "even though appellant's position on the principal controversy should be incorrect, appellant is entitled to a lien upon equipment of an equal value or amount with the equipment which was subject to its mortgage at the time of the consolidation"; that the Consolidated Company had the use of this equipment and derived revenue from it and wore it out, and replaced such thereof as became useless with other equipment; that the Consolidated Company always possessed and that the receiver took and held equipment, in replacement of that which the Coal Railway contributed to the consolidation of 1894, and that to the value of such Coal Railway equipment as went into the consolidation the Metropolitan is entitled to a lien upon equipment. We find no evidence of the value of the Coal Railway equipment at the time of the consolidation, beyond the fact that its cost price was $1,230,357.71, and that as against this $1,215,000 of the Metropolitan bonds were issued.

It does not appear that through bookkeeping, accounting, marking or in any manner whatever the Consolidated Company ever set apart any of the much larger equipment it acquired after the consolidation, as in replacement of disposed-of Coal Railway equipment, or that any steps whatever were taken to subject to the lien of the closed Metropolitan mortgage any of the subsequently acquired equipment, as in replacement of that disposed of. The most frequent practice of the Consolidated Company was to procure equipment from the makers, who took trust certificates or other obligations, under which they retained the title, or a lien on the equipment, for the price of it, and from time to time the Central Trust Company or the Bankers' Trust Company would certify bonds in accordance with the provisions of their mortgages not exceeding the value of the equipment, to supply funds with which the company might discharge its obligations therefor to the makers, and thus acquire title from or release of the liens of the makers. To a certain extent also the Consolidated Company bought equipment, and from time to time the Central and Bankers'

Trust Companies issued bonds as against the equipment for the amount of its value. Since the consolidation of 1894 bonds under these mortgages have been certified and issued as against practically all of the equipment acquired after the consolidation, aggregating $15,343,000—an amount which is evidently far in excess of the present value of the 23,000 units of equipment in the hands of the receiver to be sold under the decreed liens of the Central Trust and the Bankers' Trust mortgages.

This contention for a lien of the Metropolitan rests, not on any covenant for lien on after-acquired property, but on a contractual obligation of the mortgagor to maintain and replace the mortgaged equipment. But the Metropolitan mortgage imposes no such obligation. The usual covenant for maintenance and replacement of equipment is not to be found in this mortgage. The nearest approach is a provision in article VIII empowering the trustees to allow the railway company to dispose in its discretion of such equipment, machinery and the like, as may have become unfit for use, the company replacing such by new, and all property acquired to replace "any of the property conveyed under the provisions of this article" to be subject to the lien of the mortgage without other act or conveyance. The evidence does not show any equipment to have been disposed of under the terms of this article. Evidently it was considered that the after-acquired property provisions of the mortgage would sufficiently protect the mortgagee in this regard. But these provisions having under the circumstances become ineffectual to that end, we are not at liberty, in the absence of evidence of fraudulent, mistaken or accidental omission, to import into the mortgage a replacement covenant which the parties have not included. But if it were there, or if the provisions present were properly to be construed as such a covenant, no lien would attach merely because of the mortgagor's breach of the covenant through its failure to maintain and replace the Coal Company equipment of 1894. United States Trust Co. v. Wabash W. Ry. Co. (C. C.) 38 Fed. 891; Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339.

[6] There is considerable discussion in the briefs respecting the proceeds of equipment subject to appellant's mortgage which from time to time the Consolidated Company disposed of, the amount of which was found to be $196,846.61. Part of this amount is based on the stipulation that the scrap value realized by the company for cars dismantled, destroyed or becoming otherwise useless was $95 per car. The master found the number of such cars to be 1,159, but from our examination of the evidence it appears to be 2,055, thus increasing the total so received to $281,966.61. Counsel for appellant maintain that the money so realized could not honestly have been retained by the company, except upon the theory that appellant's lien would attach to equipment which supplied the place of that disposed of, and that since the presumption is in favor of the honesty of the railway company's officers, it should be concluded that the Consolidated Company intended and understood that the Metropolitan lien would attach to units of subsequently acquired equipment equal to the dis-

posed-of Coal Railway units. Assuming even this to be so, the understanding of the Metropolitan officers could not bind the mortgagees who through their subsequent advancements as against this equipment acquired the superior equity. The amount so received by the Railway Company on account of its disposal of the mortgaged equipment was not in any manner segregated or paid into a trust fund, but went into the general coffers of the company and became indistinguishably mingled with its funds. It is not and could not well be seriously contended that these funds were traceable into the hands of the receiver, so that appellant might maintain a lien thereon, or priority of claim therefor.

[7] Lastly, it is complained that the decree improperly severs the Coal Railway from the balance of the Chicago & Eastern Illinois system, special criticism being made of the noninclusion with the Coal Railway in the foreclosure sale as decreed, of the line from Otter Creek to Brazil, Ind., and the line from Momence, Ill., to the Indiana-Illinois state line, and also of any of the equipment.

Respecting generally the severance and sale of the Coal Railway from the rest of the so-called Chicago & Eastern Illinois system, we are satisfied the decree of the district court was proper. The Metropolitan mortgage covers the Coal Railway only. The Coal Railway does not appear to be essential to the rest of the system, nor the rest of the system to the Coal Railway. It does not appear to us that either materially supplements the other. The master's report finds the Coal Railway to be a parallel and competing line with the Chicago & Eastern Illinois, and indeed the Coal Railway appears to be in a small way a system in itself. The association and ultimate consolidation of the two was manifestly for the purpose of eliminating competition between them. There appears no such interrelation between these parts as to suggest substantial disadvantage to either from the severance decreed, except as is hereinafter indicated and provided against.

Under the evidence the master found that the Coal Railway division was being and for some time had operated at considerable loss. Ordinarily this of itself would not be a sufficient cause for "sloughing off" branches, or disrupting a railroad system. While deliberate purpose to run down and make unprofitable the Coal Railway division of this system is suggested, no evidence appears to connect the trustees or bondholders of the Central Trust mortgage with any such purpose. That mortgage was given before the consolidation, and if it be true that the Coal Railway can be operated only at a loss, it would diminish the security of the Central Trust mortgage if the more remunerative property upon which it is secured, could be sold on foreclosure only in connection with the losing Coal Railway. In any view of this record, we see no impropriety in the decree in permitting severance and separate sale of the Coal Railway under the foreclosure of these mortgages.

[8] But in the separation of a railroad into parcels for the sale under the foreclosure of divisional mortgages a court of equity is not bound by any hard and fast rule to fix the parcels or divisions to

correspond absolutely with the several mortgage grants. The rights of all parties should of course be protected, without overlooking the interest of the public in the continued beneficial operation of public highways constructed and operating under its authority. The severance from one division of a part necessary to its successful operation, and not essential to the operation of any other part, cannot be justified on the ground alone of mortgage descriptions. If division must be made it should be, so far as is reasonably possible, at points which will leave the various divisions as nearly as may be in situations to be operated as railroads.

[9] The complaint which appellant makes because of the noninclusion with the Coal Railway division—or parcel D as fixed in the decree—of the road from Otter Creek to Brazil, Ind., does not impress us as well founded. This is an east and west line connecting the southern terminus of the Coal Railway with the Chicago & Eastern Illinois. By it the latter reaches the Brazil coal fields, enabling it to compete for that traffic with the Coal Railway which otherwise reaches that field, to eliminate which competition these lines became associated under one ownership and were ultimately consolidated. For traffic south of its line the Coal Railway has other connections. The Brazil-Otter Creek line would for the Coal Railway be merely a connecting link between itself and the Chicago & Eastern Illinois, while to the latter it means an entry into these coal fields. The advantage to the Coal Railway in having it, or its disadvantage in not having it is far outweighed by its greater advantage to the Chicago & Eastern Illinois and ensuing embarrassment of the latter if severed from it. Equitable considerations dictate its inclusion with the Chicago & Eastern Illinois rather than with the Coal Railway parcel.

With the Momence-State Line road the situation is quite different. This was built before the consolidation, by the Chicago & Eastern Illinois, but after a community of interest had been established between the two lines, to join a line built about the same time by the Coal Railway from Percy Junction, Ind., to the state line. The two form a line about 40 miles long (about 29 miles in Indiana and about 11 miles in Illinois) running in a northwesterly direction towards Chicago and constituting the most advantageous and logical connection of the Coal Railway for its traffic with Chicago, which is the principal market for the coal and other commodities carried by the Coal Railway. It serves to form a continuous line from Momence through Percy Junction and thence in the same general southerly direction about 100 miles further to the south terminus of the Coal Railway. That this Momence-State Line bit of road was by the Consolidated Company regarded as really a part of the general Coal Railway property is indicated in a description of it in the Bankers' Trust mortgage, where in connection with the Coal Railway from the state line to its southern terminus it was described as "a main line of railroad extending from Momence, Ill., by way of Goodland, Ind., to Brazil, Ind." There are no stations of any importance between Momence and Percy Junction, and it seems plain that severance arbitrarily at the state line would leave the Illinois stub end of practically

little value to the Chicago & Eastern Illinois and considerable of an embarrassment and loss to the Coal Railway through interference with a continuous line to its normal connection at Momence. We think that upon due protection to the lienors of the Momence end of this line, it should be included in and disposed of with the Coal Railway property.

[10] As to inclusion with the Coal Railway in the foreclosure sale of part of the equipment, what has been said respecting the Momence-State Line piece of railroad is even more applicable upon this proposition. A railroad without equipment can serve no function. While it may be said that new equipment can be acquired for the Coal Railway, this would evidently involve outlay much greater than would the retention for this road of a reasonable amount of the equipment such as has been and is in constant use thereon, and is adapted to its needs. The equipment found to be subject to the lien of the Central Trust mortgage as described in section II of article XXXVII of the decree of sale, and ordered sold with the Chicago & Eastern Illinois parcel, comprises some 23,300 units, and has been and is in use over and for the entire system, including the Coal Railway. Doubtless some of it has long been used exclusively in the operation of the Coal Railway. If all is to be withdrawn from the Coal Railway division, the Coal Railway will have none at all, while the Chicago & Eastern Illinois will have for its use all that theretofore served both itself and the Coal Railway. The Central Trust and Bankers' Trust bondholders cannot as such have any interest in depriving the Coal Railway of all equipment, so long as it realizes to them its fair value, and does not through the manner of its disposition impair the value of the other property upon which their obligations are secured. As the Coal Railway has been and is now equipped with a portion of this equipment it cannot be said that the remaining part of the system will be in any manner injured if a due portion of the equipment is sold with the Coal Railway.

As to the railroad from Momence to the state line, and equipment for the Coal Railway, the decree of sale should be modified so as to provide that the railway, from its junction with the Chicago & Eastern Illinois main tracks at Momence to the Indiana state line, and all right of way, stations, depots, structures, telegraph and other appurtenance thereto, be, under the direction of the district court, fairly appraised, and that under same direction there be set apart from the equipment found in the decree to be subject to the Central Trust mortgage lien, an amount thereof reasonably necessary and suitable for the operation of the Coal Railway as a going operating road, having reference also to the operating needs of all the divisions now being served by all of such equipment; and that under the direction of the court the equipment so set apart for the Coal Railway be appraised at its fair market value; that thereupon within a time to be fixed in the decree, appellant indicate as the district court may direct, whether or not the Momence-State Line road, or the equipment set apart, or both are acceptable at such appraised values, and if acceptable, they or such as is acceptable, be accordingly included and offered for sale with said Coal Railway; and upon the sale thereof, before any part of

the proceeds of same is applied upon the Metropolitan Trust debt, the amount or amounts of such appraised valuations shall be retained by the master out of such proceeds, to stand in lieu of and in the substitution for said Momence-State Line road and the said equipment so set apart, the amount so retained to be subject to the liens as now fixed in the decree upon the railroad and equipment; and if the acceptance of appellant as above provided for is not forthcoming, the railroad or equipment as to which the acceptance is not made shall not be so included with the Coal Railway, but shall be disposed of in the manner provided in the decree; the expense of such setting apart and appraisements to be borne by appellant, unless before this is done appellant shall file its disclaimer of any claim for such inclusion of the Momence-State Line road, or equipment, or both. In the case of such inclusion with the Coal Railway of the Momence-State Line road, or equipment or both, the decree should be further correspondingly modified as to the upset prices therein fixed, and in other respects where necessary to conform.

The cause is remanded with instructions to so modify the decree of foreclosure as to make it conform hereto. In the other respects the decrees are affirmed. Two-thirds of the costs of the appeals shall be paid by appellant, and one-third by appellees.

On the argument Judge KOHLSAAT sat with the court, but he died before the opinion was prepared.

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NAVASSA GUANO CO. v. COCKFIELD et al.

(Circuit Court of Appeals, Fourth Circuit. April 3, 1918.)

No. 1578.

1. EVIDENCE ⊂=68—PRESUMPTION—NATURAL CONSEQUENCES OF ACT.
A person is presumed to intend the natural consequences of his acts.

2. FRAUDULENT CONVEYANCES ⊂=139—FORM OF TRANSFER—INSURANCE PREMIUMS—RIGHTS OF CREDITORS.
Where insured, knowing that he was insolvent and realizing he was about to die within a few days, attempted to change beneficiary of his policy, making it payable to his brother, instead of his legal representative, the transaction was fraudulent as to his creditors, although he did not intend to defraud creditors, and although policy by its terms had no surrender value; only two annual premiums having been paid thereon.

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Suit by the Navassa Guano Company against Elle Nixon Cockfield and George W. Dickson, as executors of the will of S. R. Cockfield, deceased, and others. Decree (244 Fed. 222) for defendants, and plaintiff appeals. Decree reversed in part, and cause remanded, with direction.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Philip H. Arrowsmith, of Lake City, S. C., and Henry E. Davis, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for appellant.

A. C. Hinds, of Kingstree, S. C. (Kelley & Hinds, of Kingstree, S. C., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The material facts appear to be these: On February 5, 1916, S. R. Cockfield, of Johnsonville, S. C., insured his life for $6,000, payable at his death to his legal representatives, and paid the first annual premium of $185.70. The policy contained this provision:

"The insured may, at any time while this policy is in force, by written notice to the company at its home office, change the beneficiary or beneficiaries under this policy, such change to take effect only upon the indorsement of the same on the policy by the company."

On February 5, 1917, the insured paid the second annual premium, partly by note secured by the policy, and thereby continued the insurance in force for another year. Three days later, February 8th, he was stricken with a serious and, as it proved, fatal illness. The next day, the 9th, or later, he wrote the insurance company:

"Inclosed please find policy 29888, which you will change the beneficiary and make it payable to Reamer L. Cockfield, related to me as brother. Please attend to this and return to me promptly."

Under date of the 13th, the company acknowledged receipt of the policy and request, and added:

"We attach a formal request to be complied with for this purpose. Have your signature witnessed by a disinterested party, return to us, and the matter will have our immediate attention. In the meantime your policy will be held in abeyance."

The insured died on the 16th of February, without having executed the "formal request." It is admitted that he was insolvent when his letter to the company was written and at the time of his death. Reamer L. Cockfield, the brother named in the letter, was a physician, and as such attended the insured in his last illness, and the trial court found in effect, and upon ample and convincing testimony, that S. R. Cockfield, when he wrote the insurance company, had been advised by his brother that his illness would probably terminate fatally. In a word, we take it to be established that the insured changed the beneficiary named in his policy, or attempted to do so, with full knowledge of his insolvency and in anticipation of death within a comparatively short time.

The suit is brought, as the decree appealed from succinctly states, "to subject the proceeds of this insurance policy, which the insurance company admits to be due and payable to the party who may be lawfully entitled, to the payment of the creditors of S. R. Cockfield, upon the ground, first, that the transfer was invalid, null, and void as to creditors, and, next, that in any event the transfer was insufficiently executed, so as to pass the title of the policy, and it still remains the

property of the estate of S. R. Cockfield, and should be administered as such, and applied to the payment of his creditors." The court below sustained the transfer of the policy and awarded the proceeds to the transferee, Dr. Cockfield, less so much as represents the premiums paid by the insured in his lifetime, which was directed to be turned over to his executors. The decree distributes the insurance money accordingly, and the creditor appeals.

We put aside, without expressing any opinion, the contention of appellant that the attempted change of beneficiary was ineffectual for any purpose, in order to decide the case upon the assumption that the letter written to the company by the insured a few days before his death effected a valid transfer of the policy and its proceeds, except as against the rights of creditors. The argument in behalf of appellee rests upon the proposition that, inasmuch as the policy by its terms had no cash surrender value, only two annual premiums having been paid, its transfer to the brother diverted nothing of value from the insured's estate, and this we apprehend is the crux of the case. Some support is sought by analogy in that section of the Bankruptcy Law which provides for the disposition of insurance on the life of a bankrupt, and under which it is held that a policy having no surrender value does not pass as an asset to the trustee. Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148. But this is not a bankruptcy proceeding, and it seems manifest that the statutory right of a trustee in such case cannot measure or affect the right of creditors in a suit like this to reach the proceeds of a policy on the ground that as to them it has been fraudulently transferred. The only law here applicable is the statute of Elizabeth, which upon this issue is the common law of South Carolina.

[1, 2] Granting, however, the principle invoked by the appellee, that a policy without surrender value may be validly transferred even as against creditors, we are not prepared to hold that the policy in question had no surrender value at the time of its transfer. If the insured had then been in his usual health, with the normal expectation of life, his estate would not have been depleted by a change of beneficiary, and creditors could not justly complain. In that case the transferee might have taken a burden, instead of a bounty, because of the probability that an indefinite number of premiums would have to be paid. But the situation here is altogether different. The insured knew that he was about to die; he had been told so by his brother. He therefore knew, or at least supposed, that presently, and long before another premium would be payable, the full amount of his policy, less the small note secured thereby, would come into the hands of his executors and be subject to the claims of creditors. The only reasonable inference is that in these circumstances he undertook to turn over to his brother, to whom it was a pure donation, the insurance money which otherwise would go to the payment of his debts. This being so, we think it cannot be said that the transferred policy was valueless. On the contrary, as it seems to us, the fact of impending death, the practical certainty that the life of the insured would end within a few days, operated to remove the element of con-

tingency, and gave to the policy at the time of its transfer an actual pecuniary value closely approximating its face amount. The terms of the policy relating to surrender value may be controlling, when the insured entertains the ordinary expectation of life; but they should not be permitted to shield a gratuitous transfer to the prejudice of creditors, when he knows that death is an early certainty. Nor can the transfer in question be defended on the ground of difference between conscious and constructive fraud, for it is familiar doctrine that every man must be presumed to intend the natural consequences of his acts. The insurance procured by Cockfield was by his direction made payable to his legal representatives, and it thereby became, whatever its value, an asset of his estate. When he sought to change the beneficiary, he knew that death was near, and that the proceeds of the policy, if not transferred, would soon be paid to his executors; and he was therefore chargeable with the results of his action, even if he lacked the intention of defrauding his creditors. In short, we are convinced that the transaction under review was fraudulent as to creditors and must be so adjudged.

And this conclusion is sustained, as we think, by the clear weight of authority. A case directly in point is Stokoe v. Cowan, 29 Bevan, 637. The facts are strikingly similar. Cowan had two policies upon his life, one taken out in April, 1857, the other in June, 1858, both payable to his estate. On November 9, 1859, he assigned them absolutely to his mother, to whom they had been previously pledged for a small amount. He died insolvent on the 3d of December following. Stokoe, a creditor at the time of the assignment, brought suit to set it aside. At the time of the transfer Cowan was ill with consumption, and it was known by those about him that he could live but a short time longer. The same defense was set up as here, that the policies were of little or no value; the assignee being liable to pay the premiums, and their value therefore depending entirely upon the amount of future payments. But the Master of the Rolls, in a brief but very explicit opinion, held that the assignment could not stand as against creditors, and gave the plaintiff a decree for the full amount of the policies, less the sum for which they were pledged, saying, among other things, that:

"The value of a policy does not depend so much on the number of payments made, as on the age of the insured and the state of his health at the time the assignment takes place."

To the same effect is another English case decided a few years later, Freeman v. Pope, L. R. 9 Eq. 206, which is cited with approval in Central Bank of Washington v. Hume, 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370. In the latter case the Supreme Court said (128 U. S. pages 204 and 207, 9 Sup. Ct. 44, 45 [32 L. Ed. 370]):

"In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of

such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of boun'. Freeman v. Pope, L. R. 9 Eq. 206. * * * The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. * * * The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts."

We regard these authorities as decisive of the instant case and further discussion appears unnecessary. It follows that the decree appealed from, so far as it awards any portion of the insurance money, to the appellee, must be reversed, and the cause remanded, with instructions to enter a decree in accordance with the views herein expressed.

Reversed.

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## LE MORE et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. July 29, 1918. Rehearing Denied November 9, 1918.)

No. 3188.

1. CRIMINAL LAW ⟸619—CONSOLIDATION OF INDICTMENTS—DISCRETION.
   The trial court may, in its discretion, consolidate several indictments before trial, and try the same together.
2. POST OFFICE ⟸49—SCHEME TO DEFRAUD—EVIDENCE.
   In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for use of the mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with bills of lading attached were negotiated, though persons on whom drafts were drawn accepted them knowing all circumstances, *held*, that evidence was sufficient to go to jury.
3. POST OFFICE ⟸35—OFFENSES—SCHEME TO DEFRAUD.
   To sustain a conviction under Pen. Code, § 215 (Comp. St. 1916, § 10385), denouncing use of mails in connection with a scheme to defraud, proof only of the devising of the scheme or artifice to defraud, without proof that any one was defrauded, is sufficient.
4. CRIMINAL LAW ⟸822(1)—INSTRUCTIONS AS A WHOLE.
   An extract is not to be considered apart from the charge, and error cannot be predicated thereon where the charge as a whole is correct.
5. CRIMINAL LAW ⟸829(1)—REFUSAL OF REQUESTS.
   The refusal of requests to charge, covered substantially by the charge given, is not error.
6. CRIMINAL LAW ⟸829(8)—INSTRUCTIONS—GOOD CHARACTER.
   Where the court correctly and fully charged on good character, the refusal of a requested charge that good character itself might generate a reasonable doubt of guilt *held* proper.
7. CRIMINAL LAW ⟸393(2)—EVIDENCE COMPULSORILY PRODUCED.
   In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with scheme to defraud, books of ac-

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

count of partnerships in which defendants were partners, which were produced by the trustee in bankruptcy of the firms, who had taken possession of them, held admissible over objections that they were compulsorily produced.

8. POST OFFICE ⟸49—OFFENSES—EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, where defendants contended that money obtained, etc., went into firms of which they were members, *held* that the government could show the amounts defendants drew from such firms, etc.

9. CRIMINAL LAW ⟸351(10)—ATTEMPT TO DESTROY EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby ocean carriers were induced to issue bills of lading though no shipments were delivered, etc., a cablegram sent by one of the defendants directing destruction of bills of lading, etc., *held* admissible against him, being an attempt to destroy evidence.

10. CRIMINAL LAW ⟸371(1)—EVIDENCE—OTHER OFFENSES—INTENT.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby ocean carriers were induced to issue bills of lading though no shipments were delivered, etc., proof of the use of other bills of lading, to cover which no goods were shipped, was admissible on the issue of fraudulent intent, the evidence not being confined to transactions set out in the indictment.

11. CRIMINAL LAW ⟸448(12)—OPINION—EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with the bills of lading attached were negotiated, etc., testimony by bankers that they would not have made advances had bills not been attached, or had they known no goods were shipped, was admissible, being evidence of effect of recitals according to course of business of bankers, rather than mere opinion as to effect in a specific instance.

12. CRIMINAL LAW ⟸448(3)—EVIDENCE—INTENT.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with bills attached were negotiated, etc., testimony that witness did not personally expect to make shipments when he drew bills was not incompetent, as a statement of opinion, where answer was limited to his own expectation, and amounted to no more than that witness gave no instructions for shipment when he drew the bills.

13. POST OFFICE ⟸49—OFFENSES—EVIDENCE.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, whereby defendants induced ocean carriers to issue bills of lading though no shipments were delivered, and drafts with the bills of lading attached were negotiated, etc., *held*, that testimony that witness drawing bills of lading declined to accept power on ground bills of lading were not regular was admissible on question of defendant's intent.

14. WITNESSES ⟸277(4)—CROSS-EXAMINATION OF ACCUSED—SCOPE.
Where a defendant charged with violating Pen. Code, § 215 (Comp. St. 1916, § 10385), by using mails in connection with scheme to defraud, whereby ocean carriers were induced to issue fraudulent bills of lading, which were attached to drafts that were negotiated, testified that acceptors who understood transaction were able to pay, etc., cross-examination as to amount of acceptances was not objectionable as relating to matter not brought out on direct examination.

15. WITNESSES ⟸277(1)—CROSS-EXAMINATION OF ACCUSED—DISCRETION.
Where a defendant voluntarily takes the stand he waives his constitutional privilege, and the extent of his cross-examination is a matter for the discretion of the trial judge.

16. CRIMINAL LAW ⟸721(2)—ARGUMENT—DEFENDANT'S FAILURE TO TESTIFY.
Where defendant took the stand, but was prevented from answering questions on cross-examination by objections that they did not come within the scope of the direct examination, the prosecutor could comment in his argument on defendant's failure to answer.

17. CRIMINAL LAW ⟸722½—ARGUMENT—OTHER OFFENSES.
In a prosecution under Pen. Code, § 215 (Comp. St. 1916, § 10385), for using the mails in connection with a scheme to defraud, etc., where defendants, who had become bankrupt, contended that moneys realized from the scheme went into their business, argument of the prosecutor as to disposition of the proceeds, *held* warranted, not being in effect an attempt to charge defendants with the offense of concealment in bankruptcy.

18. CRIMINAL LAW ⟸1134(4)—MOTION FOR NEW TRIAL—REVIEW.
The overruling of defendant's motion for new trial cannot be reviewed on writ of error.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Albert Le More and Edward E. Carriere were convicted of having devised a scheme or artifice to defraud, etc., in violation of Penal Code, § 215, and they bring error. Affirmed.

Charlton R. Beattie, of New Orleans, La., George Wesley Smith, of Rayville, La., and Michel Provosty, of New Orleans, La., for plaintiffs in error.

Jos. W. Montgomery, U. S. Atty., of New Orleans, La.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

GRUBB, District Judge. [1] 1. The plaintiffs in error were convicted of having devised a scheme or artifice to defraud in violation of section 215 of the Penal Code (Act March 4, 1909, c. 321, 35 Stat. 1130 [Comp. St. 1916, § 10385]). They were convicted under two indictments, which were consolidated before trial, and tried together. Plaintiffs in error objected to the consolidation, and assign the order of the court directing the consolidation as error; but this was a discretionary matter, and no abuse of discretion is shown in the record.

[2, 3] 2. The plaintiffs in error also assign as error the refusal of the District Court to direct a verdict of acquittal. Section 215 requires of the government, in order to prove its case, to establish but two things: The forming or devising a scheme to defraud, and the deposit in the post office of a letter to effectuate the scheme. Among other classes of frauds mentioned in the section is devising of a scheme to defraud by means of false representations, and this is the class of fraud relied upon by the government in this case for conviction. No questions presented by the appeal relate to the second proposition, i. e., the use of the mails by the plaintiffs in error. It is denied by them that they devised any scheme to defraud the parties they are alleged in

the indictments to have intended to defraud. The scheme relied upon by the government was, briefly stated, this: The plaintiffs in error were engaged in the business of exporting staves from the ports of Mobile and New Orleans to European countries, and had been so engaged for many years before their bankruptcy. The staves were exported by them to three or four regular consignees, among whom was the firm of B. Gairard Fils, in Paris. They had also formed a branch in England, which did business under the name of the Liverpool Stave Company, and to which they consigned staves. When they shipped staves the course of business was to draw on the consignee, with bill of lading for the staves attached to the draft, and to procure bankers in this country or abroad to purchase or discount the drafts. The drafts were time drafts, which required acceptance by the consignee on presentation. Payment followed in 60 or 90 days after acceptance. The bills of exchange had attached to them a slip, directing delivery of the attached bill of lading to the acceptor, upon his acceptance, and the course of business was to make delivery of the bill of lading to the consignee, upon his acceptance of the draft and bill of exchange, and he thereby acquired title to the staves, if any were shipped. For many years before the bankruptcy of the firms of which the plaintiffs in error were the members a practice had sprung up between these firms and two steamship lines, the Austro-American Steamship Company and the Vogeman Line, to issue bills of lading to the firms of plaintiffs in error for staves when no staves had been in fact received by the steamship company for transportation, upon a letter of the plaintiffs in error guaranteeing future delivery of staves of the quantity and description set out in the bill of lading. Certain of the consignees were privy to this course of business. The evidence tended to show, with reference to the Austro-American Line, at least, that it made an endeavor to locate on the yard of plaintiffs in error in New Orleans, which was opposite the steamship company's dock, staves corresponding to the requirement of each bill of lading, and to identify them. However, the staves were never delivered on shipboard in a large majority of cases during the last years of the firms' history. Instead of shipping the staves to the consignee, in pursuance of the bill of lading, when the draft drawn on the consignee was presented to him for acceptance he accepted the draft, detached the bill of lading, and surrendered it either to the officers of the steamship company at European port of destination or returned it to the plaintiffs in error's firm in this country, and they in turn surrendered it to the steamship company's agents at point of shipment. Upon receipt of the bill of lading the steamship company surrendered the letter of guaranty which they had taken to secure delivery of the staves to the plaintiffs in error or their firm. Upon receiving each bill of lading plaintiffs in error drew against the consignee mentioned in it for the purchase price of the supposed shipment, attached the bill of lading evidencing the shipment to the draft, presented the draft, with bill of lading attached, to some banker for discount, and received the proceeds of the draft from the banker. The banker thereupon forwarded the draft and bill of lading to the consignee, through its correspondents, and procured the acceptance of the

draft by the consignee, and the consignee, upon presentment of the draft for payment, would pay it, though he had never received any staves at all. All the drafts which were the basis of all the counts in both indictments had been presented and accepted in this way, though no shipments of staves had been made to answer the requisition of the bills of lading. In the years during which this practice was pursued drafts amounting to $16,000,000 had pursued this course. Many of these drafts were paid by subsequently drawn drafts, which were, in effect, renewals of the previously drawn drafts. This course of business was in this way prolonged. The drafts against which no shipments of staves were made, and which were not mere renewals, represented unsecured loans to the drawers. At the time of the bankruptcy there were outstanding, accepted but unpaid, drafts in an amount largely in excess of a million dollars, B. Gairard Fils having accepted over a million of this amount. The death of the senior Gairard precipitated the crisis, resulting in the failure of his firm, and as well that of the other consignees, the Liverpool Stave Company, the Association Industrielle Française of Paris, Coulon, Berthoud & Co., and Fry, Miers & Co. of London, and thereafter the partnerships of which plaintiffs in error were members. The holders of the drafts, which were outstanding, accepted, but not paid, were unable to obtain payment either from the bankrupt drawers or drawees, and had no recourse against the bills of lading or their contents.

The positions of the plaintiffs in error are twofold. They say no fraud was committed by them because the evidence shows that they intended that the drafts should be paid by the acceptors, and were reasonably justified in believing that they would be paid from the fact that over a course of previous years similar drafts had been paid in every case, though they had aggregated millions, and because the consignees were wealthy business men, who were supposed to be amply able to respond to liabilities such as were represented by their acceptances. They further say that, conceding a fraud was committed by the false representation contained in the bill of lading attached to the drafts, and to cover which no goods had been delivered to the issuing steamship company for transportation, the persons defrauded were not the bankers who discounted the drafts, as the indictments charged, because the law and the direction contained on the slips attached to the drafts advised them that the bills of lading were security for the acceptance only of the drafts, and not for their payment, and because all the drafts set out in the indictment were in fact accepted, and the bills of lading delivered to acceptors for their disposition, and it was immaterial to the bankers, after acceptance, whether the bills of lading were true or false. They also say that, according to the course of business, the bankers invariably exacted of the consignees either an acceptance on the draft itself, or a cabled agreement to accept, which was its equivalent, before any money was advanced on the faith of them.

As to the first contention, the fraud asserted by the government against the plaintiffs in error was not the drawing of the drafts and obtaining the proceeds of the discount thereof, intending not to pay the drafts, either primarily through the acceptors or secondarily them-

selves. If it had been, an expectation, actually and reasonably entertained by the drawers that the acceptors were able and willing to pay the drafts, might have deprived the transaction of a fraudulent intent to obtain the proceeds of the discount of the drafts, expecting the drafts not to be paid. The fraud relied upon, however, consisted in an alleged false representation contained in the bills of lading, materially affecting the ability of the acceptors to pay the drafts, and inducing the bankers to part with their money, when they might have been unwilling to do so if no such representations had been made. The bill of lading recited the delivery by plaintiffs in error to the issuing steamship company for transportation to the consignee and drawee of staves in value equal to the amount of the draft.

As to the second contention, such representation might constitute a material inducement to the bankers to advance on the drafts in two ways: First, it was an assurance that the drawee would be put in funds from the proceeds of the sale of the staves when received sufficient to take up the drafts, and, second, it gave to the numerous transactions evidenced by the drafts and bills of lading the appearance of regular purchases of merchandise by the drawers, and the means of paying the sellers in a commercially recognized and customary way, when in truth and in fact the transactions were not purchases of staves by the drawees, but mere unsecured loans to the drawers from the drawees, under the disguise of regular dealings between seller and buyer of merchandise.

The function of the bills of lading was not altogether limited to that of security for the acceptance of the draft. Conceding that the bankers were not entitled to look to the bills of lading as security for either the acceptance or payment of the drafts, we still think that the recital might well constitute a material representation (1) that the acceptor would have funds with which to pay the draft when it matured, and (2) that the transaction was one in the regular course of mercantile business, and not an irregular way of borrowing money without security. If the representation was false, in that no staves were intended to be shipped when the bills of lading were issued and presented to the bankers with the drafts, then it was probable that the bankers would be defrauded in either of the ways stated by such false representations. Again, the offense created by section 215 requires proof only of the devising of a scheme or artifice to defraud. It does not require the government to establish that any person was actually defrauded by the scheme. In this it differs from the offense of obtaining money or property by false pretenses. Even though the drafts, the basis of the various counts in the indictment, were in fact accepted before the banks made advances on them, and even though such had been the usual course of business, it would not follow necessarily that the plaintiffs in error knew that acceptances would always precede advances, when they formed or designed the scheme, so as to exclude all idea that the plaintiffs in error anticipated that the bankers might rely upon the security of the bills of lading pending the time they made the advances and the time of acceptance. We think the jury were authorized to infer that the alleged false representations in the bills of lading were of a

character calculated to deceive and defraud the bankers who advanced on the faith of them, and this though the bills of lading were security for the acceptance only, and not for the payment of the drafts.

If the plaintiffs in error devised a scheme to deceive by false representations the takers of the drafts as to a material fact, affecting the ability of the acceptors to pay the drafts, or affecting the value of the security accompanying them, or the regularity of the transaction evidenced by them, and which was calculated to deceive them and induce them to discount the drafts, when otherwise they would not have done so, we think a case would be made out under section 215 of the Criminal Code, though the plaintiffs in error believed, and had reasonable grounds for believing, that the drafts would be accepted and paid by the drawees. The bankers would have been defrauded by a false representation that induced them to believe they were getting something more secure than they actually got, and the forming of a plan to do this by means of false representations would be the devising of a scheme to defraud within the express terms of section 215.

The presentation to a bank for discount of a draft with a bill of lading attached well could be regarded as a request to cash, or make an advance on, the price of goods shipped, and as a representation that the drawee's acceptance would amount to a promise to pay for goods actually shipped and by the delivery of the bill of lading made subject to his order. The absence, without the knowledge of the discounting bank, of a real shipment would make the discounting of the draft the financing of what appeared to be a real movement of goods, but which in reality was a mere deceptive appearance of such a transaction. On the face of it the supposed actual shipment of goods is a basis for a credit or advance so obtained, it appearing that the drawers were parting with the goods called for by the bill of lading, and that the drawee by his acceptance would be promising to pay for goods in transit consigned to him or his order. The result of such operations was that what the drawers and drawees realized from them came from the discounting banks, and not, as it appeared, from staves owned, shipped, and received.

For these reasons we do not think the District Court erred in refusing to direct an acquittal.

[4] 3. The next assignment is based on a portion of the charge of the District Judge. The part complained of is as follows:

"But if the only reason or cause of their discounting of the draft was the reason that they believed that the goods had been shipped, as set out in the bill of lading, that would be a false pretense and a fraudulent scheme, and the mailing of the letters in furtherance of that would complete a federal offense."

Taken by itself, the part complained of may omit reference to some of the elements of the offense, and, by reason of the omission, appear to lay undue emphasis on the influence the representations had on the bankers; but the extract is not to be separated from its context, nor considered apart from the rest of the charge. When considered with the rest of the charge, we see no error in it.

[5] 4. The plaintiffs in error complain of the refusal of the District

Judge to grant certain of their special requests to charge. We think the first, if abstractly correct, has no application to a case of alleged fraud based on false representations as to the shipment of goods contained in a bill of lading. The most visionary could not hope that merchandise not delivered to the carrier would reach the consignee. This was the gist of the scheme to defraud charged in the indictment.

We think requests numbered from 2 to 7, inclusive, were otherwise substantially charged by the court. They relate to the principle that the bills of lading attached to the drafts secured the acceptance and not the payment of the drafts, as was held in the case of National Bank v. Merchants' Bank, 91 U. S. 92, 23 L. Ed. 208.

Requests numbered 8, 9, and 10 predicated the guilt of the plaintiffs in error upon the belief of the jury that they entertained no reasonable expectation that the drafts would be paid when they procured their discount. We do not think they assert the law of this case.

[6] The eleventh request is to the effect that good character, when proven, might of itself generate a reasonable doubt of the guilt of plaintiffs in error. The District Judge charged fully upon the effect of evidence of good character in other respects. The plaintiffs in error rely upon the statement of the court in the opinion in the case of Edgington v. United States, 164 U. S. 361–366, 17 Sup. Ct. 72, 74 (41 L. Ed. 467), that "the circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing." What the court decided in that case was that the value of evidence of good character was not confined to doubtful or conflicting cases, or not to be considered by the jury "unless the other evidence left the mind in doubt," but that the weight of authority was to the effect that good character in any case, when considered in connection with the other evidence in the case, might generate a reasonable doubt. What the court said with reference to reputation for good character under some circumstances alone being sufficient to create a reasonable doubt, though without it the other evidence would be convincing, was said by way of argument, and not to announce a rule of law to be given in charge to the jury. We do not think that the trial judge was required to charge the jury in the language quoted from the opinion.

[7, 8] 5. (a) Exceptions to rulings on the evidence are relied upon for reversal. The District Judge permitted the government to introduce in evidence the books of account of the partnerships in which plaintiffs in error were partners. They were produced by the trustee in bankruptcy of the partnership, who had taken possession of them, as the books of the bankrupt firm. The plaintiffs in error objected to their use by the government upon the ground that they were compulsorily produced. The case of Johnson v. United States, 228 U. S. 457, 33 Sup. Ct. 572, 57 L. Ed. 919, 47 L. R. A. (N. S.) 263, holds to the contrary. Objection was also made to that part of the books which contained the personal accounts of the plaintiffs in error, upon the additional ground that such accounts were immaterial to any issue in the case. The plaintiffs in error contended that the money obtained on the irregular drafts all went into the business of the partnerships with

which they were connected. We think the government had the right to show, by way of explanation, the amounts that were drawn out of the partnerships by the plaintiffs in error, the individual partners.

[9, 10] (b) The plaintiffs in error also complain of the admission in evidence of a cablegram addressed to one Medinger at Paris, and delivered by the plaintiff in error Carriere to the witness Lambert to be coded and transmitted to the addressee. The loss of the original message was proven, and a foundation laid for the introduction of the copy. The cablegram was sent three or four days after the failure of the firms in which the plaintiffs in error were partners, and directed the addressee, their Paris representative, to get some bills of lading issued by the Austro-American Steamship Company which were supposed to be in the possession of Marquand Gairard, son of the senior partner of B. Gairard Fils, and to destroy them as soon as received. It is true these bills of lading were testified to have been others than those set out in the indictments, and it was shown that the cablegram was sent at the instance of, and in an endeavor to protect, the Austro-American Steamship Company, yet it constituted an attempt on the part of the plaintiff in error Carriere to destroy evidence, and was admissible, certainly, as against him, for that reason. Upon the issue of fraudulent intent the evidence was not confined to the transactions set out in the indictments. Proof of the use of other bills of lading by plaintiffs in error, to cover which no goods were shipped, was competent upon this issue.

[11] (c) The bankers who testified for the government, and who had made advances, were asked whether they would have made advances on the drafts if no bills of lading had been attached to them, or if they had been informed that no goods were shipped to comply with the requirements of the bills of lading, and were permitted to answer in different ways that they would not have done so. The questions were objected to as being irrelevant and calling for expressions of opinion from the witness. In a prosecution under section 215 the government is not required to show that the fraudulent scheme devised was successful, or that the party intended to be defrauded was actually defrauded. It is enough for it to show that the scheme devised was one that was calculated to defraud. The evidence should be considered as directed to the issue as to whether the representations in the bills of lading were of a nature likely to deceive, and not to the issue as to whether the witness was in fact deceived by them in the instant case, as would have been the case if the prosecution had been for obtaining money by false pretenses. The witnesses were bankers, accustomed to dealing in drafts of like kind. Their evidence was, in effect, that bankers purchasing drafts drawn for the purchase price of merchandise, with bills of lading attached, would rely upon the genuineness of the bill of lading, and the representation that the goods had been shipped, as recited by it, in buying the drafts. This did no more than state the course of business among bankers in this respect, and was testified to by witnesses who were experts familiar with the customs of bankers in such matters. We think the evidence was material upon the issue as to whether or not the recitals of the receipt of the staves in the bills of lading were calculated

to deceive purchasers of the drafts to which the bills of lading were attached, and that it was evidence of the effect of such recitals according to the course of business among bankers, rather than the mere opinion of the witness as to the effect of the representation upon him in a specific instance. But if the evidence called for by the questions objected to was subject to the objections made, the admission of it was not such error as would justify a reversal of the judgment. There was other unquestionably competent evidence to support a finding that banks applied to were likely to be influenced to discount drafts accompanied by bills of lading by a reliance on the bills of lading evidencing real shipments of goods. The other evidence disclosed by the record is such as to satisfy us that the exclusion of the testimony in question would not have resulted in a finding different from the one made. It is not reasonably supposable that, in the absence of that testimony, the jury would have failed to conclude from the other evidence adduced that the defendants would not have met with the same success in realizing on their drafts if it had been made known to the banks dealt with that the bills of lading accompanying drafts presented for discount did not represent any actual shipments of goods, and that the means of paying accepted drafts would be obtained from the same or other banks by discounting other subsequently drawn drafts, also accompanied by bills of lading which represented no actual movement of goods. It seems that it would not be going too far to say that it may be treated as a matter of common knowledge that credits or advances by banks based upon what appears to be actual movements of commodities in legitimate commerce would not be as readily obtainable if the falsity of the appearance of reality is made known when the credits or advances are applied for.

[12] (d) The witness Harris was permitted to testify that he personally did not expect to ship the staves when he drew the bills of lading, against objection that this was the statement of opinion of the witness. The answer of this witness was limited to his own expectation, and the context shows that it amounted to no more than a statement that he gave no instructions at the time he drew the bills of lading for the delivery of the staves for shipment. This appears from his testimony that "there had been shipments of staves made against the bill of lading drawn with a letter of guarantee." His testimony as to his own expectation, based on the fact that he had given no instructions to ship, was competent.

[13] (e) The same witness was permitted, against objection, to testify to a conversation between himself and the plaintiffs in error, in which he declined to accept a power of attorney from plaintiffs in error, assigning to them as his reason that he did not think the bills of lading were regular. This evidence tended to bring home prior notice to plaintiffs in error of the irregularities in the bills of lading, and was material upon the question of whether or not they intended to defraud.

[14, 15] (f) The plaintiff in error Carriere voluntarily testified in his own behalf. On cross-examination he was asked by the United States attorney as to the amount of accepted and unpaid drafts outstanding against B. Gairard Fils at the time of the failure of that firm, and also

as to the financial condition of the Liverpool Stave Company, and was permitted to answer, against the objection that it was matter not brought out upon direct examination, and on which he could not be properly cross-examined. The witness had testified on his direct examination to facts tending to sustain the ability of the two firms mentioned to pay their acceptances. It was proper cross-examination to show the amount of such acceptances and any fact tending to throw light on the financial condition of either acceptors. The plaintiff in error having voluntarily offered himself as a witness, the waiver of his constitutional privilege was complete, and the extent and latitude of the cross-examination was a matter for the discretion of the District Judge. Diggs v. United States, 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502.

[16] 6. The plaintiffs in error excepted to the closing argument of the District Attorney in two respects:

(a) Upon the comment of the District Attorney on the failure of the plaintiff in error Carriere to answer certain questions asked him on cross-examination to which objection had been sustained. The objections were based altogether upon the ground that the matter inquired about was not within the scope of direct examination of the witness. It is contended that comment on his failure to answer was in violation of his constitutional privilege.

In the case of Caminetti & Diggs v. United States, 242 U. S. 470–493, 37 Sup. Ct. 192, 61 L. Ed. 442, L. R. A. 1917F, 502, the Supreme Court, sustaining an instruction given by the District Court, that the failure of the defendant Diggs, who had taken the stand in his own behalf, to explain incriminating circumstances, might not only be commented upon by counsel, but might be considered by the jury, with all the other circumstances, as to his guilt or innocence, said:

"This instruction, it is contended, was error in that it permitted the jury to draw inferences against the accused from failure to explain incriminating circumstances when it was within his power to do so, and thus operated to his prejudice, and virtually made him a witness against himself, in derogation of rights secured by the Fifth Amendment to the federal Constitution.

"There is a difference of opinion expressed in the cases upon this subject, the Circuit Court of Appeals in the Eighth Circuit holding a contrary view, as also did the Circuit Court of Appeals in the First Circuit. See Balliet v. United States, 129 Fed. 689 [64 C. C. A. 201]; Myrick v. United States, 219 Fed. 1 [134 C. C. A. 619]. We think the better reasoning supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf, and voluntarily testifies for himself (Act of March 16, 1878, c. 37, 20 Stat. 30 [Comp. St. 1916, § 1465]), he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it.

"The accused of all persons had it within his power to meet, by his own account of the facts, the incriminating testimony of the girls. When he took the witness stand in his own behalf he voluntarily relinquished his privilege of silence, and ought not to be heard to speak alone of those things deemed to be for his interest and be silent where he or his counsel regarded it for his interest to remain so, without the fair inference which would naturally spring from his speaking only of those things which would exculpate him and refraining to speak upon matters within his knowledge which might incriminate him."

The District Court, therefore, did not err in permitting comment upon the failure of the plaintiff in error Carriere to answer material questions asked him on cross-examination, which he was prevented from answering by an objection interposed by his counsel upon the sole ground that they did not come within the scope of the direct examination.

[17] (b) The District Attorney's argument was also excepted to because he asked the jury what had become of the large amount of money, represented by the unpaid acceptances, and, answering his own question, said to the jury that he suspected some one of the defendants had gotten a large amount of money from the proceeds of the drafts. The contention of the plaintiffs in error is that this was in effect charging the plaintiffs in error with a separate offense—the concealment of assets from their trustee in bankruptcy. It is equally capable of being interpreted as an argument that the plaintiffs in error had gotten and disposed of the money before bankruptcy. The issue of what was done with the proceeds of the drafts, whether material or not, was treated as being material by both parties. The plaintiffs in error, through their counsel, attempted to show that all the proceeds of the drafts went into the stave business of the plaintiffs in error. The government, through the district attorney, argued that the plaintiffs in error individually benefited by the money, other than their benefit as members of the partnerships. There was evidence in the record from which the jury might have drawn either inference, and it was proper for the district attorney to support by argument the inference of individual appropriation. Whether plaintiffs in error derived benefit from the transactions individually or as partners seems unimportant upon the question of their guilt or innocence.

[18] 7. Complaint is made also of the overruling of the motion for a new trial, but the action of the District Judge on the motion is not subject to review by this court.

No error appearing in the record, the judgment of the District Court is affirmed.

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## TATUM v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. October 29, 1918.)

No. 3263.

1. RAILROADS ⟸305(2)—CROSSING ACCIDENTS—FRIGHTENING HORSE.
   A petition setting up injuries when plaintiff's horse and buggy collided with defendant's train, which alleged defendant's flagman gave no warning until the horse was only a few feet from the tracks, when the flagman swung his flag directly before the animal, scaring it, etc., *held* to state a cause of action for negligence.
2. PLEADING ⟸214(1)—DEMURRER—ADMISSIONS.
   A demurrer, for the purpose of the demurrer, admits as true the allegations of the pleading attacked.
3. PLEADING ⟸8(17)—CONCLUSIONS—NEGLIGENCE.
   Negligence being the ultimate fact to be pleaded, and not mere conclusions of law, a declaration or petition charging defendant with an act

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

injurious to plaintiff, with a general allegation of negligence, etc., is sufficient, at least against general demurrer, without setting forth the details of acts causing injury, unless they could not be negligent under any circumstances.

4. NEGLIGENCE ⟸56(1)—PROXIMATE CAUSE.
It is only when causes are independent of each other that the nearest becomes the causa proxima.

5. NEGLIGENCE ⟸136(9)—ACTIONS—JURY QUESTION.
In cases of doubt as to the existence of negligence, where it seems possible for reasonable men to reach more than one conclusion, the better rule is to leave the question of negligence to the jury.

In Error to the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Action by W. P. Tatum against the Louisville & Nashville Railroad Company. There was a judgment sustaining a demurrer and dismissing the petition, and plaintiff brings error. Reversed and remanded, with directions.

Reuben R. Arnold, of Atlanta, Ga., for plaintiff in error.

John L. Tye and Henry C. Peeples, both of Atlanta, Ga., and D. W. Blair, of Marietta, Ga., for defendant in error.

Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

SHEPPARD, District Judge. This is an action for damages for personal injuries to the plaintiff in error, due to a collision of plaintiff's horse and vehicle with defendant's train at the Main street crossing of the defendant's railroad in the town of Cartersville, Ga. There was a demurrer to the first petition, which was sustained, with leave to amend, which was done; the amendment not differing very materially from the averments of the original petition, except that the allegation in the fifth paragraph of the first pleading that "the horse took fright at an automobile and began to run towards the railroad crossing, near which the watchman flaunted his red flag, which caused the horse to shy to the right, striking a large rock, in connection with the smoke of a passenger train," is auspiciously "stricken."

In the amended pleading no allusion is made to an automobile scaring the horse, nor, indeed, that the horse was frightened, nor that the horse "in its fright had gotten completely beyond control of plaintiff," nor that "connection with the smoke of a passenger train" had anything to do with the collision.

In the last paragraph of the amendment, the plaintiff attempts to lay aside the "weights that doth so easily beset," by striking all allegations in the original petition which are "inconsistent with this amendment." To this method of pleading, we note in passing, the defendant properly complains under one assignment of its demurrer.

The second pleading, which is styled "Amendment to Declaration," omitting for the sake of brevity and perspicuity the argument and evidence with which it bristles, states in substance that plaintiff was driving a horse attached to a buggy on Main street in the town of Cartersville, towards the railroad crossing on said street; that Main street

is straight for 250 yards in the direction from which plaintiff was approaching; that defendant maintained a watchman at said crossing, who had a clear view of the plaintiff the distance of 250 yards. One hundred and sixty feet from the crossing in the direction from which plaintiff was approaching was the intersection of Main and Public Square streets, the latter 90 to 100 feet wide. When plaintiff reached this street, the horse was going at a brisk trot, but under "perfect control," and could have been checked up or easily turned into Public Square. While plaintiff was traversing the street the said distance of 250 yards, plaintiff was in full view of the crossing, which was clear. The watchman, who was standing near the crossing, had a clear view of plaintiff's horse and buggy coming in his direction for a distance of 250 yards. The customary warning to persons of the approach of trains or danger was to step to the center of the crossing and to wave a red flag. While plaintiff was driving down toward the crossing the distance before mentioned, the watchman, facing in his direction, stood with his stop signal "down by his side," which was notice, if not an invitation, to the plaintiff that the crossing was clear. At that time the train approaching the Main street grade crossing could have been seen by the watchman a quarter of a mile away. Plaintiff's view of the track in the direction from which the train was coming was obstructed by buildings and box cars, and by the exercise of ordinary care he could not have known of the approaching train. The train gave no signal of its approach, and, notwithstanding the watchman's opportunity to signal plaintiff when he was as far as the intersection of Public Square street 150 feet away, or to have given him timely warning, he permitted plaintiff to approach within 25 or 30 feet of the crossing, when suddenly he sprang in front of the horse, violently gesticulating and waving a "huge red flag," which frightened the horse and caused it to swerve to the right 20 to 30 feet, where the buggy struck a large boulder, when the horse swerved again to the left and sprang onto the track, where the buggy was demolished by the passing train, from which plaintiff sustained his injuries.

Plaintiff alleges as concurrent acts of negligence, in addition to the foregoing, defendant's failure to observe the blow-post law of Georgia, a violation of the speed ordinance of the town of Cartersville, and failure to keep a lookout on the engine of the train. In view of the conclusion reached upon the negligent acts here summarized, only brief notice later need be taken of the concurrent acts of negligence.

[1, 2] Defendant demurred to the petition as amended, specifying many grounds, which altogether amount to a general demurrer, to the effect that the amended pleading stated no cause of action. The court sustained the demurrer and dismissed the petition, and this order is assigned here as error. The question, then, presented upon this assignment, is: Does the amended declaration state a cause of action? Do the acts of negligence alleged in the amended pleading, which for the purpose of the demurrer are admitted to be true, raise a question of fact which entitles plaintiff to the intervention of a jury?

[3] There is no hard and fast rule for pleading negligence. The general rule is well stated in 29 Cyc. 570:

"A complaint or petition in an action for negligence must show negligence on the part of the defendant. * * * The rule sustained by the weight of authority is that, negligence being the ultimate fact to be pleaded, and not mere conclusions of law, a declaration or complaint charging defendant with an act injurious to plaintiff, with a general allegation of negligence in the performance of the act, is sufficient, at least against a general demurrer for want of facts, without stating details or particulars of the act causing the injury, unless the particular acts alleged are such that they could not be negligent under any possible state of facts or circumstances probable under the allegations of the complaint."

The instant declaration sets forth facts with unnecessary detail, but if the facts alleged are sufficient to make a prima facie showing of negligence against the railroad company, and unless the acts pleaded actually refute the charge of negligence, it is sufficient to warrant a submission of the facts to a jury to determine whether there was negligence. Then, if plaintiff has disclosed by his statement of the facts any acts or conduct on the part of the defendant's servants, showing negligence prima facie, it would seem, under the authorities, sufficient to withstand a general demurrer.

From a fair analysis of the amended declaration we find that the defendant company kept a watchman at the crossing in question to warn travelers of the approach of trains, and according to the declaration his sins and defaults were more serious because of the fact that they were more of commission than of omission. When we examine for the primary cause of the collision between the train and the horse and buggy, we are informed from the pleading that it was the frightened horse. What caused the horse to take fright? We ascertain likewise that it was the conduct of the watchman. In what respect? The frantic waving of the "red flag" before the horse's face.

It is a reasonable inference from the facts alleged that a horse under "perfect control," moving even at a brisk trot, could have been checked with the reins in the distance of 25 feet upon a timely signal to the driver. At least the averments of the amended petition would support a reasonable inference that the watchman failed to flag plaintiff, when he knew or ought to have known of the probable danger, when he saw plaintiff coming 150 feet away. According to the declaration, the watchman was, or should have been, cognizant of the approach of the train, and knew, or should have known, of the obstructions alleged to have obscured plaintiff's view of the track. The plaintiff, seeing the watchman at the crossing, could well have relied on him for warning, and the described attitude of the watchman while in clear view of the plaintiff's approaching vehicle may have been sufficient to have relieved plaintiff of the obligation to "stop, look, and listen."

A jury might conclude, from the facts disclosed by the declaration, that the demeanor of the watchman at his post of duty was an invitation to plaintiff to proceed with impunity to the point, at least, where the course of the horse was suddenly diverted, within 25 to 30 feet of the track. Even this distance away might have sufficed for stopping the horse, but what the watchman actually did, according to the story of the pleader, was extraordinary. After seeing the horse and buggy

come down the street for 250 yards, the watchman waited until the animal was within 25 to 30 feet of the crossing to make a demonstration of warning, which, if the allegations are true, was well calculated to excite the horse beyond control, and render defendant responsible for the natural consequences of such fright. The act of the horse swerving back in the direction of the track after contact with an obstruction could not be said to be beyond the reasonable and legitimate consequences of such a stop signal. Can it be said, from the acts alleged, that the conduct of the watchman, under the circumstances, was that of a reasonably prudent person? If not, then the question whether there was negligence was one of fact, properly to be submitted to a jury.

[4] The swerving back of the horse onto the track by impact of the buggy with the boulder, after its direction was diverted, was a condition subsequent to the cause. It may be that the watchman's act produced the fright which necessarily set the cause of the collision in operation. It is only when the causes are independent of each other that the nearest becomes the causa proxima. Milwaukee, etc., R. Co. v. Kellog, 94 U. S. 469, 24 L. Ed. 256; Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395.

[5] Whether the conduct of the watchman, under the circumstances of the case, was that of a reasonably prudent man, in the exercise of ordinary care, we think was not a question of law, but of fact. We cannot say that a jury of reasonable men could reach but one conclusion upon the facts of this case. Even in cases of doubt as to the existence of negligence, the better rule, it seems, is to leave the question of negligence to a jury to determine. Richmond v. Powers, 149 U. S. 43, 13 Sup. Ct. 748, 37 L. Ed. 642; McDermott v. Severe, 202 U. S. 600, 26 Sup. Ct. 709, 50 L. Ed. 1162.

Without adverting to the concurrent causes of negligence alleged, since the case must be sent back, further than to say that negligence predicated on the violation of statutes and ordinances is generally facts for the jury (Grand Trunk v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485), we conclude that there are sufficient acts of negligence charged against the watchman to have warranted the submission of the facts to a jury.

If the defendant should apprehend embarrassment in the preparation of its defense, as indicated by the demurrer, by inconsistent allegations of the complaint or other matters not of substance, it is enough to say that special demurrers are available under the Georgia practice, by which the vice, if any, may be corrected in the trial forum.

The judgment below is reversed and remanded for further proceedings not inconsistent with this opinion. It will be so ordered.

## DOE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 28, 1918.)

Nos. 5196, 5197.

1. INDICTMENT AND INFORMATION ⟸99—DESCRIPTION OF OFFENSE—REFERENCE TO OTHER COUNTS.
   That a count in an indictment is bad does not affect the propriety of references in other counts to facts stated therein to avoid repetition.
2. CRIMINAL LAW ⟸984—SENTENCE—LEGALITY.
   Where a verdict of guilty is rendered upon all the counts of an indictment, and the sentence imposed does not exceed that which might properly have been imposed under any one count, the sentence is good, if any count is sufficient.
3. INDICTMENT AND INFORMATION ⟸110(3)—ESPIONAGE ACT—LANGUAGE OF STATUTE.
   An indictment, under Espionage Act, tit. 1, § 3, for willfully obstructing the recruiting or enlistment service, is sufficiently specific, if it charges the offense in the language of the statute.
4. CRIMINAL LAW ⟸1036(8) — FEDERAL COURTS — REVIEW BY APPELLATE COURT.
   It is within the sound discretion of the Circuit Court of Appeals to notice the claim of counsel for a convicted defendant that there was no evidence to sustain the verdict, although the question was not raised in the trial court.
5. ARMY AND NAVY ⟸40—ESPIONAGE ACT—WILLFULLY OBSTRUCTING RECRUITING SERVICE.
   Evidence *held* sufficient to sustain a conviction for willfully obstructing the recruiting and enlistment service of the United States.
6. CRIMINAL LAW ⟸24—INTENT—PRESUMPTION FROM UNLAWFUL ACT.
   A defendant must be presumed to have intended the legitimate and necessary consequences of his willful and deliberate acts.
7. ARMY AND NAVY ⟸40 — ESPIONAGE ACT—RECRUITING SERVICE — "OBSTRUCT."
   The word "obstruct," as used in Espionage Act, tit. 1, § 3, making it an offense to obstruct the recruiting or enlistment service, should be given a broad meaning, and includes to hinder, impede, embarrass, and retard, in whole or in part.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Obstruct.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Criminal prosecution by the United States against Perley B. Doe. From a judgment of conviction, defendant brings error. Affirmed.

F. T. Johnson, of Denver, Colo. (S. H. Johnson, of Denver, Colo., on the brief), for plaintiff in error.

Harry B. Tedrow, U. S. Atty., of Denver, Colo.

Before CARLAND and STONE, Circuit Judges, and ELLIOTT, District Judge.

CARLAND, Circuit Judge. Doe was charged in two indictments, No. 3105 and No. 3106, with violating section 3, title 1, and section 3, title 12, Act of Congress June 15, 1917 (40 Stat. 217, c. 30). Each indictment contained three counts. The indictments were consolidated for the purpose of trial, and the defendant was found guilty upon each count, and a general judgment was entered on each indictment; the

sentences of imprisonment to run concurrently. The indictment was attacked by demurrer and motion in arrest, on the ground that neither of the counts of the indictments stated facts sufficient to constitute an offense against the United States. The third count of indictment 3105 was in the following language:

"That said Perley B. Doe, on, to wit, November 26, A. D. 1917, at the city and county of Denver, in the state and district of Colorado, and within the jurisdiction of this court, the United States then and there being at war with the Imperial German Government, pursuant to a joint resolution of the Congress of the United States, approved by the President of the United States April 6, 1917, did feloniously and willfully obstruct the recruiting and enlistment service of the United States, to the injury of the said service, and to the injury of the United States, in that he, said Perley B. Doe, did then and there deposit and cause to be deposited in the post office of the United States at said city and county of Denver, and thereby cause the post office establishment of the United States to deliver to the Lutheran Church, South Logan and Dakota streets, Denver, Colorado, and divers persons to the grand jurors unknown, a certain circular, and circulars, which said circular and circulars were in words and figures identical with the words and figures of the statement set forth in the first count of this indictment, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States."

The circular referred to in said count is as follows:

"In his war message, April 2, Wilson spoke of Germany's 'promise' to end the U-boat warfare. At Madison Barracks Lansing said: 'The immediate cause of war was the announced purpose of Germany to break its promise as to submarine warfare.'

"Germany never made any such promise. In the note of May 4, 1916, containing the so-called promise, Germany carefully stated that as to the future she must 'reserve itself complete liberty of decision.'

"For brief but adequate statement of diplomatic notes that led to war send to your Congressman for La Follette's speech of April 4, 1917, which was suppressed.

"Endless chain. Please write at least one copy and send this and that to friends of immediate peace."

[1] The fact that the first count may have been bad in no way affects the propriety of referring to it to save repetition. Blitz v. United States, 153 U. S. 308, 14 Sup. Ct. 924, 38 L. Ed. 725; Crain v. United States, 162 U. S. 625, 16 Sup. Ct. 952, 40 L. Ed. 1097.

[2] Where a verdict of guilty is rendered upon all the counts of an indictment, and the sentence imposed does not exceed that which might properly have been imposed upon conviction under any single count, such sentence is good, if any such count is sufficient. Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; Ballew v. United States, 160 U. S. 187, 197, 16 Sup. Ct. 263, 40 L. Ed. 388; Selvester v. United States, 170 U. S. 262, 267, 18 Sup. Ct. 580, 42 L. Ed. 1029; Hardesty v. United States, 168 Fed. 25, 26, 93 C. C. A. 417.

[3] Counsel for defendant urges that the count above quoted is bad, because it does not allege facts showing how or in what way the act of the defendant would obstruct the recruiting and enlistment service of the United States, and does not give the names of the particular persons who were affected by the conduct of the defendant. The offense charged is purely statutory, and the words of the statute contain all

the ingredients of the offense. The count under consideration charges the offense in the language of the statute, and this is sufficient. Potter v. United States, 155 U. S. 438, 15 Sup. Ct. 144, 39 L. Ed. 214; United States v. Gooding, 12 Wheat. 460, 6 L. Ed. 693; United States v. Britton, 107 U. S. 655, 2 Sup. Ct. 512, 27 L. Ed. 520; Burton v. United States, 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

"The means of effecting the criminal intent, or the circumstances evincive of the design with which the act was done, are considered to be matters of evidence to go to the jury to demonstrate the intent, and not necessary to be incorporated in an indictment." Wharton's Criminal Law, § 292; Evans v. United States, 153 U. S. 584, 14 Sup. Ct. 934, 38 L. Ed. 830; May v. United States, 199 Fed. 42, 117 C. C. A. 420.

We think the count in question clearly apprised the defendant of what he must be prepared to meet, and showed with accuracy to what extent he might plead a former acquittal or conviction. Cochran v. United States, 157 U. S. 286, 15 Sup. Ct. 628, 39 L. Ed. 704.

[4] The question of the sufficiency of the evidence to sustain a verdict of guilty on the count under consideration was not raised in the trial court during the trial, but we are asked to consider it, although not so raised. It is within the sound discretion of this court to notice the claim of counsel that there was no evidence to sustain the verdict of guilty, although this question was not raised in the trial court. Wiborg v. United States, 163 U. S. 632, 16 Sup. Ct. 1127, 41 L. Ed. 289; Clyatt v. United States, 197 U. S. 207, 28 Sup. Ct. 429, 49 L. Ed. 726; Crawford v. United States, 212 U. S. 183, 29 Sup. Ct. 260, 53 L. Ed. 465; Weems v. United States, 217 U. S. 349, 30 Sup. Ct. 544, 54 L. Ed. 793; Sykes v. United States, 204 Fed. 909, 123 C. C. A. 205; Moore v. United States, 224 Fed. 95, 139 C. C. A. 651.

[5] We have decided to exercise our discretion in this case. The undisputed evidence showed that the defendant circulated the statement set forth in the indictment and several hundred others of similar import to German Lutheran and other churches of various denominations, professors in German colleges and other Universities, and individuals. Some of the cities to which the statements were sent were Boston, New York, Milwaukee, Denver, and San Francisco. A statement sent to Beth-Eden Church, Denver, Colo., closed with the words:

"We are forced to the endless chain to get the truth before the people. Will you help Truth, Free Speech, and Peace by writing and circulating one or many copies of this? Secret League of Patriots for Free Speech or Blood."

A statement sent to Benjamin Largent, Denver, Colo., opened with the words:

"By the greatest campaign of lies the world has ever known the young men of Germany and America are being made to hate and kill each other."

A statement sent to J. G. Marner, Denver, Colo., opened with the statement:

"By clever lies spread by war parties in all countries, the young men of the world are being duped into hating and killing each other."

The circulars, other than the one set forth in the indictment, were circulated about the same time as the former, and were offered for the

purpose of showing intent. The defendant testified that his intent was only to establish the truth. On cross-examination the defendant admitted that in a letter to his sister, which was seized by the post office authorities, he had used the following language:

"You have seen the beautiful pictures in the post office labeled 'Great Opportunity to See the World. Enlist in the Navy.' The government deliberately entices its citizens, thoughtless boys for the most part, into the army and navy and then holds them in peonage."

Also:

"Our laws, recognizing that peonage is an abuse, makes it illegal everywhere else. In time of peace there is no excuse for it certainly in the military forces. To allow a young man of 18 to sell himself into slavery to slick-tongued recruiting officers is of course an outrage."

Also:

"I saw the prisoners in the naval prison at Charleston before it was moved to Portsmouth. Mere boys sentenced to two years in prison because they had left a job they did not like. It went to the heart of all of us, I think; the looks on the faces of some of those boys! I am sure that unjust punishment will make criminals of some. Others it will mark humiliated and broken for life. A crowd of us Postmen visited the prison together and there was a hush upon us as we went away. I for one swore (as Lincoln did) that if ever I were given power slavery would be abolished in our army and navy."

We think that a fair construction of the circular contained in the indictment shows that its author intended to convey the idea that, in so far as the United States based their declaration of war upon the announced purpose of Germany to break her promise as to submarine warfare, the United States was wrong, as Germany had never made any such promise. Such an argument would have a direct tendency to obstruct the recruiting and enlistment service of the United States. Whether a man shall enlist in the service of the United States is determined by the conclusion reached in his mind as to his duty to do so. Nothing would be more liable to prevent or obstruct an affirmative decision than the thought that his country was in the wrong.

[6, 7] The necessary and legitimate consequence therefore of the circular would be to obstruct the recruiting and enlistment service of the United States, and, the circular having been knowingly issued, the defendant must be presumed to have intended the necessary and legitimate consequences of his act. Moreover, looking outside of the circular to other evidence in the record, it appears beyond question that the defendant was engaged in the advocacy of principles which would necessarily obstruct the recruiting and enlistment service of the United States, and if such service was so obstructed it would be to the injury of the United States. The word "obstruct" should be given a broad meaning in order to carry out the undoubted intention of Congress. It has been uniformly held that the word as used in the statute means to hinder, impede, embarrass, and retard, in whole or in part, the recruiting and enlistment service of the United States.

The constitutional power of Congress to enact the legislation under which the indictment is drawn is so well established at this day as to need no discussion. The power to declare war is not to be turned into

an empty phrase by limiting the power of the United States to make the war power effective.

The third count of indictment No. 3106 charged the defendant with using the mails and postal service of the United States for the transmission of the circular described by reference in the third count of indictment No. 3105. For reasons heretofore stated, this count was good, and, as the mailing of the circular was admitted, it followed as a matter of course, if the defendant was guilty under the third count of indictment No. 3105, he was guilty under the third count of indictment No. 3106, as the jury found. This state of the record sustains the judgment of the court on indictment No. 3106, and we need not discuss the other counts of that indictment.

There is one objection to the judgments on each indictment which was not assigned as error, but called to the attention of the court at the argument. It is this: The formal judgments entered each recited that the court found the defendant "guilty of the crime of obstructing enlistment service of the United States." Giving to this language the effect claimed for it, it would not affect the judgment as to the third count of indictment No. 3105, heretofore considered. We think, however, the language must be considered as surplusage. The jury found the defendant guilty, not the court; and, the judgment on each indictment being general, no inference ought to be indulged in that the court intended to limit its sentence to count 3 of indictment No. 3105 in the sentence on that indictment, or that it did not intend to impose any sentence under indictment No. 3106. It would be of no practical value to the defendant if his claim should be sustained, except as to the fine of $100, as the terms of imprisonment run concurrently.

There being no error with reference to the third counts of each indictment, the judgments below are affirmed; it being unnecessary to consider the objection with reference to the other counts of the two indictments.

It is so ordered.

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## ELGIN, J. & E. RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. August 23, 1918. Rehearing Denied November 9, 1918.)

No. 2486.

1. INDICTMENT AND INFORMATION ⊜65—MATTERS OF EVIDENCE.
An indictment charging that a railroad company violated Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by false billing, etc., assisting a shipper to obtain transportation at less than the usual rates, is not defective because it did not set out the waybills, for the waybills are mere evidence of the classification, etc.

2. CARRIERS ⊜38—REGULATIONS—VIOLATION—INDICTMENT.
An indictment charging that a railroad company violated Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper to obtain transportation at less than the regular rates, *held* not required to set forth the steps provided by law to fix a lawful rate of transportation, such as publishing and posting.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. CARRIERS ⊂=38—VIOLATION OF REGULATIONS—INDICTMENT.
As the regular rates to be charged must be made by the railroad company itself, an indictment charging a violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper to obtain transportation at less than the regular rate, need not be amplified by setting forth the means or steps taken to adopt the rate.

4. CARRIERS ⊂=38—OFFENSES—INDICTMENT.
An indictment charging that a railroad company, in violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), assisted a shipper to obtain transportation at less than the regular rate, is not defective, though alleging the rates departed from to be on paper, wood pulp, and strawboard boxes knocked down flat in carload, whereas the shipments charged did not specify that the boxes were knocked down.

5. CARRIERS ⊂=38—OFFENSES—INDICTMENT.
An indictment charging a violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by a railroad company, in that it assisted a shipper to obtain transportation at less than the regular rate, *held* not defective, as failing to set forth the manner or means whereby the shipper was assisted, etc.

6. CARRIERS ⊂=38—OFFENSES—INDICTMENT.
As a shipper is primarily responsible for freight charges, and the contracts for transportation were made by it, an indictment charging that a railroad company, in violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), assisted the shipper to obtain transportation at less than the regular rates, was not defective for failure to allege that the shipper actually paid the freight.

7. INDICTMENT AND INFORMATION ⊂=202(2)—FORMAL DEFECTS—CURE BY VERDICT.
Defects in an indictment charging that a railroad company, in violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), assisted a shipper to obtain transportation at less than the regular rates, etc., *held* mere imperfections of form, which, after verdict, were cured by Rev. St. § 1025 (Comp. St. 1916, § 1691).

8. CORPORATIONS ⊂=428(1)—KNOWLEDGE OF AGENT—IMPUTATION TO CORPORATION.
A corporation is not chargeable with knowledge of facts which become known to its agent, unless the agent in the line of his duty ought and could reasonably be expected to communicate the knowledge to his principal.

9. CRIMINAL LAW ⊂=1172(6)—APPEAL—HARMLESS ERROR.
A charge, in a prosecution against a railroad company for violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper to obtain transportation at less than the regular rates, etc., that the railroad company was chargeable with all knowledge about the shipments that any of its agents might have, *held* harmless, if erroneous, where there was no evidence from which the jury might have imputed to the company knowledge of any agent whose knowledge was not properly attributed to it, etc.

10. CARRIERS ⊂=38—OFFENSES—EVIDENCE.
In a prosecution against a railroad company for violation of Interstate Commerce Act, § 10 (Comp. St. 1916, § 8574), by assisting a shipper, etc., to obtain transportation at less than the regular rates, evidence *held* sufficient to sustain the conviction, warranting an inference that the company knew the nature of the shipment.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

The Elgin, Joliet & Eastern Railway Company was convicted of violating Interstate Commerce Act, § 10, and it brings error. Affirmed.

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Kempes K. Knapp, of Chicago, Ill., for plaintiff in error.

Charles F. Clyne, of Chicago, Ill., and Stanley Payne, for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

ALSCHULER, Circuit Judge. Plaintiff in error railroad company, herein called Company, was indicted for violation of section 10 of the Interstate Commerce Act.[1] Act Feb. 4, 1887, c. 104, 24 Stat. 382 (Comp. St. 1916, § 8574).

The indictment charges four shipments by the Carrier-Low Company, on each shipment four counts being predicated, which severally allege that the Company (a) by false billing assisted, (b) by false classification assisted, (c) by false billing suffered and permitted, and (d) by false classification suffered and permitted, the shipper to obtain transportation at less than the regular rates.

The several counts charge that the Company knowingly received at its Joliet, Ill., station for interstate shipment, initially over its railroad, cars of paper, wood pulp and strawboard boxes, which were falsely classified or billed as "strawboard," on which latter the regular rate of transportation was less than on the boxes.

The sufficiency of the indictment was attacked by a motion in arrest of the judgment which was rendered upon the verdict of the jury, the grounds alleged being that the indictment (1) fails to set out the instrument or entry alleged to constitute the false billing or false classification; (2) fails to allege facts necessary to the existence of any lawful rate charged to have been departed from; (3) fails to charge that the rate alleged to have been departed from was applicable to the shipments in question; and (4) fails to allege facts sufficient to charge that the shipper was assisted by the Company to obtain the transportation at the lower rate.

[1] The complaint under the first contention is mainly that the waybills for the shipments were not set out in the indictment. We do not regard the waybills themselves as the billing or the classification, but rather as evidence of it. The statutory offense charged consists in knowingly suffering and permitting, or assisting the shipper to procure, transportation at less than the regular rate. While it is essential that the means (the false billing or classification) be charged, it is not necessary that the indictment set forth evidence of the means.

[1] "Any common carrier subject to the provisions of this act, or, whenever such common carrier is a corporation, any officer or agent thereof, or any person acting for or employed by such corporation, who, by means of false billing, false classification, false weighing, or false report of weight, or by any other device or means, shall knowingly and willfully assist, or shall willingly suffer or permit, any person or persons to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was committed, be subject to a fine of not exceeding $5,000, or imprisonment in the penitentiary for a term of not exceeding two years, or both, in the discretion of the court, for each offense."

Armour Packing Co. v. United States, 209 U. S. 56, 28 Sup. Ct. 428, 52 L. Ed. 681. The allegations are that the defendant by "false billing" and by "false classification" assisted, or suffered and permitted, the shipper to obtain transportation at unlawful rates of the particular shipments set out in the indictment. While this sufficiently apprised the defendant of the nature of the charge it had to meet, yet if in the preparation of its defense it was necessary and proper that it be further advised respecting the waybills, a request for further particulars would in all probability have produced such further information thereon as the government possessed, and the defendant was entitled to have. Kirby v. United States, 174 U. S. 47, 19 Sup. Ct. 574, 43 L. Ed. 890; Durland v. United States, 161 U. S. 306, 16 Sup. Ct. 508, 40 L. Ed. 709; Rosen v. United States, 161 U. S. 29, 16 Sup. Ct. 434, 40 L. Ed. 606; Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

[2, 3] The second contention rests on failure to set forth the steps required by law to be followed to fix a lawful rate of transportation—such as publication and posting. We consider the allegations sufficient in that regard in charging that the regular rate established and then in force was as stated in the indictment, without setting forth the steps which were essential for the fixing of such rate. United States v. Miller, 223 U. S. 599, 32 Sup. Ct. 323, 56 L. Ed. 568. Besides, the regular rate as charged then to have been in force must by necessary inference be the rate made by the railroad company itself, and presumably it would know not only its own rates, but the steps it had taken to fix them; and the Company is manifestly at no disadvantage and under no hardship if the allegation in the indictment of the existence of the regular rate is not amplified by setting forth the means or steps taken to adopt it. Standard Oil Co. v. United States, 164 Fed. 376, 90 C. C. A. 364 (7th C. C. A.).

[4] The third objection proceeds upon the assumption that the indictment charges the rate departed from to be on "paper, wood pulp and strawboard boxes, knocked down flat, in carload lots," whereas the shipments charged did not specify that the boxes were "knocked down" or that they were carload lots. We regard this discrepancy immaterial, in view of the allegation that the defendant falsely billed and transported the shipment over the described route "at a total rate and charge of 7½ cents for each 100 pounds thereof, instead of 9 cents per 100 pounds (the amounts and destinations differing as to the several shipments), the regular rate and charge then established and then in force on the said railway route and line of transportation, for the transportation of the said paper, wood pulp and strawboard boxes, between Joliet aforesaid and Indianapolis aforesaid."

[5] Nor are we impressed with the fourth ground urged, viz. that the indictment fails to set forth the manner or means whereby the shipper was assisted or suffered to obtain the transportation at less than the lawful rate. In the language of the statute the Company was charged with assisting or suffering and permitting the shipper to obtain the transportation at less than the lawful rate, by means of false billing or classification. The shipments were described, car

numbers given, and the lawful rate and the rate charged were both stated. One cannot well read the counts without concluding that they charge the shipments to have been made by and through procurement of the shipper; and while further particulars might with propriety have been stated, we believe the language of the Supreme Court in New York Central R. R. Co. v. United States, 212 U. S. 481, 29 Sup. Ct. 304, 53 L. Ed. 613, is quite applicable here:

"An examination of the indictment shows that it specifically states the elements of the offense with sufficient particularity to fully advise the defendant of the crime charged and to enable a conviction, if had, to be pleaded in bar of any subsequent prosecution for the same offense."

[6] Hereunder it is further urged that the indictment fails to state that the freight was paid or to be paid by the shipper, and that hence the shipper did not obtain the transportation at the lower rate. If it were shown, as alleged, that through false billing or classification the Company knowingly and willfully suffered or assisted the shipper to obtain the shipments to be accepted and transported at the lower rate, it would not in our judgment affect the proposition if the shipper did not actually pay, or was not to pay, the freight charges. The goods being delivered for shipment by the shipper, and the contract for the shipment being made with and by it, the shipper obtains the transportation and is primarily liable for the freight charges, regardless of his contractual relations with his consignee governing the ultimate payment thereof. The interest of the shipper to secure for its patrons transportation at rates at least as low as those enjoyed by the patrons of any competitive shipper affords a strong inducement to the shipper to procure transportation at lowest obtainable rates.

[7] We are satisfied, not only that the indictment is sufficient, but also that the imperfections alleged against it are as to matters of form which in no manner prejudiced the defendant, and, after verdict, are cured by the operation of section 1025 of the Revised Statutes (Comp. St. 1913, § 1691).

The various errors assigned and discussed, predicated on rulings upon admission and rejection of evidence, are in the main based upon the want of proper allegations in the indictment involving substantially the same propositions we have considered. The disposition of these contentions respecting the sufficiency of the indictment disposes likewise of the claims respecting the admissibility of these various items of evidence—the bills of lading and the like. We regard them as evidence proper to be admitted under the allegations of the indictment, and not requiring specific allegations thereof in the indictment to render them admissible.

[8, 9] The charge to the jury respecting the Company's knowledge of the false classification and underrating of these shipments is seriously complained of. It is as follows:

"Now, it is the rule that where as in this case there is an inquiry as to the knowledge of a party respecting a situation or a subject-matter, the rule is that the defendant is chargeable with all knowledge about it that any and all of its agents, officials and employés have about the thing they are dealing with in the line and course of their dealing for the defendant upon

the subject-matter. So in this case, in determining the question of what knowledge the defendant had as to the real character of the several shipments, you will consider all the information which the evidence shows all of the defendant's officers, agents and employés had upon that subject, and if you find that collectively they all had information which if all in the hands or in the brain of one man would amount to knowledge of the fact of the real character of the shipments that were going forward, and that despite that fact the wrong rate was given to it, your verdict will be guilty."

A substantially similar charge was approved by the Sixth Circuit Court of Appeals in a case where the railroad company charged with violation of the same act had at hand the actual records from which it appeared that a shipment of lumber, which, in order to obtain thereon the lower through tariff rate, was falsely represented to be, and was accepted as, through freight, whereas in fact it was not such. Grand Rapids R. R. Co. v. United States, 212 Fed. 577, 129 C. C. A. 113; also in Michigan Central R. R. Co. v. United States, 246 Fed. 353, 158 C. C. A. 417, where the controlling facts are very similar.

It would seem that, as stating a rule of general application, the charge is too broad, and that under some circumstances it would be error to give it. For instance, if in the case before us there were evidence that a car repairer or track hand or other like employé of the company actually saw the contents of the cars in question before they were billed out, and knew they contained strawboard and not paper boxes, the jury under such a charge would be required to find that this knowledge of such an employé was knowledge of the Company. But in the nature of things the knowledge of such an employé, who has no function whatever with respect to receiving or classifying freight, and no concern whatever with shipments or rates or tariffs, and no occasion, purpose or duty to communicate to his employer such incidental knowledge thus coming to him, would not ordinarily be the knowledge of the Company. A corporation is not chargeable with knowledge of facts which become known to its agent, unless the agent in the line of his duty ought and would reasonably be expected to communicate the knowledge to his principal. Neal v. M. E. Smith Co., 116 Fed. 20, 54 C. C. A. 226; Korn v. Chesapeake & Ohio Ry. Co., 125 Fed. 897, 62 C. C. A. 417; Reed v. Munn, 148 Fed. 737, 80 C. C. A. 215; Mechem on Agency (1st Ed.) §§ 718–721; Tiffany on Agency, p. 262.

We have searched the record here narrowly, but vainly, for an instance where the jury, under this charge, might have imputed to the Company knowledge of any agent whose knowledge was not lawfully and properly attributable to his principal. It nowhere appears that any one connected in any capacity with the Company saw the contents of these particular cars before they were shipped, or was specifically told what they contained. The conclusion of the Company's knowledge of the nature of the shipments is not based upon what appears specifically with reference to the particular shipments, but rather upon the general course of dealing between the Company and this shipper, as to which course of dealing it seems plain to us from the record, there can be no question of the Company's knowledge; and in passing thereon the charge could not possibly have misdirected or misled the jury. There being no evidence in the record to which the

charge could have been applied with resultant prejudice to plaintiff in error, its giving worked no harm.

[10] This brings us to the contention that in no event does the evidence warrant the inference of the Company's knowledge that these cars contained the alleged paper boxes and not strawboard. Under the record herein, the jury might have found that the Company did a large freight business at Joliet, where there were many manufacturers, among them this shipper which sent over this railroad an average of a carload of freight weekly; that the shipper had for some years been engaged in manufacturing paper boxes at Joliet, and that the Company, in its advertising matter for soliciting freight business, enumerated the industries at Joliet, describing this one as a manufacturer of paper boxes, and that the Company well knew that this shipper was engaged only in the business of making paper boxes, and that its outgoing freight business was the shipment of such boxes, made up or "knocked down," mostly in carload lots; that the shipper began to bill out its product as "strawboard," and that soon representatives of the Western Weighing and Inspection Bureau (established by the railroads generally for properly classifying freight shipments) contended that these shipments should be classified as "paper boxes knocked down," which classification carried a higher freight tariff rate; that while at first it was decided that the shipments were entitled to the lower rate, it was afterwards determined that the shipments were not "strawboard," but were paper boxes, and that the higher rate applied; that for a year or more after such determination, the shipper nevertheless continued to prepare its bills of lading, giving the shipments the classification of "strawboard," and to so tender its shipments to the Company, whose regular agents signed the bills accordingly, and the freight was forwarded; that during all such time the representatives of the Western Weighing and Inspection Bureau frequently protested to the Company at its Joliet freight office against the classification of the shipments as "strawboard" and its corresponding rate, and in case of such protests the particular shipments protested against, to the knowledge of the Company, would be "set up" to the "paper box knocked down" classification and the rate advanced accordingly, to which "setting up" the shipper in each case acceded without protest; that some of the time the complaint and the "setting up" occurred at the destination; that in obtaining rates for shipping, the shipper usually asked the Company's Joliet freight representative for rates to a given destination on "strawboard" and on "paper boxes knocked down," but that during the time in question it never tendered for shipment any such freight as "paper boxes," but always as "strawboard," and the Company continued to receive and classify and bill out and forward these shipments as such; that at the Company's Joliet freight office, out of the hundreds of carloads shipped daily, the "setting up" was extremely rare, so that a very considerable proportion of the shipments of which complaints were made, resulting in the "setting up" of the shipments, were the shipments of this one shipper; that the complaints as to these shipments became so numerous, requiring in each instance the holding up of the shipment and the "set-

ting up" of the classification and rate, that it became a nuisance to the Company, and after a year or more of such practice the Company for the first time requested the shipper to discontinue the shipments as "strawboard," whereupon the practice ceased; but that during the continuation of the practice the shipments of the "paper boxes knocked down" in question were tendered, and by the Company billed, classified, and forwarded, and were paid for, at the lower "strawboard" rate; that there were a number of railroads at Joliet engaged in sharp competition with the Company for freight business, soliciting this shipper, which likewise gave them business, tendering to them also its shipments as "strawboard," which were so accepted and billed and submitted to the "setting up" wherever discovered and insisted upon.

From these facts we cannot say the jury was not warranted in concluding, as it probably did conclude, that the Company, to obtain, hold, or extend its business with this shipper, was entirely willing that this product, though known to the Company to be paper boxes, should be presented for shipment as "strawboard," and be classified and billed accordingly, and if the shipment went through under such classification and corresponding rate, well and good; otherwise it would be "set up," and the regular and higher tariff rate applied. If the jury did so conclude, and presumably it did, it needs no further demonstration to justify the ultimate finding that the Company knowingly and willfully, through false billing, or false classification or both, assisted or suffered and permitted the shipper to obtain transportation at less than the regular rate.

The judgment is affirmed.

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L. P. LARSON, JR., CO. v. WM. WRIGLEY, JR., CO.

WM. WRIGLEY, JR., CO. v. L. P. LARSON, JR., CO.

(Circuit Court of Appeals, Seventh Circuit. July 30, 1918.)

Nos. 2498, 2500.

1. TRADE-MARKS AND TRADE-NAMES ⟸3(4)—SUBJECT-MATTER.
The word "Spearmint" is a common noun, denoting flavor, and is not susceptible of appropriation as a trade-mark.

2. TRADE-MARKS AND TRADE-NAMES ⟸59(5)—INFRINGEMENT.
The word "Peptomint" is so different in appearance and sound that it would not infringe "Spearmint," were it a proper trade-mark.

3. TRADE-MARKS AND TRADE-NAMES ⟸93(3) — UNFAIR COMPETITION — EVIDENCE.
Evidence *held* insufficient to show that defendant, a rival gum manufacturer, which sold its product under the name "Peptomint," was guilty of unfair competition towards complainant, which sold its gum under the name "Spearmint."

4. TRADE-MARKS AND TRADE-NAMES ⟸84—RELIEF—FRAUD.
Where complainant, who sued for unfair competition and infringement of trade-mark, attempted to deceive the court and oppress his opponent, that was sufficient ground for denying him equitable relief.

5. EVIDENCE ⟸265(7)—JUDICIAL ADMISSIONS—ACCEPTANCE.
While a litigant has no cause to complain if the court accepts his solemn and sworn admissions in pleadings and testimony as true, his

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

adversary cannot compel the court to do so, for, if that were possible, a court could be forced to decide moot, feigned, and collusive cases, etc.

6. EVIDENCE ⊂=265(7)—JUDICIAL ADMISSIONS—ACCEPTANCE.

In a real and legitimate controversy, a party should be left bound by his averments in pleadings and his admissions in testimony, unless the court can find an absolute demonstration from other evidence, or from facts within judicial notice, that the averments and admissions could not be true.

Appeals from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Bill by the William Wrigley, Jr., Company against the L. P. Larson, Jr., Company, together with another bill by the same complainant against the same defendant, which counterclaimed. The first bill was dismissed, and complainant appeals; while the second bill and counterclaim were dismissed, and defendant appeals—the appeals being consolidated. First decree affirmed, and that part of the second decree dismissing the counterclaim reversed, with directions.

Certiorari denied 248 U. S. —, 39 Sup. Ct. 22, 63 L. Ed. —.

James R. Offield, of Chicago, Ill. (Charles K. Offield, of Chicago, Ill., of counsel), for Wm. Wrigley, Jr., Co.

Charles H. Aldrich, Frank F. Reed, and Edward S. Rogers, all of Chicago, Ill., for L. P. Larson, Jr., Co.

Before BAKER and ALSCHULER, Circuit Judges, and LANDIS, District Judge.

BAKER, Circuit Judge. In No. 2500 Wrigley Company appeals from the final dismissal of its bill against Larson Company for alleged unfair competition and infringement of trade-mark.

[1, 2] "Spearmint" was counted on as a trade-mark and was charged to be infringed by "Peptomint." First. "Spearmint" is a common noun, denoting flavor, and is therefore not susceptible of appropriation as a trade-mark. Second. "Peptomint" is so different in appearance and sound that there would be no infringement, even if "Spearmint" were a proper trade-mark.

[3, 4] Respecting unfair competition, an inspection of the packages discloses some marked dissimilarities. On the display side of the one "Wrigley's Spearmint Pepsin Gum" are the prominent words; on the other, "L. P. L. Peptomint Gum." "Spearmint," specially emphasized, is printed on the shaft of a spear, lying horizontally along the middle of the label. "Peptomint," specially emphasized, is printed on a straight-line banner, running obliquely from lower left to upper right, and laid upon a circle in the middle of the label. These differences, when the labels are placed side by side, are very striking. But there are also striking similarities. Both packages severally contain 5 sticks of gum, done up in pink wrappers, which protrude at each end some distance beyond the label wrappers. Both labels are done on white paper with red and green printers' inks. Spear shaft and head are green, and thereon "Spearmint" shows in large white letters. Larson Company's banner is green, and thereon "Peptomint" shows in large

white letters. "Wrigley's" above the spear and "Pepsin Gum" below are printed in red. Larson's circle is red. In segments above and below the banner "L. P. L." and "Gum" appear in white on the red background. Both labels bear sprigs of mint in green.

If the case were to be disposed of by the foregoing comparison, the finding might well be that the similarities so overbear the differences that the casual purchaser might be misled by the common color and printing scheme; and such was the view of the learned District Judge in granting a pendente lite injunction on the sworn bill and exhibits.

But at the final hearing other facts appeared, which may be briefly summarized as follows: In gum making before Wrigley's time it was common practice to form sticks of the size and shape now used by Wrigley and Larson; to wrap the sticks in pink paper; to put 5 sticks in a package; to put 20 packages in a box; to tie each package of 5 pink sticks with a counterband of white paper; to use red and green printers' inks on the white counterband; to display the maker's name and "Gum" or "Pepsin Gum" in red letters; and, if the flavor was of the mint order, to print the name denoting flavor in white on a green design or in green on a white design. And on the package of this general style Wrigley was not the first to apply "Spearmint" as a display word of special emphasis. That had been done by Pulver years before Wrigley came on the scene. So there was nothing that Wrigley did not take from others, except his own name and the spear as the design on which to spread the word "Spearmint."

Wrigley, of course, knew these facts, and also the inside story of his suit against Pulver. According to the final decree in that case, Wrigley, not Pulver, was the originator of the "Spearmint" package. But the decree was not entered until Wrigley owned both sides of the lawsuit. He gave Pulver $100,000 in cash and $150,000 in notes running one to five years. If Pulver should fail to keep still, there might be trouble in collecting the notes remaining unpaid. It was Larson's persistent digging that unearthed this hidden story.

Wrigley's oppression of his opponent and his attempt to deceive the court were ample grounds for refusing him relief in equity; and in the strict law, when Wrigley is limited, as he must be, to his own name and the spear design for displaying "Spearmint," Larson is not liable for using his own initials and the oblique banner across the circle for displaying "Peptomint."

[5] In No. 2498, the record came here first; but it presents a later controversy. Larson, while under the pendente lite injunction against his "Peptomint" package, brought out his "Wintermint" brand. Wrigley sued him as an infringer of "Wrigley's Doublemint" package. On final hearing Wrigley's bill was dismissed for want of equity, and Wrigley has acquiesced.

Wrigley's bill described the packages and averred that confusion had arisen and was bound to continue. This was fortified by the opinion testimony of Wrigley and another officer of his company. Larson, in his answer and counterclaim, fully accepted Wrigley's position as to similarity and confusion, denied that "Wrigley's Doublemint" was the elder, and averred that Wrigley had deliberately brought out "Double-

mint" to undermine Larson's established and growing trade in "Wintermint." The evidence proves with certainty that "Wintermint" was seven months older than "Doublemint." A reasonably clear inference from facts in the record is that Wrigley was acquainted with the "Wintermint" package before adopting his "Doublemint" package.

But, in support of the counterclaim, no proof was made of actual confusion. Counsel, however, contend that an inference to that effect may be drawn from Larson's testimony that after "Doublemint" appeared his sales of "Wintermint" materially decreased. True, but a falling off in business may result from fair as well as from unfair competition.

Insistence comes to be centered on the proposition that the trial court was not at liberty to determine the question of actual or probable confusion from a comparison of the packages and from the lack of direct testimony, but was bound to take that issue as settled by Wrigley's averments and admissions in court; and counsel cite many cases as supportive of their contention.[1]

Undoubtedly a litigant has no cause for complaint if the court accepts his solemn and sworn admissions in pleadings and testimony as true. But we must reject the contention that his adversary has the right to compel the court to do so. Otherwise a court could be forced by parties to decide moot, feigned, and collusive cases, or a chancellor might be made to proceed with an equitable accounting between partners who had stolen the property they brought into court.[2] But the present case on the counterclaim is not moot, nor feigned, nor collusive, and it presents a question of Larson's legitimate property rights.

In the "Wintermint" package the sticks of gum are wrapped in green paper; also in the "Doublemint" package. Both have counterbands of white paper bearing words and devices in red and green printers' inks. To a casual glance the packages seem alike in some degree. But the differences are noticeably prominent. "Wintermint" is displayed

[1] Sullivan v. Colby (C. C. A. 7th) 71 Fed. 460, 464, 465, 18 C. C. A. 193; 10 R. C. L. 701, 702, sub. "Estoppel," where the authorities are cited as follows: Sutherland v. Sutherland, 102 Iowa, 535, 71 N. W. 424, 63 Am. St. Rep. 477; Tarbell v. Royal Exchange Shipping Co., 110 N. Y. 170, 17 N. E. 721, 6 Am. St. Rep. 350; Morrison v. Atkinson, 16 Okl. 571, 85 Pac. 472, 8 Ann. Cas. 486, and note. Vide Appeal and Error, 2 R. C. L. 183 et seq.; Balloch v. Hooper, 146 U. S. 363, 13 Sup. Ct. 128, 36 L. Ed. 1008; Northern Pac. Ry. v. Paine, 119 U. S. 561, 7 Sup. Ct. 323, 30 L. Ed. 513; Kansas R. Co. v. Morton, 61 Fed. 814, 10 C. C. A. 12; Central R. Co v. Stoermer, 51 Fed. 518, 2 C. C. A. 360; Clark-Montana R. Co. v. Butte & S. Copper Co. (D. C.) 233 Fed. 547; Historical Pub. Co. v. Jones Bros. Pub. Co., 231 Fed. 638, 145 C. C. A. 524; Morton v. Clark, 181 Mass. 134, 63 N. E. 409; Loughridge v. N. W. Ins. Co. 180 Ill. 267, 54 N. E. 153; Standard Brewing Co. v. Bemis Malting Co., 171 Ill. 602, 49 N. E. 507; Leeds v. Townsend, 228 Ill. 451, 81 N. E. 1069, 13 L. R. A. (N. S.) 197.

[2] Everet v. Williams, section 94, note, Lindley on Partnership (5th Eng. Ed.); Evans v. Richardson, 3 Merivale, 469; Richardson v. Buhl, 77 Mich. 632, 43 N. W. 1102, 6 L. R. A. 457; Bartle v. Nutt, 4 Pet. 184, 7 L. Ed. 825; Coppell v. Hall, 7 Wall. 542, 19 L. Ed. 244; Oscanyan v. Arms Co., 103 U. S. 261, 26 L. Ed. 539; Fowle v. Spear, Fed. Cas. No. 4996; Heath v. Wright, Fed. Cas. No. 6,310; Kohler v. Beeshore, 59 Fed. 572, 8 C. C. A. 215; Uri v. Hirsch (C. C.) 123 Fed. 568; Fetridge v. Wells, 13 How. Pr. 388; Simmons v. Mansfield Drug Co., 93 Tenn. 84, 23 S. W. 165.

on Larson's oblique banner; "Doublemint," on the shaft of a spear having a head at each end. And the name of the maker in each case is given emphasis: "Larson's Wintermint," "Wrigley's Doublemint." From a comparison the learned District Judge found that the distinctive words and marks were so dominating that the careless purchaser, desiring "Larson's Wintermint," would not be misled into taking "Wrigley's Doublemint."

[6] With nothing before us but the packages, we would be inclined to concur in the finding. But the record contains also Wrigley's averment in his bill that confusion had arisen. There was no proof to support that averment and Larson's parallel averment. But Larson's counsel may have relied on the stipulation of fact in bill and counterclaim to save hunting up and bringing in witnesses of wrongful sales. Furthermore, Wrigley and another interested with him gave testimony as experts in the gum business that confusion was likely to result from the similarities; and so there is a basis for at least the possibility that Wrigley's averment of fact and his expert opinion may be true, and that Larson's diminished sales came from Wrigley's simulation of the "Wintermint" package.

In such a situation, the rule, in our judgment, is this: In a real and legitimate controversy, a party should be left within the knot of his averments in pleadings and admissions in testimony, unless the court can find an absolute demonstration from other evidence in the case or from facts within judicial notice, like the laws of physics, etc., that under no circumstances could the averments and admissions be true. This is in analogy to the rule respecting the sustaining of a demurrer to a bill for infringement of a patent on account of the invalidity of the patent on its face. Westrumite Co. v. Commissioners, 174 Fed. 144, 98 C. C. A. 178; Lange v. McGuin, 177 Fed. 219, 101 C. C. A. 389.

In No. 2500 the decree is affirmed.

In No. 2498 the part of the decree that dismisses the counterclaim of Larson Company is reversed, with the direction to enter an injunction and order an accounting.

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## TEVANDER et al. v. RUYSDAEL.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918.)

No. 2554.

1. PARTNERSHIP ⇐104—ACTION BETWEEN PARTNERS—NATURE OF SUIT.
A suit, in view of pleadings, evidence, and findings, *held* not one to dissolve a corporation, but one within the power of a court of equity, to reestablish the status prior to fraud.

2. PARTNERSHIP ⇐311(5)—CONTRACT TO DISSOLVE—FRAUD—EVIDENCE.
Evidence *held* to warrant finding of fraudulent representations, relied on, justifying rescission of the executed agreement between plaintiff, a young woman without business experience, and defendant, sole business manager, who had been partner of plaintiff's husband up to his death, for dissolution of partnership between them, organization of a corporation, and transfer to it of partnership assets.

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

3. PARTNERSHIP ⟸311(5)—CONTRACT TO DISSOLVE—FRAUD—NATURE OF REPRESENTATIONS.

Representations whereby defendant induced plaintiff to agree to dissolution of equal partnership between them, organize a corporation with the controlling share in defendant, and transfer to it the partnership assets, while some of them were promissory in character, being in substance a statement of defendant's state of mind towards plaintiff, which, if true, would have made the change immaterial, being false, to her prejudice, were representations of facts.

4. PARTNERSHIP ⟸311(5)—CONTRACT TO DISSOLVE—FRAUDULENT REPRESENTATIONS—CARELESS RELIANCE.

A young inexperienced woman *held* not careless in relying on the representations of her partner, the sole business manager, former partner of her deceased husband, for falsity of which she seeks rescission of her agreement with him for dissolution of the partnership, organization of a corporation in which he should have the controlling share, and transfer to it of the partnership assets.

5. PARTNERSHIP ⟸311(4)—PRIVATE DISSOLUTION AND SETTLEMENT—FRAUD—LACHES.

Plaintiff *held* not guilty of laches in bringing suit for rescission of her agreement for dissolution of partnership with defendant, organization of a corporation in which he should have the controlling share, and transfer to it of partnership assets, much of the most convincing proof of the fraud not coming to light till a few months before suit.

6. PARTNERSHIP ⟸311(5)—CONTRACT TO DISSOLVE—AVOIDANCE FOR FRAUD—PARTNERSHIP AGREEMENT.

On avoidance for fraud of contract for dissolution of partnership, the partnership agreement, providing that all patents and inventions of either partner shall belong to the partnership, governs rights of the parties, and patent taken out by one of them is properly adjudged to belong to the partnership.

7. PARTNERSHIP ⟸83—AGREEMENT FOR COMPENSATION—EFFECT OF FRAUD.

Absolute right of a partner to 20 per cent. of profits as compensation as business manager, under agreement of copartner that he should have this for faithful services, is avoided by his attempt to defraud copartner.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by Eleanor M. Ruysdael against Olof N. Tevander and others to establish a relation of partnership, recover assets, dissolve such partnership, appoint a receiver, etc. Decree for plaintiff, and defendants appeal. Affirmed.

Appellee sought and secured a decree holding the incorporation of the Standard Cap & Seal Company as for naught, decreeing the relations between Tevander and herself to be those of a partnership, decreeing that the partnership be dissolved, ordering an accounting with Tevander, adjudging that certain patents standing in the name of Tevander be assigned to the partnership, and ordering a distribution of the assets between the parties.

Appellant Tevander and the deceased husband of appellee entered into a partnership to conduct the manufacture of a machine for making seals for capping bottles, the business name being Tevander & Co. Mr. Manierre acquired his half interest in this partnership on June 21, 1910, for which he paid $5,500. The business was very successful. Appellee became a partner shortly after her husband's death, October 7, 1912, her position being the same as that of her deceased husband. Tevander, who was made the active manager immediately thereafter, received a salary of $5,000 per year, which in 1914 was increased to one-fifth of the net earnings, with a guaranteed minimum of $6,000.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In January, 1915, the corporation, Standard Cap & Seal Company, was formed under the laws of Illinois, with a capital stock of $50,000, of which Tevander took 251 shares and appellee 249, issued in exchange for the assets and good will of the copartnership, Tevander continuing in the active management of the company. Upon the execution of the formal assignment of the business assets and good will of the copartnership to the corporation, the parties, by a written agreement, canceled the contract of partnership.

During the last year of the copartnership the profits, after deducting Tevander's 20 per cent., amounted to about $45,000. Immediately upon incorporation, with the consent of a nonstockholding director, Tevander reduced the cash dividends to 10 per cent., secured in his own name patents in which appellee claimed an interest, drew as his salary for 1915 the sum of $21,274.40 and for 1916 $33,359.22.

Although a director, and to a certain extent controlling the second director, who held no stock, Tevander endeavored to sell to the corporation the new patent standing in his name.

In the articles of copartnership it was agreed that "all patents and inventions of either partner shall belong to the partnership, and at the time of the application shall be assigned to the partnership. No partner has a right to grant a license, sell, assign, or reassign any patent or invention without the written consent of the other."

Appellee testified that at the time the agreement to organize the corporation was entered into she asked Mr. Tevander about the title to inventions, to which Mr. Tevander replied: "Of course, anything I invent along the lines of the business will belong to the company. The law takes care of this and there is no use writing it down."

The District Court made specific findings covering all of the issues, and all of them were favorable to appellee. Among other things the court found:

"(7) During the existence of the partnership between Tevander and plaintiff, Tevander formed a plan to eliminate plaintiff from the half ownership in these new inventions, and the patents therefor, when they should issue, to which she was entitled under the terms of the partnership agreement, by inducing her to terminate the copartnership then existing between them, by transferring all the assets thereof to a corporation; planning and intending to withhold from plaintiff all information concerning the new invention and device, and to withhold application for patents therefor until after the termination of the partnership and the transfer of the assets to the corporation.

"(8) During the month of January, 1915, and prior to the 22d day thereof, Tevander, designing to cheat and defraud plaintiff, conceived the scheme of inducing her to consent to the incorporation of the business, planning to induce her to give him one extra share of stock in the corporation which he planned to organize, intending to use the control thereby given him in the selection of a board of directors, a majority of whom would do his bidding, so that by refusal to declare dividends he might so reduce plaintiff's income as to make her dependent upon his will, and by these means and other cunning devices so discourage and harass her as to force her to part with her interest at a figure far below its real value.

"9. With the foregoing designs Tevander represented to plaintiff that the business was assuming such proportions that the copartnership could be carried on more conveniently and with greater profit as a corporation; that the business of the copartnership could go on as before, but, as to the extra share to be given him, this was merely to enable him to have his own way with the management, and to protect him in event of her death, remarriage, or sale of her interest against evilly disposed persons who might set out to wreck the business for the purpose of robbing him of his interest therein; that he would treat her as he always treated her; that, so long as she remained his partner in the business, he would consider he held this extra share as much for her benefit as for his own; that her income would not be reduced. On the other hand, Tevander threatened that unless she would assent to his wishes he would bring suit to dissolve the copartnership; that no one but himself understood the business or would desire to purchase it; that the result of such suit would be the sale of the business at a price far

below its real value; that in the event of such sale she would realize very little for her interest; all of which representations were false and fraudulent and made by Tevander with the fraudulent designs aforesaid.

"(10) By the foregoing and divers other cunning persuasions, promises, and threats which, at the time of making them, he did not intend to fulfill or perform, and which were made for the purpose of cheating and defrauding and for the purpose of eliminating plaintiff from any ownership in his new inventions when they should have been perfected and patented, Tevander induced plaintiff to consent to the organization of a corporation, to be managed by three directors, who need not be stockholders, and to transfer to him, at the nominal consideration of $250, one extra share of stock which would otherwise belong to her, when the real value thereof was largely in excess of this price."

Additional specific findings necessary to sustain appellee's bill were made. As conclusion of law the court found:

"(26) By reason of the fraud practiced by Tevander upon plaintiff, the assignment of the assets of the copartnership on February 22, 1915, to Standard Cap & Seal Company, and all subsequent assignments of the assets of the copartnership to the corporation, and the cancellation and termination of the agreement of copartnership indorsed upon the written agreement thereof (attached to bill of complaint herein as Exhibit 2), and the contract entered into between plaintiff and Tevander, January 27, 1915 (attached to the bill of complaint as Exhibit 3, providing for the payment to Tevander of 20% of the net profits per annum as and for salary), were at the time of their several executions void and of no force or effect, and the oral agreement of copartnership entered into between plaintiff and Tevander in October, 1912, and confirmed by the written agreement of copartnership entered into October 31, 1914, has continued in full force and effect until the date hereof, and the patents for the new closure and closure-applying machines covered by United States letters patent numbered 1,200,669 and 1,219,791 were procured by Tevander during the copartnership between plaintiff and himself, and the ownership of these patents are subject to the terms and conditions of their partnership agreement. * * *"

Appellants attack (a) the authority of the federal court by decree in chancery to dissolve the corporation Standard Cap & Seal Company; (b) the findings of the court on the issues of fraud and fraudulent representations; (c) appellants also attack that portion of the decree requiring Tevander to assign patents standing in his name to the partnership.

Edward W. Everett and Dwight B. Cheever, both of Chicago, Ill., for appellants.

Albert Fink, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). [1] Was the federal court without authority to enter the decree here attacked?

Appellants urge that this is a suit to dissolve an Illinois corporation, the appellant herein, Standard Cap & Seal Company; that the federal court should adopt the rulings of the highest court of Illinois upon the authority of a court of equity to dissolve such corporation (Sim v. Edenborn, 242 U. S. 131, 37 Sup. Ct. 36, 61 L. Ed. 199; Ennis Water Works v. City of Ennis, 233 U. S. 652, 34 Sup. Ct. 767, 58 L. Ed. 1139; Yazoo & Miss. V. R. R. v. Adams, 181 U. S. 580, 21 Sup. Ct. 729, 45 L. Ed. 1011); that it is the established law of the state of Illinois that a corporation cannot be dissolved except by complying with the statutes in respect thereto (Wheeler v. Pullman Iron & Steel Co., 143 Ill. 197, 32 N. E. 420, 17 L. R. A. 818; People v. Weigley, 155 Ill. 491,

40 N. E. 300; Shriver v. Day, 276 Ill. 403, 114 N. E. 918); that a federal court cannot, independent of statutory authority, dissolve a state corporation (Wells Co. v. Gastonia Co., 198 U. S. 177, 25 Sup. Ct. 640, 49 L. Ed. 1003; Conklin v. U. S. Ship-Building Co. [C. C.] 140 Fed. 219; Republican Mountain Silver Mines v. Brown, 58 Fed. 644, 7 C. C. A. 412, 24 L. R. A. 776); that the record fails to disclose facts bringing the case within any of the reasons enumerated by the Illinois statute as sufficient ground for dissolution.

With these various contentions there can be no quarrel, but appellee contends this is not a suit to dissolve the Illinois corporation, Standard Cap & Seal Company, but is one to set aside an agreement made between appellee and Tevander, entered into through false and fraudulent representations made by Tevander and relied upon by appellee, and to restore the partnership theretofore existing, and terminated only by reason of the fraudulent agreement, and to retransfer to such copartnership assets fraudulently taken from it, and to secure such relief upon the re-creation of the copartnership as one partner is entitled to receive in a winding-up proceeding.

The prayer for relief, while not conclusive, is instructive. Among other things complainant prayed that—

"the incorporation of the business of the copartnership heretofore existing be held for naught, and it be decreed that the true relations existing between Tevander and herself are those of copartnership; that the partnership be dissolved, an accounting be had with Tevander and the assets distributed between them; that Tevander be required to set forth the nature of his new improvement and inventions, and decreed to hold the same in trust for the copartnership; pending final determination of this cause a receiver be appointed," etc.

The allegations in the bill set out with considerable particularity the history of the copartnership and the corporation; the fraudulent representations and inducements made by Tevander to secure a termination of the partnership and the organization of the corporation, wherein Tevander secured, through the ownership of a majority of the stock, permanent control of the policy of the company; the efforts of Tevander to avoid the provisions of the copartnership respecting title to patents, heretofore quoted; the securing of patents in Tevander's name; and efforts to force appellee to sell her interest in the company's business. The findings support appellee's theory that no dissolution of the corporation is involved. It appears to us that the pleadings, evidence, and findings justify this court in concluding that the suit is one to re-establish the status quo ante the fraud, dissolve the partnership, grant an accounting, appoint a receiver, and divide the assets.

While appellants strenuously contend that to strip the corporation of its assets is in substance to work a dissolution, they overlook the fact that the property passed to the corporation by reason of an agreement secured through fraud. Inasmuch as Tevander and appellee are the only stockholders of the corporation, and therefore the rights of third parties are not involved, no good reason is seen why a court of equity should not grant such relief as will afford appellee adequate redress for the wrongs by her suffered through the fraudulent representations of Tevander.

While no authorities are cited in support of the jurisdiction of a court of equity upon facts such as here disclosed, we find none of appellants' citations in point. Surely a court of equity will delight in finding the necessary means of enforcing its decrees against delinquent defendants, and its powers are as extensive as the exigencies of the case demand. If appellee was induced to enter the agreement to dissolve the partnership and create the corporation through the fraudulent representations of Tevander, will a court of equity permit the latter to escape liability by hiding behind the fictitious third party, the corporation, the stock of which he and appellee are the sole owners? The assets of the copartnership were turned over to this corporation by reason of the action of the copartners, which action was induced by the fraudulent representations of appellant Tevander. This fact being shown, the right of the corporation to the assets of the copartnership is subject to be defeated upon proof that fraud was practiced upon the copartnership. In other words, the title of the corporation to the assets here involved rests upon an assignment from the copartnership. Contemporaneously executed and indorsed on the back of the assignment is an agreement to dissolve the copartnership. Both assignment and agreement to dissolve in turn rest upon the written agreement of Tevander and appellee (a) to dissolve the copartnership, (b) organize the corporation, and (c) assign to the latter the assets of the former. If fraud tainted the last-named agreement, its consequences reach all three transactions. Even though the corporation may not be dissolved, no good reason is advanced why it should hold property under an assignment secured through fraud.

We conclude the court was authorized to grant the relief decreed in this suit.

[2] Does the evidence warrant the finding that Tevander made false and fraudulent representations relied upon by appellee to her damage, and which fraudulent representations justified the court in rescinding the agreement made to dissolve the copartnership?

In the previous discussion the court assumed that the evidence justified the findings of the court in favor of the appellee. But appellants deny the sufficiency of the proof to warrant such findings.

A careful and thorough examination of the evidence justifies the conclusion that not only was there evidence to support the court's findings, but no other conclusion would have been warranted.

It will serve no useful purpose to restate in detail the evidence which leads us to this conclusion. It will be sufficient to say that the parties hardly stood at arms' length and dealt as strangers. Appellee was a young, inexperienced person, whose husband had engaged with appellant Tevander in a business that was unusually profitable. Upon the death of her husband, appellee, then scarcely of age and entirely inexperienced in business matters, immediately made Tevander sole manager of the business, intrusted him with the entire conduct of the business, and paid him a princely salary—in 1914, $10,644.24, in 1915, $21,274.40, in 1916, $33,359.22. In addition thereto Tevander's share of the profits exceeded the amounts received by him as compensation. Immediately upon securing control of the corporation through the

ownership of a majority of stock, Tevander secured action preventing the payment of any cash dividends in excess of 10 per cent., although the annual profits of the company exceeded 300 per cent. of the capital. This conduct is hardly explainable upon any theory other than that he hoped thereby to force appellee, who was accustomed to live beyond an income of $2,500, to sell her interest in the business.

Tevander's conduct with reference to the patents is even more reprehensible. Under an agreement with his deceased partner to turn over to the partnership any patent that might be secured by him that pertained to the business of the partnership, it is impossible to reach any other conclusion than that he sought the dissolution of the copartnership to rid himself of this written obligation. No sooner had the copartnership been dissolved, and the agreement with reference to patents terminated, than he filed application in the patent office for a patent in his own name, which patent covered a machine that threatened to displace the one manufactured by the company. Controlling two of the three directors, he endeavored at a subsequent meeting of the directors to sell this patent to the company for the sum of $500,000.

[3] But appellants urge that there were no actionable misrepresentations made by Tevander, and if the findings of the court, Nos. 8 and 9, heretofore quoted, be accepted, no fraudulent statements appear upon which a suit to rescind a contract might be predicated. In other words, it is claimed that the statements made by Tevander that—

"the business was assuming such proportions that the copartnership could be carried on more conveniently and with greater profit as a corporation; that the business of the copartnership could go on as before, but, as to the extra share to be given him, this was merely to enable him to have his own way with the management and to protect him in event of her death, remarriage, or sale of her interest against evilly disposed persons who might set out to wreck the business for the purpose of robbing him of his interest therein; that he would treat her as he always treated her; that so long as she remained his partner in the business he would consider he held this extra share as much for her benefit as for his own; that her income would not be reduced. * * *"

—were mere promissory representations, and were not actionable.

With this conclusion we cannot agree. While some of these representations were promissory in character, they were in substance but an expression of Tevander's state of mind toward appellee. If the statements were true, then appellee was justified in assuming that the partner of her deceased husband, and her own partner for a year and a half, entertained no covetous designs upon her property, but only desired to treat her in the manner in which a confiding partner might well expect from an active partner, well compensated for his responsibility. If the statements were true, then Tevander's attitude toward appellee was such that it mattered not whether the business was conducted as a copartnership or as a corporation, whether the share which gave to Tevander the majority of the stock stood in the name of one party or the other, or in the name of both. Surely such representations were material and persuasive only as they impressed appellee with the asserted open, fair, and friendly state of mind which appellant Tevander professed to possess toward appellee.

No separate consideration of appellant's claim that appellee was not influenced or induced to act by the representations is necessary. It ap-

pears that, notwithstanding the warning given her by friends, she chose to place reliance upon the professions of friendship made by her partner, the friend of her deceased husband. She relied thereon even as against the judgment of disinterested advisors.

[4] Nor can we say that she was careless in so relying upon Tevander's representations. The business had been wonderfully successful. She had received in the year 1914 over $18,000 for her share of the profits, after paying Tevander his salary, and after providing a reasonable surplus in the treasury. The entire responsibility rested upon Tevander, and appellee was not unmindful of Tevander's right to be protected in case of her sudden and unexpected death.

[5] Nor are we impressed with the claim that appellee failed to act promptly after discovering the fraud. Proof of the deception came only by piecemeal. Courts are slow to hold the defrauded party guilty of carelessness because of his or her reluctance to believe a former associate or partner false to his trust. Appellants are not in a good position to urge the enforcement of any harsh rule based upon appellee's tardy awakening. Much of the proof of the most convincing character did not come to light until a few months before suit was instituted. We conclude appellee was not guilty of laches.

[6] Did the court err in adjudging that Tevander held the patents in trust for the partnership?

Under the agreement made between the original parties to the partnership, all patents of the character under consideration belonged to the partnership. Tevander's claim to them arose from the agreement terminating the partnership. This contract, having been avoided by the fraud heretofore mentioned, the original agreement governed the rights of the parties, and the court properly adjudged the patents to belong to the partnership.

[7] Complaint is also made because the court refused to allow Tevander, as his salary, 20 per cent. of the profits for the year 1916.

By the decree an accounting was ordered and all matters referred to a master. Under such accounting Tevander may be allowed a reasonable compensation for his services during this year. Whether the master will allow 20 per cent. of the net profits or a lesser sum will depend upon all the facts and circumstances disclosed upon such hearing. Clearly, Tevander has forfeited his right to an absolute claim to the sum fixed in the contract. The agreement allowed him a given per cent. of the net profits for *faithful* services.

The decree is affirmed.

Judge KOHLSAAT participated in the hearing of this suit and concurred in the conclusion, but died before the announcement of this opinion.

## In re ARKIN DRESS CO., Inc.

### Petition of SHAINE.

(Circuit Court of Appeals, Second Circuit. May 23, 1918.)

No. 110.

1. BANKRUPTCY ⟸140(2)—RECLAMATION OF MERCHANDISE—IDENTIFICATION.
Where bankrupt, shortly before bankruptcy, purchased merchandise, obtaining credit through false representations, sellers had a right to reclaim merchandise so long as it remained in the hands of the bankrupt, and could reclaim proceeds of the sale so long as they could identify the fund.

2. BANKRUPTCY ⟸212—RECLAMATION OF MERCHANDISE—IDENTIFICATION OF FUND—SUFFICIENCY OF EVIDENCE.
On petition for reclamation of merchandise fraudulently obtained by bankrupt and sold shortly before bankruptcy, evidence *held* insufficient to trace proceeds of sale into hands of trustee.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the Arkin Dress Company, Incorporated, bankrupt. Reclamation proceeding by Heyman Cohen & Sons. Report of special master, recommending denial of petition for reclamation, reversed by District Court, and order entered directing trustee to pay over to Heyman Cohen & Sons, or their attorneys, the sum of $1,283.25. On petition to revise the order by Maurice L. Shaine, as trustee. Order reversed, and motion to confirm report of special master granted.

The alleged bankrupt is a corporation organized under the laws of the state of New York, of which Louis Arkin, Jr., was the president and general manager. On December 29, 1916, a petition in involuntary bankruptcy was filed against it and on January 11, 1917, an order was entered adjudicating it an involuntary bankrupt. On December 30, 1916, the revising petitioner was appointed receiver, and on February 21, 1917, trustee of the bankrupt.

Rosenberg & Ball, of New York City (David W. Kahn, of New York City, of counsel), for revising petitioner.

Morrison & Schiff, of New York City, for respondents Heyman Cohen & Sons.

Before WARD and ROGERS, Circuit Judges, and LEARNED HAND, District Judge.

ROGERS, Circuit Judge. A reclamation proceeding was instituted by Heyman Cohen & Sons, jobbers in woolen and dress goods in the city of New York. Their petition asked for an order requiring the receiver to turn over the sum of $2,085; that amount representing the proceeds of certain merchandise sold by them to the bankrupt and resold by the latter to one Rosenzweig.

The reclamation petition alleged that the petitioners had sold to

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

the bankrupt certain merchandise, consisting of 1,737⅝ yards of blue serge cloth, being induced to do so by the false and fraudulent representations made by Louis A. Arkin, Jr. The matter was referred to a special master, who recommended the denial of the petition of the reclaiming creditors, basing his recommendation upon the ground that the proceeds of the goods so sold had not been traced into the hands of the receiver. Motions were then brought on, in the District Court, to confirm and to reverse the report; and the District Judge decided that the special master had erred in his conclusions and that the reclamation should be granted. An order was accordingly entered, directing the trustee to forthwith pay over to Heyman Cohen & Sons, or their attorneys, out of the moneys in his hands as trustee, the sum of $1,283.25. It is this order that we are now asked to revise.

It appears that the Arkin Dress Company, on December 17, 1916, represented to Heyman Cohen & Sons, the reclaiming creditors, that it had an order from John Wanamaker for a quantity of dresses requiring 2,300 yards of blue serge cloth. The Dress Company also represented that it had on deposit at that time with the Union Exchange National Bank at least $3,000. A check in the sum of $2,210.96 was delivered by the bankrupt to Heyman Cohen & Sons to pay an indebtedness due from it to Heyman Cohen & Sons, not then due, but which it was necessary to pay to get more credit. It also, and for the purpose of inducing Cohen & Sons to sell and deliver to it the blue serge cloth above referred to, represented falsely that its financial condition was the same or better on December 27 than it was on September 9, 1916, there having been a financial statement on that date. In reliance on these representations Heyman Cohen & Sons delivered to the bankrupt 1,737⅝ yards of blue serge cloth, valued at $2,085.

Before selling the cloth to the bankrupt the claimants inquired of Woods' Commercial Agency as to the bankrupt's financial condition. They were informed that on December 11, 1916, the president of the bankrupt corporation submitted an affidavit which he now swears was false. It also appears that its bank credit on December 27, instead of being $3,000, as represented, was only $54.90. The petition in involuntary bankruptcy was filed two days after the delivery of the blue serge. The president of the bankrupt corporation swears that this merchandise was delivered in the original packages by the bankrupt the day after it received them to one Rosenzweig, who paid to the bankrupt the sum of $2,500. He also swears that of this amount $2,100 was turned over in currency by him to the receiver in bankruptcy. It clearly appears that this merchandise was obtained from the claimants by means of false representations made to them by the bankrupt directly, as well as through the Woods' Commercial Agency. The representations were false, and they were relied upon by the claimant.

[1] The claimants had a right to reclaim the merchandise so long as it remained in the hands of the bankrupt. They could also claim the proceeds of the sale to Rosenzweig so long as they could identify the fund. The testimony was that the bankrupt sold to Rosenzweig

at 65 per cent. of the cost. Computed on that basis, the bankrupt received $1,553 for the Heyman Cohen & Sons serge. But as Rosenzweig paid him altogether $2,500 for the total merchandise turned over, and retained out of that $415 for himself, the proportionate loss to the claimants out of the transaction amounted to $269.75. This left $1,283.25 as the sum due the claimants, and the District Judge has entered an order directing the receiver to turn over that amount to the claimant.

[2] The trustee claims that this order of the District Judge was erroneous, in that it has not been shown that the proceeds of the identical goods sold by Heyman Cohen & Sons were ever paid over to the receiver. The sole question in the case is whether the claimants have identified the fund. The testimony they rely upon is that of Louis Arkin, Jr., and if it can be believed the proceeds of the goods have been traced into the hands of the trustee, and the order of the District Judge is right. If the question were simply one between the vendor and the vendee, the testimony of Arkin might be accepted; but the decision of the question affects the rights of all the creditors of the bankrupts' estate, and if the fund in its entirety is to be withdrawn, and turned over to Heyman Cohen & Sons, all other creditors being excluded therefrom, the evidence should not be doubtful, but should be reasonably conclusive. We are unable to regard the testimony as at all persuasive. Arkin testified, it is true, that he sold the identical goods his company received from the claimants to one Rosenzweig, and that he received from him $2,500. But he stated that that sum represented also somebody else's goods; that he did not know how much he received for the claimants' goods; that he did not know how much other merchandise he sold or what he received for it. He admitted, however, that he got 65 per cent. of the amount he paid the claimants for the goods. He admitted that the statement given to the Woods' Commercial Agency on December 11, 1916, and which he had signed was not true. He admitted that on December 27, 1916, he had no unfilled order from John Wanamaker which required about 2,300 yards of cloth, and denied that he had represented that he had such an order, although the testimony of the claimants showed that he had made such a representation. He admitted that he knew his company was insolvent when he bought the serges from Heyman Cohen & Sons, and that for perhaps three or four weeks prior to that purchase and prior to the failure his company had ceased to do any making of dresses, and was simply buying merchandise and selling it in the original packages at a loss, getting for it from 50 to 65 per cent. of what it cost; that in the month or two prior to the failure he had bought more than $40,000 worth of goods, which he had sold in the manner above indicated; that he did not know whose goods he sold to Rosenzweig at the time he sold him the claimants' goods. In answer to the question, "Who were you doing business with at that time?" he answered, "I don't remember exactly." This man is not entitled to belief. He is revealed by his own testimony as thoroughly unscrupulous, dishonest, and unworthy of credence. Whether the money he turned over to the trustee was money which

came from the sale of the claimants' goods, or from the sale of some one else's goods, is not proven.

The order of the District Court is reversed, and the motion to confirm the report of the special master is granted.

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## HARDWOOD PACKAGE CO. v. COURTNEY CO.

(Circuit Court of Appeals, Fourth Circuit. April 3, 1918.)

No. 1569.

1. SALES ⊜53(1)—CONTRACT—QUESTION FOR JURY.
   In an action by the seller of hardwood staves for the buyer's failure to accept, whether there was complete agreement between the parties as to the terms of the contract of sale *held* a question of fact for the jury.
2. CONTRACTS ⊜35—FORMAL CONTRACT.
   Apart from statute of frauds, if minds of contracting parties meet at all points, and their agreement of sale is fully set forth in unsigned memorandum, which they both accept as correct, binding obligation results, though it was their intention to have formal contract prepared and signed.
3. CONTRACTS ⊜35—SIGNATURE OF FORMAL CONTRACT.
   An unsigned contract cannot be enforced by either of the parties, however completely it may express their mutual agreement, if it was also agreed that the contract should not be binding until signed by both.
4. SALES ⊜53(1)—SIGNATURE OF FORMAL CONTRACT—QUESTION FOR JURY.
   In action by seller of hardwood staves for buyer's refusal to accept, whether it was intention of both parties that contract be reduced to writing and signed by both before it became binding, *held* question of fact for jury.

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller, Judge.

Action by the Courtney Company against the Hardwood Package Company. To review judgment for plaintiff, defendant brings error. Reversed.

D. M. Easley and D. E. French, both of Bluefield, W. Va., for plaintiff in error.

W. E. R. Byrne, of Charleston, W. Va. (Linn & Byrne, of Charleston, W. Va., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and McDOWELL, District Judge.

KNAPP, Circuit Judge. The questions deemed controlling in this case will appear from a comparatively brief statement, without reciting at length the somewhat complicated facts out of which the litigation arose. In the court below the Courtney Company, defendant in error, was plaintiff, and the Hardwood Package Company, defendant, and they will be so designated in this opinion. These parties, through their respective agents, entered into negotiations in the latter part of 1912 for the sale by plaintiff and purchase by defendant of a large quantity of barrel staves. On the 21st of December, at defendant's place of business in Philadelphia, an agreement appears to have been reached

with a representative of plaintiff. A contract was accordingly drawn up in duplicate, on the printed form used by defendant, and both copies sent by mail unsigned to plaintiff at Charleston, W. Va., for its signature. The plaintiff, however, declined to execute this contract, and instead prepared a contract of its own, dated January 1, 1913, which was signed in duplicate by its president and mailed to defendant on the 9th of that month. The defendant received this contract in due course, but did not sign it. On the 1st of May it was returned unsigned, with a letter stating that "we have canceled all negotiations, for staves and heading, that we may have had with you," and refusing in effect to take the staves in question. To this the plaintiff replied in substance that a binding contract had been made, that it had at all times been ready and willing to perform the same, that the market price of staves had gone down materially, and that if defendant persisted in its refusal it would sell the staves for the best price then obtainable and hold the defendant responsible for any resulting loss.

Some three years later, in March, 1916, this suit was brought to recover, as damages for alleged breach of contract, the difference between the amount for which plaintiff sold the staves to other parties, after defendant refused to take them, and the amount that plaintiff would have received at the price named in the contract claimed to have been made; that is, the contract prepared by plaintiff and sent to defendant in January, 1913, as above stated. The special count of the declaration is on that contract, set out in full in the pleading, which is asserted to be valid and enforceable, because it expresses the actual agreement of the parties and was accepted as such by the defendant. At the trial, and under its plea of nonassumpsit, the defendant gave evidence tending to support two defenses: (1) That there was no complete agreement between the parties, because their minds never met on any contract, verbal or written; and (2) that it was the understanding and intention of plaintiff and defendant alike that the contract for which they were negotiating should not be binding, unless reduced to writing and signed by both parties. The jury found for the plaintiff for the full amount of its claim, and defendant comes here on writ of error.

[1, 2] It is enough to say that in our opinion the first of these defenses was not established as matter of law. True, certain acts and declarations of plaintiff were shown which seem quite inconsistent with a belief on its part that a definite contract had been made, and apparently the jury would have been warranted in finding that the negotiations in question went no further than proposals by each side, first the defendant, and later the plaintiff, which the other side was not willing to accept. But in view of the explanations of plaintiff, and taking into account all the evidence upon this issue, we think it became a question of fact which was properly submitted to the jury. Apart from the statute of frauds, which is not set up in this case, it is well settled that if the minds of contracting parties meet at all points, and their agreement is fully set forth in an unsigned memorandum, which they both accept as correct, a binding obligation results, although it was their intention to have a formal contract prepared and signed. Jenkins &

Reynolds Co. v. Cement Co., 147 Fed. 641, 77 C. C. A. 625; Whitted & Co. v. Fairfield Cotton Mills, 210 Fed. 725, 128 C. C. A. 219; Morton v. Witte, 147 App. Div. 94, 131 N. Y. Supp. 778; Drummond v. Crane, 159 Mass. 577, 35 N. E. 90, 23 L. R. A. 707, 38 Am. St. Rep. 460.

[3] But it is equally well settled that an unsigned contract cannot be enforced by either of the parties, however completely it may express their mutual agreement, if it was also agreed that the contract should not be binding until signed by both of them. In the leading case of Mississippi & Dominion Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063, 41 Am. St. Rep. 545, it is said:

"When parties enter into a general contract, and the understanding is that it is to be reduced to writing, or if it is already in a written form that it is to be signed before it is to be acted on, or to take effect, it is not binding until it is so written or signed. * * * When correspondence indicates that a formal draft of a contract was in the minds of the parties, or at least in the mind of the party sought to be charged, as the only authoritative evidence of a contract, and that he did not have, nor signify, any intention to be bound until the written draft had been made and signed, he is not bound until such draft is duly made and signed. * * * The burden of proof is upon the party claiming the completion of the contract before the written draft thereof is signed."

To the same effect are Ambler v. Whipple, 87 U. S. (20 Wall.) 546, 22 L. Ed. 403, Hennessy v. Bond, 77 Fed. 403, 23 C. C. A. 203, Spinney v. Downey, 108 Cal. 666, 41 Pac. 797, and Morrill v. Mining Co., 10 Nev. 125.

[4] In the instant case, as already said, it was one of the defenses that neither the contract sued upon nor any other contract for the purchase of staves was to take effect and be binding until signed by both parties, and accordingly the defendant asked the following instruction:

"The court instructs the jury that, if you believe from the evidence in this case that it was the intention of the plaintiff and defendant, in their negotiations respecting the contract for staves, that it was to be reduced to writing and signed by both parties before it became a binding contract, then you will find for the defendant."

This instruction was refused on the ground, as appears from the record, that it was "misleading in its terms under the evidence." How this could be said is not apparent. The proposition of law involved in the request is undoubtedly sound, and it seems clear to us that the evidence on this issue presented a question of fact to be passed upon by the jury. Two references will suffice. As late as February 14th plaintiff wrote defendant:

"We have never received the copy of the contract for staves sent you some time ago. Not having heard from you, we are shipping some of these staves to other parties."

And on the trial of the cause Samuel Courtney, then president of the plaintiff company, testified:

"Q. And the reason you didn't commence shipping staves is because they didn't sign the contract? A. That is right. Q. And you knew that the con-

tract had to be signed by Mr. Pew? A. Yes, sir. I knew it was supposed; he said some place that Pew would have to sign it."

This of itself was enough, as we think, to raise a question for the jury. And the obvious effect of refusing the requested instruction was to shut out an independent defense, which, if sustained by a finding of fact, would have defeated the plaintiff's action. Whether or not it was understood throughout the negotiations that the parties would be bound only by a signed agreement was a distinct and vital issue, which, on the proofs made, was plainly for the jury to determine. We cannot sustain defendant's contention that the evidence on this issue was so conclusive as to require a directed verdict in its favor; but we are convinced, after careful study of the case, that the question here considered was a question of fact, which should have been submitted to the jury under proper instructions. The refusal to so submit it was therefore an error for which the judgment must be reversed.

As the remaining questions appear to be of little importance, and may not arise on another trial, we deem it unnecessary to make them the subject of discussion.

Reversed.

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SOLER, Commissioner of Health, v. SCOVILLE et al.

(Circuit Court of Appeals, First Circuit. November 21, 1918.)

No. 1348.

1. TERRITORIES ⊜32—PORTO RICO—ACTION AGAINST—CONSENT.
Action against the commissioner of health of Porto Rico, in his official capacity, to restrain him from purchasing land and erecting a tuberculosis hospital, *held* in reality against the sovereign, and so not maintainable without its consent; it being presumed, in the absence of allegation to the contrary, that he acted in good faith and within the scope of his authority, and he acting under his general authority, and not under any special and limited authorization.

2. COURTS ⊜405(2)—CIRCUIT COURT OF APPEALS—SCOPE OF REVIEW.
The appeal being from an interlocutory decree under Judicial Code, § 129 (Comp. St. 1916, § 1121), the Circuit Court of Appeals is authorized to determine whether the District Court had jurisdiction.

Appeal from the District Court of the United States for the District of Porto Rico; Hamilton, Judge.

Suit by Hector H. Scoville and others against Alejandro Ruiz Soler, Commissioner of Health for Porto Rico. From an interlocutory decree, granting a temporary injunction, defendant appeals. Reversed and remanded.

Col. Edward S. Bailey, Asst. Judge Advocate General, of Washington, D. C. (Howard L. Kern, Atty. Gen., of Porto Rico, on the brief), for appellant.

Hector H. Scoville, of San Juan, P. R. (Charles Hartzell and Daniel F. Kelley, both of San Juan, P. R., on the brief), for appellees.

Before BINGHAM and JOHNSON, Circuit Judges, and ALDRICH, District Judge.

⊜For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

BINGHAM, Circuit Judge. This is an appeal from an interlocutory decree of the United States District Court for Porto Rico granting a temporary injunction restraining the appellant, Soler, commissioner of health for Porto Rico, from purchasing a certain tract of land and erecting thereon a hospital for the treatment of tuberculosis patients. In the court below Soler appeared specially, and entered a motion to quash the summons and dismiss the petition for want of jurisdiction, assigning as reason therefor that the action, although brought against the commissioner of health in his official capacity, was in reality an action against the people of Porto Rico, who had not consented to be sued, and therefore the court was without jurisdiction.

It appears that on February 19, 1918, a temporary restraining order was issued; that on March 9, 1918, the defendant's motion to dismiss for want of jurisdiction was denied; and that, affidavits relating to the plaintiffs' motion having been filed, a temporary injunction, as prayed for in the complaint, was granted.

In the assignment of errors the appellant complains that the court erred in denying his motion and granting the motion for a preliminary injunction.

It is conceded by the appellees that the people of Porto Rico cannot be sued without its consent, and it may well be conceded, for in Porto Rico v. Rosaly y Castillo, 227 U. S. 270, 33 Sup. Ct. 352, 57 L. Ed. 507, it was held that—

"It is not open to controversy that, aside from the existence of some exception, the government which the organic act established in Porto Rico is of such nature as to come within the general rule exempting a government sovereign in its attributes from being sued without its consent."

It is also conceded that the defendant, Soler, as commissioner of health for Porto Rico, is charged with the duty of erecting a tuberculosis hospital.

In the act of March 2, 1917, providing a civil government for Porto Rico and known as the Jones Act (39 U. S. Stat. at Large, pp. 951, 955, 964, c. 145), certain executive departments of the government were created, among which was the department of health, the head of which was to be known as the "commissioner of health." It was also provided that—

"The heads of departments shall collectively form a council to the Governor, known as the executive council. They shall perform under the general supervision of the Governor the duties hereinafter prescribed, or which may hereafter be prescribed by law, and such other duties, not inconsistent with law, as the Governor, with the approval of the President, may assign to them." Section 13.

"That the commissioner of health shall have general charge of all matters relating to public health, sanitation, and charities except such as relate to the conduct of maritime quarantine, and shall perform such other duties as may be prescribed by law." Section 19.

And "that the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable. * * *" Section 37.

In pursuance of the authority above conferred the Legislature of Porto Rico in Act No. 71, approved December 6, 1917, and in Act No. 89, approved December 7, 1917, appropriated the sums of $20,000 and

$40,000, respectively, which acts, except as to the sums appropriated, read as follows:

"Care of tuberculosis patients, including purchase and repair of equipment, construction and repair of buildings, and insurance on equipment and on buildings owned by the people of Porto Rico and used as a sanatorium, including also the purchase of the necessary land, payment of salaries of personnel and expenses of transportation of patients and other expenses, for six months, $20,000."

It appears that the land on which a tuberculosis hospital was located had been taken by the military authorities of the United States for a training camp; that, to meet the public necessity thus created, the defendant, by virtue of the general authority vested in him as commissioner of health and the appropriation acts of December 6 and December 7, 1917, entered into a contract for the purchase of a certain tract of land, containing about 35 acres, from a Mr. and Mrs. Hubbard, situated on the south side of the highway leading from Rio Piedras to Carolina, in the district of Sabana Llana, intending to erect thereon a tuberculosis hospital. The plaintiffs are the owners and lessees of properties adjoining said tract of land on the east and west sides thereof, and they bring this suit to enjoin the purchase of the land and the erection of the hospital.

From the foregoing provisions of law it appears that Soler, as commissioner of health, was authorized, and that it was his duty, to determine upon a suitable site for the location of a tuberculosis hospital, and to purchase the same for the people of Porto Rico, and it is evident that the performance of this duty involved the exercise of administrative or official discretion.

[1] It is not alleged in the bill that the defendant, in deciding upon the location, acted in bad faith and beyond the scope of the authority conferred upon him, and, in the absence of such an allegation, it is to be presumed that he acted in good faith and within the scope of his authority. In view of this situation, and the fact that the bill is prosecuted against Soler in his official capacity as commissioner of health, the question arises whether the action is not one in reality against the sovereign, the people of Porto Rico. As to this we entertain no doubt. The action is brought to enjoin the consummation of a contract in which the defendant individually has no interest, and in which the people of Porto Rico are alone interested. It is, in reality, an action against the sovereign (In re Ayers, 123 U. S. 443, 503, 8 Sup. Ct. 164, 31 L. Ed. 216; Minnesota v. Hitchcock, 185 U. S. 373, 22 Sup. Ct. 650, 46 L. Ed. 954; Murray v. Wilson Distilling Co., 213 U. S. 151, 29 Sup. Ct. 458, 53 L. Ed. 742; Wells v. Roper, 246 U. S. 335, 38 Sup. Ct. 317, 62 L. Ed. 755), and, if it has not consented to be sued, the action cannot be maintained.

It is contended by the appellee that the defendant, Soler, in determining upon the location and purchase of this property for a hospital, was a special agent, and that, if this is so, the action can be maintained, for, under the provisions of section 1804 of the Civil Code of Porto Rico, the government has in such case consented to be sued.

But we think that the commissioner of health in the transaction in

question was acting under his general authority and not under any special and limited authorization and that the action cannot be maintained against the people of Porto Rico, for, in that situation, it has not consented to be sued.

[2] As the appeal is from an interlocutory decree under section 129 of the Judicial Code (Act March 3, 1911, c. 231, 36 Stat. 1134 [Comp. St. 1916, § 1121]), we are authorized to determine whether the District Court had jurisdiction. Supreme Council of Royal Arcanum v. Hobart, 244 Fed. 385, 157 C. C. A. 11.

The decree of the District Court is reversed, and the case is remanded to that court, with directions to enter a decree dismissing the bill; and the appellant recovers costs.

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## INDEPENDENT HARVESTER CO. v. TINSMAN.

(Circuit Court of Appeals, Seventh Circuit. September 6, 1918.)

No. 2558.

1. SALES ⟸43(3)—RESCISSION—REPRESENTATION OF FACT.
Representation that an invention can be used without infringing any existing patent may be one of fact, rather than mere opinion, as regards right to rescind a contract of sale made in reliance thereon.

2. JUDGMENT ⟸585(4)—RES JUDICATA—DIFFERENT CAUSES OF ACTION.
Judgment on a note is not an estoppel to suit to rescind for fraud the contract under which the note was given; that issue not having been actually litigated in the action on the note, and the causes of action being different.

3. SALES ⟸126(1)—SUIT FOR RESCISSION—LACHES.
Bill to rescind for fraud having been filed within a few months after the fraud was discovered, and within less than the period of limitations after the making of the representations, suggestion of laches, in the absence of a showing of special circumstances, is without force.

4. SALES ⟸43(2)—RESCISSION—MISREPRESENTATION—INTENT.
Material misrepresentation, made to induce purchase and actually relied and acted on, is sufficient for rescission, and the seller's intention is immaterial.

5. SALES ⟸123—RESCISSION—CONDITIONS PRECEDENT.
Eviction from enjoyment of patent is not a condition precedent to right of purchaser to rescind for fraudulent misrepresentation that invention infringed no existing patent.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Suit by the Independent Harvester Company against Samuel H. Tinsman. From an adverse decree, complainant appeals. Reversed, with directions.

Charles S. Burton, of Chicago, Ill., for appellant.
Charles C. Bulkley, of Chicago, Ill., for appellee.

Before BAKER and EVANS, Circuit Judges.

BAKER, Circuit Judge. This appeal challenges a final decree based on a ruling that appellant's bill failed to state a cause of action in equity.

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A brief outline will suffice for a background against which to consider the points of assault.

In November, 1909, Tinsman represented to Thompson, appellant's president, that Tinsman had invented a new cultivator, that he was thoroughly versed in the cultivator art, and that his invention could be patented and could be fully used without infringing any subsisting patents. Thompson was inexpert and without knowledge or information respecting the state of the art, so informed Tinsman, and Thompson relied upon Tinsman's representations, as Tinsman knew, in entering into a written contract for the invention and Tinsman's services in making a commercial embodiment. Under the contract appellant paid Tinsman $500 and gave him seven notes for $1,000 each, payable one a year for seven years. In 1904 Tinsman took out a cultivator patent, which prevented the use of his 1909 improvements. This 1904 patent Tinsman had sold and assigned to others before he came to Thompson. Three additional prior patents also prevented the free manufacture and sale of the cultivator that Tinsman was building for appellant. Before appellant learned these facts two notes were paid and suit was started on the third. Prayer was for rescission, restoration of consideration paid, and injunction against prosecution of the suit on the third note. By a supplemental bill appellant showed that pending this suit Tinsman had obtained judgment in the suit on the third note, and prayed that he be enjoined from taking out execution thereon.

[1] 1. Appellee says that statements respecting infringement are only expressions of opinion, as this court ought to know from its experience in patent cases. No matter how difficult it may be from the evidence in patent cases, courts are forced to make a finding of fact with respect to infringement. Appellee, however, was free to limit himself to an expression of opinion; but, according to the bill, he made representations of fact regarding the place of his 1909 improvements in the cultivator art.

[2] 2. What is the effect of the stated fact that judgment has been entered upon the third note? As to the cause of action based upon that note all issues are closed, not only those that were actually litigated, but also those that might have been. But fraud as a ground for rescission of the contract is a different cause of action, and the judgment on the note is not an estoppel against counting on fraud in procuring the contract unless that issue was actually litigated in the suit on the note. And the bill does not disclose that it was. Packet Co. v. Sickles, 24 How. 333, 16 L. Ed. 650; Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 681; Chemical Co. v. Kirven, 215 U. S. 252, 30 Sup. Ct. 78, 54 L. Ed. 179.

[3] 3. Appellee contends that laches is a bar. In Maine, where appellant was and is located, and where the contract was made and to be performed, six years is the period after which actions at law or in equity on account of fraud shall not be commenced. R. S. Me. c. 83, § 99. And in Illinois, where appellee is a citizen and resident, and where he is being sued, the limitation is five years. R. S. Ill. par. 7217, § 22. Time does not begin to run until the fraud has been, or

might with diligence have been, discovered. Kirby v. Lake Shore, etc., Ry. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569; Bailey v. Glover, 21 Wall. 342, 22 L. Ed. 636. As the bill was filed within a few months after the fraud was discovered, and within less than five years after the representations were made, the suggestion of laches, in the absence of any showing of special circumstances which would justify equity in shortening the legal period, is wholly without force.

[4] 4. Appellee assails the bill because it contains no direct averment that Tinsman knew that the representations were false when he made them. In an action of deceit by vendee against vendor, intentional misrepresentation by the vendor is an essential element. But in a bill for rescission, the question whether the vendor intentionally falsified is immaterial. It is enough that the representation was contrary to fact, was material, was made to induce the vendee to act, and was actually relied and acted upon by the vendee to his injury. Smith v. Richards, 13 Pet. 26, 10 L. Ed. 42; Turner v. Ward, 154 U. S. 618, 14 Sup. Ct. 1174, 23 L. Ed. 391; Benton v. Ward (C. C.) 47 Fed. 253; Simon v. Goodyear Rubber Shoe Co., 105 Fed. 573, 44 C. C. A. 612, 52 L. R. A. 745; Hindman v. First Nat. Bank, 112 Fed. 931, 50 C. C. A. 623, 57 L. R. A. 108; Kell v. Trenchard, 142 Fed. 17, 73 C. C. A. 202; In re American Knit Goods Manufacturing Co., 173 Fed. 480, 97 C. C. A. 486.

[5] 5. Appellee also insists that, because appellant was never evicted from enjoyment of the patent, it has no right to rescind. A right of rescission arises on discovery of the fraud, not on eviction. Otherwise, the greater the fraud, the less chance there would be for the right of rescission ever to be exercised. If the party defrauded were given so little that no third party would ever attempt to take it away from him, the defrauding party would be forever safe. Such a strange doctrine would put a great premium on rascality. As a matter of fact, it is elementary that, when asking a court of equity to rescind a contract, it is not even necessary to tender back any benefits that may have been enjoyed, or to offer to make compensation therefor, as the decree of the court will see that equity is done. Even cases which hold that eviction is a condition precedent to the vendee's right to refuse payment on the ground that the title given by the vendor was defective are very careful to state expressly that eviction is not a condition precedent in cases of fraud. Peters v. Bowman, 98 U. S. 56, 25 L. Ed. 91; Consumers' Gas Co. v. American Electric Co., 50 Fed. 778, 1 C. C. A. 663.

The decree is reversed, with direction to overrule the motion to dismiss the bill.

NOTE.—Judge KOHLSAAT was present at the argument and agreed in consultation that the decree should be reversed, but he died before the opinion was prepared.

## In re CLARK REALTY CO.

## RICHTER v. GOETZ.

(Circuit Court of Appeals, Seventh Circuit. August 13, 1918. Rehearing Denied November 19, 1918.)

No. 2553.

1. BANKRUPTCY ⟸314(6)—TAX CERTIFICATES—PAYMENTS.
Under Bankruptcy Act, § 64a (Comp. St. 1916, § 9648), providing for the payment of taxes, it is the duty of the trustee in bankruptcy to pay tax certificates issued to purchasers, when premises of the bankrupt which were subject to mortgage were sold for nonpayment of state taxes.

2. JUDGMENT ⟸668(1)—CONCLUSIVENESS—PERSONS CONCLUDED—CAPACITY.
Though petitioner was party to a proceeding wherein the petition of the mortgagee to compel the trustee to pay tax certificates was denied, *held*, that petitioner, having acquired the certificates, was not estopped by that decision from securing payment, as he was seeking relief in a new capacity.

3. BANKRUPTCY ⟸322—PROCEEDINGS—PAYMENT OF TAX CERTIFICATES.
Though petitioner was allowed to prove against the bankrupt's estate for the difference between the indebtedness due and the value of property covered by mortgage securing the debt, and for the purpose of computing such value the amount of outstanding taxes was deducted, *held*, petitioner, having acquired tax certificates, was entitled to have the same paid out of the general estate, but the claim for difference should be reduced.

4. BANKRUPTCY ⟸324—TAX CERTIFICATES—INTEREST.
The holder of tax certificates on mortgaged property belonging to a bankrupt estate *held* limited in the way of interest to 6 per cent. per annum.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

In the matter of the Clark Realty Company, bankrupt. On petition by August Richter, Jr., trustee, to compel Julius J. Goetz, trustee in bankruptcy, to pay certain tax certificates, etc. From an order of the District Court, affirming an order of the referee denying the relief sought, petitioner appeals. Reversed, with directions.

See, also, 148 C. C. A. 342, 234 Fed. 576.

Appellant, named as trustee in a certain mortgage given by the bankrupt, Clark Realty Company, for $150,000, petitioned the court to compel appellee, trustee in bankruptcy of the Clark Realty Company, to pay certain taxes assessed in 1913, and which became due and payable January 1, 1914. The premises were sold for nonpayment of taxes and tax certificates were duly issued to the purchasers pursuant to the statutes of the state of Wisconsin governing that subject. In the year 1917 appellant purchased these tax certificates and they were duly assigned to him.

The mortgagor, Clark Realty Company, was duly adjudged a bankrupt on February 3, 1914, and appellee was named its trustee in bankruptcy April 3, 1914. Appellee immediately took possession of the property covered by the mortgage and collected the rents until August 28, 1914, when he surrendered and abandoned the property pursuant to an order of the court.

Appellant petitioned the court to order appellee to pay him the amount represented by the tax certificates, with such interest as under the statutes of Wisconsin such a holder is entitled to recover. The District Court, affirming the order of the referee, denied the relief sought, and this appeal resulted.

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Appellee relied upon a previous decision of the District Court, affirmed by this court. 234 Fed. 576, 148 C. C. A. 342. In that application appellant sought to have the court direct appellee to pay these same taxes, out of the rents and profits by appellee collected, to the then holders of the tax certificates.

Leo Mann, of Powell, Wyo., and Lines, Spooner & Quarles, of Milwaukee, Wis., for appellant.

Lawrence A. Olwell, of Milwaukee, Wis., for appellee.

Before BAKER and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). [1] As the holder of the tax certificates, appellant was, in the absence of any showing of special circumstances barring him from enforcing such a right, entitled to an order directing the payment of such taxes out of the estate of the bankrupt. His right to such payment was not limited to the fund realized out of the rents and profits collected by the trustee from the lands covered by the mortgage. The duty of the trustee to pay the taxes is clearly set forth in section 64a of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. 1916, § 9648]), which reads as follows:

"The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, state, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court."

Commenting upon this statute the court says in Dayton, Trustee, v. Stanard, Treasurer of Pueblo County, 241 U. S. 588, 36 Sup. Ct. 695, 60 L. Ed. 1190:

"Considering the plain provision in section 64a of the Bankruptcy Act of 1898 that 'the court shall order the trustee to pay all taxes legally due and owing by the bankrupt * * * in advance of the payment of dividends to creditors,' * * * we entertain no doubt of the propriety of requiring that the certificate holders, who had paid the taxes and assessments at the sales, be reimbursed upon the cancellation of their certificates, or of requiring that the reimbursement be out of the general assets. The taxes and assessments were not merely charges upon the tracts that were sold, but against the general estate as well."

This statute and the construction placed upon it by the court is but another expression of the policy of the United States to exact priority in favor of the United States, the state, county, or municipality, in all cases of taxes where insolvency has intervened.

[2] Appellee contends, however, that appellant is estopped by the decision in Re Clark Realty Co., 234 Fed. 576, 148 C. C. A. 342.

We think otherwise. While the parties in that proceeding were the same in name as in the proceeding now before us, and the relief sought was somewhat similar, the facts upon which the petitioner now relies differ materially from the facts disclosed in the petition in the former proceeding. In the former application appellant was not the holder of the tax certificates. The application was there made by a mortgagee to have the court direct the trustee to redeem certain tax certifi-

cates held by a third party out of a special fund collected by the trustee in bankruptcy. While the court on such an application could have granted the relief, its refusal so to do was not, upon the facts shown, error. Quite different would have been the situation had the applicant been (as he now is) the certificate holder. Petitioner now seeks relief as the holder of the tax certificates. Consequently the petitioner, though the same in name, is legally a different party, because he is suing in a different capacity and upon a legal demand which was not and could not properly be included in the earlier proceeding. Under the section and the decision quoted above, the petitioner, therefore, is entitled to have the assets of the bankrupt devoted to the payment of the taxes.

[3] Appellee further claims that if the relief is granted, two allowances for the same claim will have been made. This contention results from the filing and allowance of a claim in appellant's favor for the difference between the admitted indebtedness of the bankrupt to appellant and the value of the security covered by the mortgage. In determining this difference the court deducted from the fair valuation of the property covered by the mortgage the amount of the outstanding taxes. This allowance was made when the tax certificates were in the hands of third parties. Under such circumstances the court properly deducted the outstanding tax certificates from the value of the security. But appellant by subsequently acquiring the tax certificates should not be barred from collecting them. He is entitled to receive the sum represented by the certificates, but his claim representing the difference between the amount of the bankrupt's indebtedness to him and the value of the security, should be reduced in accordance with the provisions of sections 57k and 57*l* of the Bankruptcy Act (Comp. St. 1916, § 9641) to the extent of these tax certificates.

[4] While entitled to recover the amount due as taxes, appellant is limited in the way of interest to 6 per cent. per annum. Dayton, Trustee, v. Stanard, Treasurer of Pueblo County, supra.

The decree is reversed, with directions to enter an order in accordance with this opinion.

NOTE.—Judge KOHLSAAT concurred in the foregoing conclusions, but died before the opinion was prepared.

RICHTER et al. v. ROCKHOLD.

SAUL et al. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. November 11, 1918.)

Nos. 3167, 3168.

1. BANKRUPTCY ⊜136(2)—SUMMARY ORDER—WHAT CONSTITUTES.
An order directing the bankrupt to pay or secure to the trustee the cash surrender value of insurance policies providing for change of beneficiary *held* not a summary order against the beneficiary named; the order not purporting to affect her rights.

2. BANKRUPTCY ⊜143(12)—INSURANCE POLICIES—RIGHTS OF TRUSTEE.
Where a life policy provided for change of beneficiary and recognized a loan value, though the insurer declined to pay or recognize a cash surrender value, *held* that, as it appeared there was little, if any, difference between the loan and cash surrender value, an order directing the bankrupt to pay or secure same to trustee was proper, for the bankrupt could secure the surrender value from the company, etc.

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; George W. Jack, Judge.

In the matter of the bankruptcy of Jacob Richter. Petition by the bankrupt and another to superintend and revise an order affirming an order of the referee requiring the bankrupt to pay or secure to George F. Rockhold, trustee, the cash surrender value of insurance policies. Likewise a petition to superintend and revise a similar order made in the bankruptcy of Morris Saul. Orders affirmed.

W. T. Henry, of Dallas, Tex. (Sam Leake, of Dallas, Tex., on the brief), for petitioners.

Julius H. Runge, of Dallas, Tex., for respondent.

Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

BATTS, Circuit Judge. Petitions to superintend and revise in the two cases present the same question, and will be disposed of by consideration of the case of Richter.

The petition is for revision of an order affirming an order of the referee requiring the bankrupt, within 30 days, to pay or secure to the trustee the cash surrender value of two insurance policies, and providing that, if this value (fixed by the order) were so paid, the policies should be delivered to him, and that otherwise they should pass to the trustee as assets of the estate. It was provided that—

"A copy of this order be given by mail to the bankrupt, to his wife, Bella Richter, and to the New York Life Insurance Company for their observance."

[1] The order complained of cannot be considered a summary order against Bella Richter. She is named as beneficiary in a policy, under the terms of which the beneficiary may be changed. Whether her rights be as in a policy in which the right to change is not retained, subject to be defeated, or be inchoate or in expectancy, the

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order cannot have the effect, and does not purport to have the effect, of affecting these rights.

[2] The policy allows a change of beneficiary, and provides "a loan value," but does not refer to "a cash surrender value." The company issuing the policy declines to pay or recognize a cash surrender value.

In Hiscock v. Mertens, 205 U. S. 202, 27 Sup. Ct. 488, 51 L. Ed. 771, the cash surrender value was not provided for in the policy, but was recognized by the insurance company. So in Cohen v. Samuels, 245 U. S. 52, 38 Sup. Ct. 36, 62 L. Ed. 143. In the opinion in Malone v. Cohn, 236 Fed. 882, 150 C. C. A. 144, by this court, the question is asked: Does its failure to expressly provide for a present cash surrender value stand in the way of the bankrupt acquiring the right to hold, own, and carry the policy by paying or securing the trustee an ascertained sum of money? And, arguing the negative, the court cites Hiscock v. Mertens, to the effect that—

"The failure of the policy to provide expressly for a present cash surrender value does not have this effect, if, in fact, it has such a value by the concession or practice of the company issuing it."

There was, however, in the case no evidence of any concession or practice of the company recognizing a cash surrender value.

So far as appears, however, no case has, in terms, held that where the policy does not provide for a cash surrender value, and there is no concession or practice of the company recognizing it, and there is a refusal of the company to pay the cash surrender value, or to otherwise recognize its existence, the provisions of section 70a of the Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 565 [Comp. St. 1916, § 9654]) may nevertheless be made to apply. This question is now distinctly presented.

The testimony of an actuary, called as a witness in this case, was to the effect:

"That, in the business of life insurance, there is no difference between the loan value and the surrender value of life insurance policies, except a slight difference in the method of computation. * * * The basis of the computation of the cash surrender value of the policy and the loan value is the same, both being based on the reserve, and the loan and cash surrender value are equivalent."

A differentiation is made by a witness connected with the insurance company issuing the policy. Among his answers to interrogatories is the following:

"Payment of the cash surrender value of the policy by the company completely terminates the policy and all insurance benefits thereunder; but, after a loan is made on the policy, the insurance thereunder may be, and is usually, continued by the payment of the same premium, with interest on the loan; in the event of the death of the insured, or the maturity of the policy, the loan is deducted from the amount payable on the policy."

Whether or not a company, by its policy or otherwise, recognizes a cash surrender value, the value exists. If there is a difference between the loan value and the cash surrender value, the difference would, ordinarily, be in favor of the latter. By payment of the cash

surrender value, the company escapes all future liability. The value to the company is there, and what it amounts to in dollars is a matter of ascertainment by computation, if it is not indicated by the policy. It is a value that has been created by and from the business or estate of the bankrupt, and his creditors are entitled in law and good morals to the benefit of it. On the other hand, the creditors having received this value, there can be no reason why the bankrupt should not get the benefit of life insurance which he might not at that time be able to secure, and at a premium rate less than would be demanded upon a new policy.

It is within the rights and the ability of the bankrupt to secure from the life insurance company the amount required by the order to continue his policy, and if he does not pay the cash surrender value, as legally and properly ascertained, the referee should take such steps as may be necessary and proper to secure for the creditors the benefit of the asset evidenced by the policy.

The orders sought to be revised are confirmed.

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GILLESPIE v. RIGGS et al.

(Circuit Court of Appeals, Fourth Circuit. October 1, 1918.)

No. 1636.

1. FRAUDULENT CONVEYANCES ⊂=241(3)—EQUITABLE RELIEF.
   A simple contract creditor, who has no lien or security of any kind, and who asserts no right to subject any specific property to the payment of his debt, cannot invoke the aid of equity for the collection of his claim, and is not entitled to have conveyances by his debtors set aside on the theory that they were made to hinder.
2. COURTS ⊂=366(1)—PRECEDENTS—STATE DECISIONS.
   The decisions of the highest state court, interpreting the local statutes, are binding on the federal courts.
3. CREDITORS' SUIT ⊂=32—EXECUTORS AND ADMINISTRATORS ⊂=535—FRAUDULENT CONVEYANCES ⊂=221—SURETIES—JUDGMENT AGAINST PRINCIPAL—RESTRAINING CONVEYANCE.
   In West Virginia, a judgment against an executor is only prima facie evidence of liability of the sureties on the executor's bond, so a legatee, securing judgment, cannot maintain a bill against sureties on the bond to restrain them from conveying their property, or to set aside their conveyances as in fraud of creditors.

Appeal from the District Court of the United States for the Northern District of West Virginia, at Parkersburg; Alston G. Dayton, Judge.

Bill by John J. Gillespie against Caleb B. Riggs and others. From a decree dismissing the bill (248 Fed. 843), complainant appeals. Affirmed.

See, also, 241 Fed. 311, 154 C. C. A. 191.

Thomas P. Jacobs, of New Martinsville, W. Va., and David F. Pugh, of Columbus, Ohio (McCoy & Swiger, of Sistersville, W. Va., on the brief), for appellant.

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Charles E. Hogg, of Point Pleasant, W. Va. (Olin C. Carter and C. B. Riggle, both of Middlebourne, W. Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The appellant, John J. Gillespie, plaintiff below and hereinafter so called, is the sole heir at law and sole legatee under the will of his father, William H. Gillespie, who died in 1897, and whose executor is the defendant Walter R. Smith. In August, 1914, in a suit brought for an accounting in the circuit court of Tyler county, W. Va., plaintiff recovered a judgment against the executor for some $36,000, besides costs. Execution was issued soon afterwards and returned unsatisfied, and the judgment remains wholly unpaid. The sureties on the executor's bond were not made parties to this suit, and there is no judgment against them.

In October, 1914, plaintiff brought in the court below an action at law against the surviving sureties, six in number, and they set up in defense that he had released one of them in 1909, and that all were thereby discharged. Thereupon he instituted a suit in equity to cancel this release, on the ground that it has been procured by fraud, and to enjoin its use as a defense in the law action. Answer of denial was filed, the case tried, and a decree entered in March, 1916, releasing the surety in question from liability, and enjoining the use of the release, except to secure to the other defendants credit for such sum as the released surety would be liable for, if he had not been released. The law action remains pending and untried.

In April, 1916, this suit was commenced. The bill of complaint, after reciting at length the facts above summarized, sets out in detail various transfers of real estate by certain of the defendants, sureties on the executor's bond, which transfers they are alleged to have made for the purpose of hindering, delaying, and defrauding the plaintiff, and of evading their liability as such sureties. It is not alleged that these defendants are insolvent, or that they have not other property sufficient to discharge the obligation. The relief prayed for is in substance a cancellation of the transfers already made, and an injunction against further transfers by the surety defendants. On their motion the bill was dismissed for want of jurisdiction, and plaintiff appeals.

[1] It is beyond question that a mere contract creditor, who has no lien or security of any kind, and who asserts no right to subject any specific property to the payment of his debt, cannot invoke the aid of equity for the collection of his claim. The principle is broadly declared by the Supreme Court in Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 378, 14 Sup. Ct. 127, 128, 37 L. Ed. 1113, as follows:

"The plaintiffs were simple contract creditors of the company, their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between

equitable and legal remedies in the federal courts cannot be obliterated by state legislation. Scott v. Neely, 140 U. S. 106 [11 Sup. Ct. 712, 35 L. Ed. 358]; Cates v. Allen, 149 U. S. 451 [13 Sup. Ct. 883, 37 L. Ed. 804]."

[2, 3] This being so, it is manifest that no case is here made for equitable cognizance, unless the status of plaintiff, as respects the surety defendants, is quite different from that of a contract creditor. His contention is that the decree he got against the executor is binding on the sureties, although they were not parties to the suit, and therefore he is entitled to the same relief as though he had a judgment against them. His whole argument rests on that proposition. But obviously the decree is not binding on the sureties in any absolute sense. Plaintiff has no lien on their property and no right of seizure and sale under execution. The most that can be claimed for the decree is that it is competent evidence against the defendants in the law action (Stovall v. Banks, 77 U. S. [10 Wall.] 583, 19 L. Ed. 1036), and that it makes a prima facie case against them in that action (Crim v. England, 46 W. Va. 480, 33 S. E. 310, 76 Am. St. Rep. 826). In the last-named case it was said:

"The general law is that a judgment against an administrator or executor for a debt, or a decree for a balance in his hands, is conclusive upon the sureties in his bond, though they are not parties. * * * But in the Virginias it is not conclusive, but only prima facie. State v. Nutter, 44 W. Va. 385 [30 S. E. 67]; 1 Lomax, Ex'rs, 331; Hobson v. Yancey, 2 Grat. [Va.] 73; Craddock v. Turner, 6 Leigh. [Va.] 116. I am of opinion that the finding of assets in the administrator's hands is not conclusive, but prima facie, because of a peculiar Virginia statute found in Code 1891, c. 85, § 24, that no executor or surety shall be chargeable beyond assets by reason of any omission or mistake in pleading, and may offer any defense admissible in an action against the executor suggesting a devastavit. I think it is that which makes the difference between our law and the general rule."

Accepting this construction of the West Virginia statute by the highest court of that state, as we are bound to do, it must be held that the decree in question is at most only prima facie evidence of the liability of the sureties, and that they are at liberty to set up in the law action any defenses which were available to the executor in the original suit. It is certainly conceivable that some of their defenses may overcome, in whole or in part, the prima facie case made by the decree, and that plaintiff may not succeed in getting a judgment against them. Nevertheless he asks a court of equity to restrain the defendants from disposing of their property, on which he has no lien or specific claim, in order that he may be able to collect the judgment he expects to get in the pending law action to which, notwithstanding their adverse pleas, he alleges they have no defense. We are persuaded that the case made by him comes under no recognized head of equity jurisprudence, and that his bill was properly dismissed under the authority of Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, Cates v. Allen, 149 U. S. 452, 13 Sup. Ct. 883, 37 L. Ed. 804, Hollins v. Brierfield C. & I. Co., supra, and Davis v. Hayden, recently decided by us, 238 Fed. 734, 151 C. C. A. 584.

Affirmed.

## KING LUMBER CO. v. NATIONAL EXCH. BANK OF ROANOKE, VA.

In re KING LUMBER CO.

(Circuit Court of Appeals, Fourth Circuit. October 23, 1918.)

No. 1638.

1. BANKRUPTCY ⊂=440—ALLOWANCE OF CLAIMS—REVIEW.
The allowance of a claim of more than $500 can be reviewed only by an appeal within 10 days, as provided in Bankruptcy Act, July 1, 1898, § 25a (Comp. St. 1916, § 9609), and not by petition to superintend and review in matter of law, provided for by section 24b (section 9608).

2. BANKRUPTCY ⊂=446—PETITION TO SUPERINTEND AND REVISE—SCOPE OF REVIEW.
A disputed question of fact on which the allowance of a claim depended cannot be reviewed on petition to superintend and revise in matter of law provided for by Bankruptcy Act July 1, 1898, § 24a (Comp. St. 1916, § 9608).

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Western District of Virginia, at Charlottesville, in Bankruptcy; Henry Clay McDowell, Judge.

In the matter of the King Lumber Company, bankrupt. The claim of the National Exchange Bank of Roanoke, Va., to share in a composition, etc., which was rejected by the referee on the bankrupt's objection, was allowed on review, and the bankrupt petitions to superintend and revise in matter of law. Petition dismissed.

Charles W. Allen, of Charlottesville, W. Va. (Allen & Walsh, of Charlottesville, W. Va., on the brief), for petitioner.

W. J. Henson, of Roanoke, W. Va. (Woods, Chitwood & Coxe and Jackson & Henson, all of Roanoke, Va., on the brief), for respondent.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. In April, 1916, the King Lumber Company, a general contractor, borrowed from the National Exchange Bank of Roanoke the sum of $15,000, payment of which was secured by assignment of that amount of the moneys due and to become due on its contract with the city of Roanoke for the erection of a municipal building. In December following the lumber company was adjudicated bankrupt. Later it made an offer of composition which the creditors voted to accept. The offer contained this provision:

"There is due the King Lumber Company, the bankrupt, about the sum of $21,000 by the city of Roanoke, Va., on account of the construction of the City Hall; $15,000 of this amount was in April, 1916, assigned to the Exchange National Bank of Roanoke, Va., and there are sums due supply men and subcontractors, much more than sufficient to take up the balance of said sum of $21,000. This sum of $21,000 is to be distributed between the National Exchange Bank and said supply men in the order to which they may be entitled, and to be determined by the law and chancery court of the city of Roanoke, in a suit now pending therein for that purpose, and this sum is entirely abandoned, so far as the King Lumber Company is concerned, if its offer of composition is accepted."

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

In the suit referred to it was decided by the Supreme Court of Appeals of Virginia (121 Va. 460, 93 S. E. 699), that the supply men and subcontractors were entitled to priority of payment from the fund in question, with the result that the balance left for the bank was some $10,000 less than the face of its debt and interest. For this deficiency, whatever it might prove to be when all the supply men and subcontractors had been paid in full, the bank in due time filed a claim with the referee, setting up in detail the facts above summarized. Objections of the lumber company were sustained, and the claim rejected by the referee, on the ground in substance that the claimants of the Roanoke fund had agreed, when the offered composition was accepted, to look to that fund only for the payment of their debts, and to waive all right to prove the same in the bankruptcy proceedings. On review by the court below the ruling of the referee was reversed, and the claim allowed, with directions for payment to the bank, in accordance with the terms of the composition offer, of "30 per cent. of such part of its original claim as has not been satisfied out of the Roanoke city fund." The lumber company thereupon filed in this court a petition to superintend and revise, under section 24b of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 553 [Comp. St. 1916, § 9608]). The bank moves to dismiss.

[1, 2] The sole question raised by the petition is alleged error in allowing a claim of more than $500. The lumber company contended that the bank was not entitled to prove a claim because it had agreed to take what it could get out of the Roanoke fund without resort to other assets. When this contention was overruled, and the claim allowed, the only way in which the decision could be brought here for review was by appeal within 10 days as provided in section 25a of the act (section 9609). This was distinctly held in Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725, in which the Supreme Court says:

"We think this subdivision (24b) was not intended to give an additional remedy to those whose rights could be protected by an appeal under section 25 of the act. That section provides a short method by which rejected claims can be promptly reviewed by appeal in the Circuit Court of Appeals, and, in certain cases, in this court. * * * Under section 24b a question of law only is taken to the Circuit Court of Appeals; under the appeal section controversies of fact as well are taken to that court, with findings of fact to be made therein if the case is appealable to this court. We do not think it was intended to give to persons who could avail themselves of the remedy by appeal under section 25 a review by petition under section 24b."

Moreover, as this authority holds, only questions of law can be brought to this court by petition to superintend and revise. But the controversy here presented turns on a disputed question of fact. The provision in the composition offer above quoted informed all creditors that the Roanoke fund would be insufficient to pay both the bank and the supply men, but it failed to state whether the party not paid in full from that fund could come in as an unsecured creditor for the deficiency and get the percentage offered by the bankrupt. What the understanding or agreement was in that regard became the subject of sharply conflicting testimony, and on the determination of this issue of

fact depends the allowance or rejection of the bank's claim. Manifestly such a controversy cannot be reviewed on a petition to superintend and revise.

On both grounds the petition must be dismissed.

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DEVINE v. BUFFALO, R. & P. RY. CO.

(Circuit Court of Appeals, Third Circuit. December 6, 1918.)

No. 2398.

COMMERCE ⊜27(5)—LIABILITY FOR INJURY TO SERVANT—SAFETY APPLIANCE ACT.

An employé of an interstate railroad company, whose injury was caused by the failure of the company to comply with the requirements of Safety Appliance Act March 2, 1893, § 2 (Comp. St. 1916, § 8606), as to automatic couplers, may recover therefor, although not himself employed in interstate commerce.

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by Albert L. Devine against the Buffalo, Rochester & Pittsburgh Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

John G. Whitmore, of Ridgway, Pa., and Stone, Wright & Chalfant, of Pittsburgh, Pa., for plaintiff in error.

Anderson, Mathews & Wall, of Youngstown, Ohio, and Prichard & Trent, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

PER CURIAM. In the court below Devine brought suit against the Buffalo, Rochester & Pittsburgh Railway Company to recover for damages sustained by him while working as a brakeman on a train on its road. He recovered a verdict, and on entry of judgment thereon the railway company sued out this writ.

From the plaintiff's statement it appears the defendant's road extends from Pittsburgh, Pa., to Buffalo, N. Y., and the ground of action was that the railway had failed to comply with the federal Safety Appliance Act (Act March 2, 1893, c. 196, § 2, 27 Stat. 531 [Comp. St. 1916, § 8606]), in that the couplers between which the plaintiff was injured "would not at said time couple with each other automatically upon impact, without the necessity of employés of defendant going between the ends thereof to render personal assistance." The said road being itself a highway of interstate commerce generally, and the negligence charged being a failure on its part to comply with the federal Safety Act, it follows that, if the plaintiff sustained his charge of the defendant's statutory negligence, and that his injury was caused by such negligence, he was entitled to recover, even if he was not himself engaged in interstate commerce when he was injured. Railroad v. Rigsby, 241 U. S. 33, 36 Sup. Ct. 482, 60 L. Ed. 874. Such being the case, the proof

given by the plaintiff that he was engaged in interstate commerce when injured—the competency of which is here questioned—becomes a matter of no moment. The verdict and the judgment thereon would have been justified, had there been no such proof.

Further complaint is made that there was no such proof of the plaintiff's earning power as warranted the submission of that question to the jury. We have examined the record, and we find proof of the plaintiff's earning capacity and actual earnings before the accident. That proof of his earning capacity after the accident was not given was because the defendant objected to such proof, and it cannot now be heard, in the face of the court sustaining such objection, to urge as error that such proof was not furnished.

The judgment below is affirmed.

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ALSOP v. McCOMBS et al.

(Circuit Court of Appeals, Eighth Circuit. April 25, 1918.)

No. 5024.

COURTS ⊂=352—FEDERAL COURTS—STATE PRACTICE—VOLUNTARY NONSUIT.

Under Rev. St. Mo. 1909, § 1980, providing that "the plaintiff shall be allowed to dismiss his suit * * * at any time before the same is finally submitted," which by Rev. St. § 914 (Comp. St. 1916, § 1537), governs federal courts in that state, a plaintiff may of right take a nonsuit at any time before the jury has actually retired.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Action at law by James N. Alsop against Ruddell M. McCombs and others. Judgment for defendants, and plaintiff brings error. Reversed.

Chester H. Krum, of St. Louis, Mo. (George W. Jolly, of Owensboro, Ky., on the brief), for plaintiff in error.

Jeffries & Corum, of St. Louis, Mo., and Oliver & Oliver, of Cape Girardeau, Mo., for defendants in error.

Before HOOK, CARLAND, and STONE, Circuit Judges.

STONE, Circuit Judge. Suit upon contract for damages. From a judgment upon a directed verdict at the close of plaintiff's evidence a writ of error was taken.

At the close of plaintiff's evidence he moved the court for a voluntary nonsuit, which was denied. This was followed by a statement by the court that a verdict would be directed. Again plaintiff moved for nonsuit, which was denied. The sole error assigned is the refusal to grant the nonsuit. Under the "conformity statute" (R. S. § 914 [Comp. St. 1916, § 1537]), the practice of the state courts must govern. Section 1980, Revised Statutes of Missouri 1909, provides:

"The plaintiff shall be allowed to dismiss his suit or take a nonsuit at any time before the same is finally submitted to the jury, or to the court sitting as a jury, or to the court, and not afterward."

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

This court, in Chicago, M. & St. P. Ry. Co. v. Metalstaff, 101 Fed. 769, 41 C. C. A. 669, after quoting the above statute and citing numerous Missouri cases, decided that the plaintiff might "take a nonsuit at any time before the jury has actually retired."

The judgment is reversed.

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## LUTEN v. WASHBURN et al.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1918. Rehearing Denied January 21, 1919.)

No. 4742.

PATENTS ⟸328—CONSTRUCTION—VALIDITY.

The Luten patents, No. 852,970, claims 14, 15, and 16, No. 853,202, claim 17, No. 979,776, claim 1, and No. 989,272, claim 3, all for reinforced concrete construction, *held* invalid; not showing invention in view of the prior art.

Appeal from the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Suit by Daniel B. Luten against George Washburn and Weld County, Colo. From a decree dismissing the complaint, plaintiff appeals. Affirmed.

Russel T. MacFall, of Indianapolis, Ind., and Frank M. Hall, of Hillsdale, Mich. (Frank H. Drury, of Chicago, Ill., and Miles G. Saunders, of Pueblo, Colo., on the brief), for appellant.

A. J. O'Brien, of Denver, Colo. (Walter E. Bliss and Joseph C. Ewing, both of Greeley, Colo., on the brief), for appellees.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. The appellant commenced this action against appellees for infringement of United States letters patent numbered 852,970, 853,183, 853,202, 853,203, all dated May 7, 1907, 979,776, dated December 27, 1910, and 989,272, dated April 11, 1911, all issued to himself. The District Court held the patents void for lack of invention and dismissed the complaint. This is an appeal from that decree.

The patents relate to metal reinforced concrete bridges and similar structures. Appellees were alleged to have infringed the patents in the construction of what is known as "Sheep Draw Bridge" in Weld county, Colo. The specifications of the bridge called for a reinforced concrete bridge of the beam and slab type, of 30-foot span, supported on reinforced concrete abutments, 20 feet in width. In this court counsel for appellant has abandoned all claims for infringement, except as to claims 14, 15, and 16 of patent 852,970, claim 17 of patent 853,202, claim 1 of patent 979,776, and claim 3 of patent 979,272. The record shows that appellant has obtained 18 consent or pro confesso decrees declaring the patents in suit valid and infringed in different United States District Courts. In contested suits involving the claims here in-

volved, or similar claims, the Luten patents have been decided to be invalid for lack of invention in the following cases: Luten v. Allen, 254 Fed. 587, and Luten v. Young, 254 Fed. 591, in the United States District Court, District of Kansas; Luten v. Whittier, 251 Fed. 590, —— C. C. A. ——, in the Circuit Court of Appeals, Sixth Circuit; Luten v. Wilson et al., 254 Fed. 107, in the United States District Court, District of Nebraska; Luten v. Marsh et al., 254 Fed. 701, in the United States District Court, Southern District of Iowa; Ex parte Luten, 237 O. G. 917; In re Luten, 37 App. D. C. 379. So far as we know, the claims now before us, or similar claims, have not been held valid in any contested case. The claims read as follows:

Patent No. 852,970.

14. "A bridge or arch of concrete or other suitable material having wings joined thereto by rods imbedded in said wings and extending into the abutments."

15. "A bridge or arch of concrete or other suitable material having wings joined thereto by rods imbedded in said wings and extending into and through the abutments."

16. "A bridge or arch of concrete or other suitable material having wings joined thereto by rods imbedded in one of said wings and extending through the abutment into the opposite wing."

Patent No. 853,202.

17. "A bridge of concrete or similar material having a reinforced spandrel or girder extending across the abutment or pier, and cantilevered on the abutment or pier, with tension members extending across the abutment or pier near the upper surface of the spandrel or girder."

Patent No. 979,776.

1. "A reinforcement for concrete girders, beams, etc., comprising a lower horizontal tension rod and upper and lower shearing rods, each having a central horizontal part, inclined parts extending outwardly from opposite ends of the central part and horizontal parts extending outwardly from the ends of said inclined parts, the central horizontal part of the lower shearing rod being longer than that of the upper shearing rod, and the horizontal ends of the upper shearing rod being longer than those of the lower shearing rod, substantially as set forth."

Patent No. 989,272.

3. "The combination of an upright member with a transverse member and knee brace all of hardened plastic with imbedded tension members reinforcing the upright member and transverse member continuously adjacent the surfaces opposite the knee brace and extending away from said opposite surface of the transverse member intermediate its middle and the knee brace and other tension members embedded longitudinally through the knee brace."

An examination of the claims clearly shows that appellant's claim to invention, so far as the subject-matter thereof is concerned, is based upon the particular positioning of steel rods or metal bands in concrete or plastic material employed in the construction of bridges or culverts. This court, in Luten v. Sharp, 234 Fed. 880, 148 C. C. A. 478, speaking by Judge Sanborn, said:

"The use of steel and iron rods, wire mesh, expanded metal, and like articles imbedded in different ways in cement girders, beams, floors, posts, and other articles made of cement, to strengthen and reinforce them, was old, well known, and had long been practiced before the patented inventions of Luten here in question were discovered, and the question for review is one of fact."

The question of infringement was alone in issue in that case. Luten testified in the present case as follows:

"That principle of reinforced concrete is admittedly old—that steel is to be used in tension. I never have made any contention that I invented steel in tension in concrete bridges, or the use of steel in tension in many other places. What I have maintained is that I have placed the steel in a new way that produces better results, in a more efficient form. * * *

"Now, in a concrete bridge, the greatest efficiency is always secured by resisting tension or pull with steel rods. That has been established for half a century; not, perhaps, with curved tension members, but the basic idea is very old. There is no question about that."

The French patents, numbered 88,547 and 88,546, issued to François Coignet, April 6, 1869, for improvement in making artificial stone and in monolithic structures, the United States patent for construction of joists, girders, and the like, issued to François Hennebique, October 4, 1898, No. 611,907, United States patent for construction of metal concrete arch bridges, issued to H. V. Hinckley, April 25, 1899, and United States patent No. 696,838, for concrete arch construction, issued to W. C. Parmley, April 1, 1902, disclose the prior art and anticipate the claims in suit. In Turner v. Lauter Piano Co., 248 Fed. 930, — C. C. A. — (certiorari denied October 21, 1918), the Court of Appeals of the Third Circuit said:

"There is to-day neither invention nor novelty in merely placing metal reinforcement in concrete at places at which strains come. The very principle of reinforcement, as the word denotes, is to give force to or strengthen the place that is weak by adding something that is strong. Invention in reinforcement is to be found only in discovering a new principle, or in employing new means embodying the old principle. Therefore, one striving to find a new principle, or to invent a new means of concrete reinforcement under the old principle, enters a well-known and widely practiced art, and must do something more than care for tensile strains at places where they are known to come."

This language was approved by us in Turner v. Deere & Webber Building Co., 249 Fed. 753, — C. C. A. —, and Judge Hook, in delivering the opinion of the court in the same case, in speaking of the use of concrete in building construction used the following language:

"Its resistance to compression and susceptibility to other stresses in certain positions were familiar to all who had to do with it, as were the general principles of reinforcing it with wire, rods, or strips of metal which possessed the quality the concrete lacked. When the plaintiff entered, the art had so progressed that the nature of the stresses and in a general way the places where the reinforcement should be disposed or arranged were a part of the common knowledge of builders, as in greater degree was the subject of struts, braces, and the like in carpentry. In pretentious or complicated construction, where ordinary experience did not suffice, mathematical computation was available. The evidence of prior practice in building and prior publications and patents show that little was left for patentable invention in placing the customary pieces of metal here or there, or turning them this way or that, in the mass of concrete."

In Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74, we sustained the Norcross patent for a metallic concrete flooring without supporting beams. The invention in that case, however, was for a floor without supporting beams, not merely the location of the reinforcing rods. In

Turner v. Mbore, 211 Fed. 466, 128 C. C. A. 138, and in Turner v. Deere & Webber Building Co., supra, we held the Turner patent for a reinforced concrete building construction void for lack of invention in view of the prior art. Appellees claim that, in view of the prior art and on general principles, the claims in suit disclose mechanical or engineering skill alone. Appellant claims that he has placed the steel or reinforcing rods in a new way, that produces better results in a more efficient form. So it is the positioning of the reinforcing rods that is called invention. The question to be decided then, is this: In view of the prior art and on general principles, was it invention at the date of the patents to place the reinforcing rods as indicated in the claims of the patents, or was it simply the putting together by the exercise of mechanical or engineering skill things old in the art, to perform functions long known, in a manner anticipated in prior patents? Neither the specifications, claims, nor drawings of the patents in suit give any specific directions as to where the reinforcing steel should be placed. Steel rods are placed in concrete structures to resist tension or pull. It would seem to necessarily follow that it would require mechanical or engineering skill only to locate in any particular structure where the tension was, and the same skill to determine where the steel should be placed to resist such tension; but this would not be invention, which alone is patentable.

"Industry in exploring the discoveries and acquiring the ideas of others; wise judgment in selecting and combining them; mechanical skill in applying them to practical results—none of these are creation; none of these enter into the inventive act." Robinson on Patents, § 78.

In view of what was old and well known at the date of the patents, we can see no invention in the claims in suit. The wing walls in connection with bridges were old, the tying of the wings to the abutments was not new, and the employment of metal rods in connection with concrete, to strengthen the material and cause it to remain intact, was well known. We therefore agree with the Court of Appeals of the District of Columbia, in the case of In re Luten, supra, when it said:

"All therefore that appellant did was to put together by the exercise of the simplest mechanical skill things old in the art, to perform functions long known, in a matter anticipated in prior patents."

Decree below affirmed.

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TIFFANY v. PAPER PRODUCTS CO.

(Circuit Court of Appeals, Fifth Circuit. October 28, 1918.)

No. 3182.

1. PATENTS ⇐78—ANTICIPATION—PRIOR USE.

Under Rev. St. § 4886 (Comp. St. 1916, § 9430), use by others of an invention prior to patenting does not invalidate the patent, where the time did not exceed two years prior to the application and the patentee was the first to actually make the invention.

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⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

2. PATENTS ⟸81—PRIOR USE—EVIDENCE.
Evidence *held* insufficient to show that the patentee was the first to invent a device which was in use before the patent was granted.

3. PATENTS ⟸328—INVENTION—WHAT CONSTITUTES.
The Gess patent, of March 7, 1911, No. 986,379, for an improvement in the construction of a cone tube for use in knitting machines as a support for masses of yarn, was invalid; there being no invention, as the improvement involved only mechanical skill.

4. PATENTS ⟸17—INVENTION—SKILL INVOLVED.
The design of the patent laws is to reward those who make some substantial discovery which adds to our knowledge, etc., but it was never the object of those laws to grant a monopoly for every trifling device or shadow of a shade of an idea which would naturally occur to any skilled mechanic.

Appeal from the District Court of the United States for the Northern District of Georgia; William T. Newman, Judge.

Bill by Henry L. Tiffany against the Paper Products Company for infringement of patent No. 986,379. From a decree dismissing the bill (244 F. 178), complainant appeals. Affirmed.

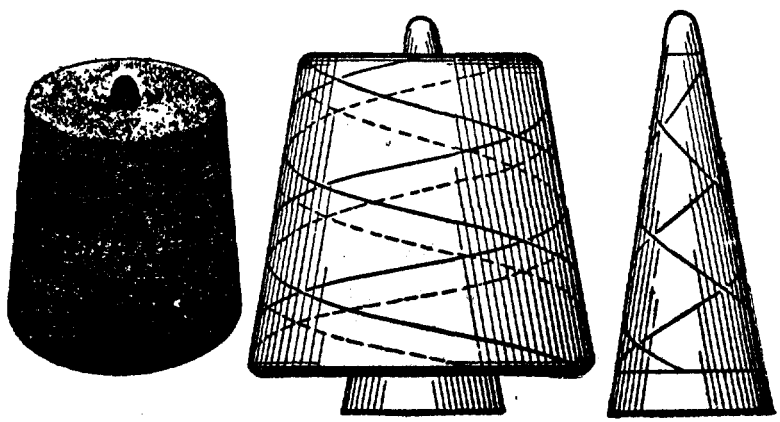
Frederick L. Emery and Irving U. Townsend, both of Boston, Mass., and Robert C. Alston, of Atlanta, Ga., for appellant.

John M. Coit, of Washington, D. C., and Wm. H. Trawick, of Cedartown, Ga., for appellee.

Before WALKER and BATTS, Circuit Judges, and JACK, District Judge.

JACK, District Judge. The appellant has appealed from a decree dismissing his bill of complaint, charging infringement of a patent to one Charles Gess, granted March 7, 1911, on application filed January 3, 1911, covering an improvement in the construction of a cone tube adapted for use in knitting machines as a support for masses of yarn, from which the yarn is drawn to the knitting machine which knits it into fabric.

The cone patented is made of compressed paper or pasteboard with roughened outer surface to hold the yarn, which is wound on it axially as shown in illustration:



At the point of the cone the paper is smooth, and the edges turned in and rounded in an arch or dome shape, so as to practically or quite close the opening in the apex. The improvement on the old cone, which had been in use many years, was in thus smoothing and turning in the point. The new cone, in contradistinction to the old, is generally known as a round-nosed cone; the old cone being generally referred to as a square-nosed cone, though this latter term is misleading, as the point is not square, but circular, and flat, instead of arched, as in the Gess cone.

The chief advantage claimed for the Gess patent is that it removes the sharp edges, which are easily mashed outward, and on which the yarn, as the top of the cone becomes bare in unwinding, frequently catches and breaks.

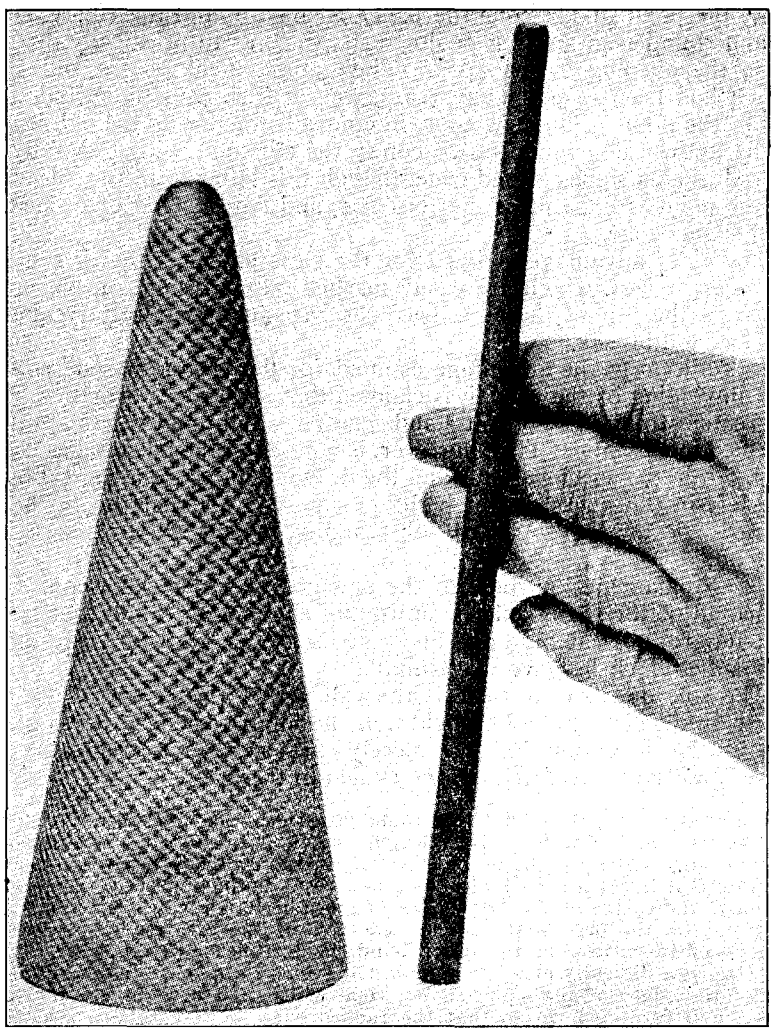
In addition to the advantage claimed for the "round-nosed" cone in the unwinding of the yarn, it is claimed that its arched formation gives it greater strength, so that it stands greater weight and is less apt to be crushed in shipping. This, however, is not one of the advantages claimed for it in the specifications, and the drawing indicates a central opening left in the apex, although the patent suggests that the tip be inturned "preferably so as to substantially, if not wholly, close said tip end."

The fundamental purpose of the patentee was to make a cone from which all of the yarn could be unwound, eliminating the danger of the last few rounds catching and breaking on the edge of the cone; hence the name which he gave it, "Knitall."

The sole question at issue is the validity of the patent. The trial court, in dismissing the bill, held that the improvement in the cone did not involve invention, but was merely such an improvement as would have readily occurred to any one skilled in the art.

"Even assuming, then, that this round-nosed cone had not been anticipated in the prior art, if it is a thing which 'would naturally and spontaneously occur to any skilled mechanic or operator, in the ordinary progress of manufacturers,' it is not a patentable invention. The distinction between mere mechanical knowledge or the knowledge of one familiar with the particular art or trade, on the one hand, and the exercise of the creative faculty or the faculty of invention, on the other hand, is at times quite difficult. There may be some difficulty about it here, but it seems to me that the mere inturning of the edges of the square-nosed cone which had been in use for many years, and turning it in so that the ragged edges of the square-nosed cone would not be there to intercept the movement of the yarn or thread, is a thing which would occur readily to any one skilled in the art or even reasonably familiar with the business of spinning yarn and adapting the same to be used readily in knitting mills. It is not right to the public to class it as having been such an invention or discovery as is patentable."

The evidence shows that Gess' idea was not a new one. It had been applied by McCausland in the cop tube many years before. The cop tube, like the cone, was, and still is, used as a support for yarn. McCausland's patent specifically provides for the turning in of the edge of the smaller end of the tube (see illustration) and the same idea is also found in several wooden bobbins with rounded noses.



The Gess Cone. McCausland Cop Tube.

It has, for a long time, been the custom to cap the "square-nosed" cone with a button or ball, of acorn shape, with a stem which fits down into the hole in the apex of the cone, thus giving the top of the "square-nosed" cone the same rounded, arched, shape as the Gess "round-nosed" cone.

Plaintiff, Tiffany, himself testified that he had seen many of these "acorns" used, before the Gess cone came on the market, entirely doing away with their use. With the acorn inserted, the cones were practically the same, save that the Gess cone consisted of only one piece,

and the square-nosed cone of two. Combining the two into one did not involve invention.

Not only was Gess' idea in rounding the nose of his cone utilized long prior by McCausland in his cop tube, and by many manufacturers in the use of the acorn device, but the record fails to show that Gess was even the first to apply this old idea in the manufacture of cones. The evidence shows that the same McCausland who invented the cop tube, as early as September, 1909, over a year prior to Gess' application for patent, January 3, 1911, had installed a machine for the purpose, and was turning in the edges of secondhand cones.

[1, 2] The plaintiff claims, however, that such use by others under section 4886 of the Revised Statutes did not invalidate the patent, where the time did not exceed two years prior to the application. This is true, provided the patentee was the first to actually make the invention; but there is no proof in the record to show the date of the invention. Gess was not a witness. The only dates shown in the record are the dates of the application for the patent and the date the patent was issued. The record shows that plaintiff, Tiffany, who later became the assignee of Gess, as early as April, 1909, contracted with the Pairpoint Corporation to manufacture a number of these round-nosed cones. There is no evidence, however, to show any privity between Tiffany and Gess at the time, or that Tiffany acted as the agent or the licensee of Gess. The only testimony bearing on this point is that of Shurtleff, of the Pairpoint Corporation, who testified that Tiffany "discovered that a round-pointed, smooth-finished cone, that was closed at the tip end, would be a great improvement." He was asked by counsel for the plaintiff in what sense he used the word "discovered," and replied:

"He (Mr. Tiffany) first brought it to our attention, though I understand that the discovery was made by Mr. Gess."

Shurtleff does not state that he understood, from Tiffany or any one else, at the time the order was given, that the invention was that of Gess. It is only clear that he so understood at the time of the trial. Neither does Tiffany, who was a witness, testify that he was acting for, or as the licensee of, Gess. From the mere fact that he afterwards became the assignee of Gess and had the patent issued to him, it would not necessarily follow that he was acting for Gess at the time he made the contract with the Pairpoint Corporation. He may have gotten the idea from Gess, or from a third person.

[3, 4] Regardless, however, of the question as to who first conceived the idea, or put it into effect, it was but a simple and natural step in the progress of the art, and the patent should not have issued.

It is evident that the in-turning of the small end of the cone tube constituted a distinct improvement; but it required no inventive faculty, because of the very fact that it was so evident. It was but the natural thing to do. The evidence shows that employés, in factories using the square-nosed cones, frequently, as the yarn was wound off, pushed in the edges of the points with their fingers. The advantage of having the point turned in was thus obvious, and such as would, in due course, suggest itself to any skilled mechanic.

Gess noticed that the edge of the top of the cone, while the yarn was being unwound, had a tendency to protrude outward in the way of the yarn. His idea was simply to bend it inward out of the way. This required merely the brain of a skilled workman, and not the genius of an inventor. The patentee had the foresight to see that this very simple and natural evolution of the cone tube would be of commercial value; but such business acumen did not make the idea patentable.

As was said by the Supreme Court in Atlantic Works v. Brady, 107 U. S. 192, 2 Sup. Ct. 225, 27 L. Ed. 438:

"The design of the patent laws is to reward those who make some substantial discovery or invention, which adds to our knowledge and makes a step in advance in the useful arts. Such inventors are worthy of all favor. It was never the object of those laws to grant a monopoly for every trifling device, every shadow of a shade of an idea, which would naturally and spontaneously occur to any skilled mechanic or operator in the ordinary progress of manufactures. Such an indiscriminate creation of exclusive privileges tends rather to obstruct than to stimulate invention. It creates a class of speculative schemers, who make it their business to watch the advancing wave of improvement, and gather its foam in the form of patented monopolies, which enable them to lay a heavy tax upon the industry of the country, without contributing anything to the real advancement of the arts. It embarrasses the honest pursuit of business with fears and apprehensions of concealed liens and unknown liabilities to lawsuits and vexatious accounting for profits made in good faith."

And again in Pope v. Gormully, 144 U. S. 254, 12 Sup. Ct. 643, 36 L. Ed. 426:

"They appear to involve such immaterial changes as would be required to adapt a known device to use in a combination with other elements already existing, and such as would occur to any skilled mechanic. Indeed, the object of these patents, and the same remark may be made of all, or nearly all, involved in these suits, seems to have been principally to forestall competition, rather than to obtain the just rewards of an inventor."

We are of the opinion that there is no error in the decree of the lower court, and the same is affirmed.

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FREEMAN-SWEET CO. et al. v. LUMINOUS UNIT CO.

(Circuit Court of Appeals, Seventh Circuit, October 15, 1918.)

No. 2651.

PATENTS ⊂=324(1)—INFRINGEMENT—APPEAL—RESTRAINING ORDER—PROPRIETY.

Where the trial court, after finding complainant's patent valid and infringed, suspended issuance of injunction pending appeal, on defendants' filing bond to cover profits, etc., *held*, that defendants were authorized to continue their business in the infringing article, and complainant will be restrained from sending circulars to their customers warning against purchasing defendants' goods, particularly where only part of their business was in the infringing article.

Suit by the Luminous Unit Company against the Freeman-Sweet Company and the Reflectolyte Company. From a decree for complainant (249 Fed. 876), defendants appeal. On motion by defendants (appellants) for a restraining order pending appeal. Order issued.

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⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Paul Bakewell, of St. Louis, Mo., and Walter H. Chamberlin, of Chicago, Ill., for appellants.

Dodson & Roe, of Chicago, Ill., and Zell G. Rae, of Des Moines, Iowa, for appellee.

Before BAKER and ALSCHULER, Circuit Judges, and LANDIS, District Judge.

PER CURIAM. Appellee is owner of the Guth patent, No. 1,076,418, October 21, 1913, for improvements in lighting fixtures. The District Court held that claim 1 was valid and infringed by a certain lighting fixture manufactured by appellant Reflectolyte Company and sold by appellant Freeman-Sweet Company (249 Fed. 876); but the District Court suspended the issuance of an injunction, pending an appeal to this court in which the finding of validity and infringement is challenged, on condition that appellants should file a bond to cover profits and damages and should file monthly reports of sales and consignments. Appellants complied with the conditions; and the record has been filed, but the cause is not ready for submission.

Appellant Reflectolyte Company manufactures many types of lighting fixtures in addition to the one alleged and found to be an infringement, all of which are identified by the trade name "Reflectolyte." Appellee, pending the appeal, has been sending letters and circulars to the customers of Reflectolyte Company and to the retail trade generally, warning the addressees against buying "Reflectolyte" fixtures and threatening suit against those who should fail to comply with the warning.

Applying the doctrine of Kessler v. Eldred, 206 U. S. 285, 27 Sup. Ct. 611, 5 L. Ed. 1065, to this situation, we find that the District Court by its decree authorized appellants, on the conditions named, to continue their businesses in the alleged infringing structure as going concerns. That means that they are entitled to protection in such business against loss and damage by having their customers interfered with and having others who might want to become customers frightened away. And we further find that appellee's letters and circulars are misleading and deceptive, not only in failing to state that appellants have complied with the conditions of the decree, but also in making their threats broad enough to include all the fixtures put out under the trade name "Reflectolyte."

It is therefore ordered:

(1) That appellee, its agents, attorneys, and the like, be and they are hereby severally enjoined, pending final decision, from issuing any letters or circulars similar to those attached to the motion.

(2) That appellee within 10 days file with the clerk of this court a list of the names and addresses of all persons and concerns to whom appellee has mailed or otherwise sent any such letter or circular.

(3) That the clerk mail a copy of this order to each of said persons and concerns.

(4) That the costs of this motion, including all expense of the clerk incurred in complying with clause 3, be taxed against appellee.

## SEARS, ROEBUCK & CO. v. PEARCE.

(Circuit Court of Appeals, Seventh Circuit. October 1, 1918. Rehearing Denied November 19, 1918.)

No. 2540.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—HEATING SYSTEM.
The Pearce patent, No. 705,287, for a heating and distributing system, discloses novelty and invention, and is valid; also *held* infringed.

2. PATENTS ⟸275—INFRINGEMENT—DAMAGES.
Upon the facts in this case, an action for infringement against a user, where the patented article is made and sold by the patentee, the damages recoverable are represented by the difference between its cost and his selling price.

3. JUDGMENT ⟸551—MERGER AND BAR—ACTION AT LAW AND SUIT IN EQUITY —INFRINGEMENT OF PATENT.
Where a patentee elects to sue at law for an infringement, and recovers full damages, the judgment is a bar to a subsequent suit in equity for an injunction based on the same infringement.

4. COSTS ⟸34—ACTION AT LAW FOR INFRINGEMENT.
On recovery in an action at law for infringement, the costs are taxable to defendant, although the action was based on two patents, and the issues as to one were withdrawn from the jury.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Illinois.

Action by William H. Pearce against Sears, Roebuck & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

Action at law for damages for infringement of patents Nos. 705,287 and 997,002. Verdict and judgment for plaintiff. Defendant in error, herein called plaintiff, the owner of two patents, brought suit against plaintiff in error, herein called defendant, and one Robert Gordon, for damages arising out of the alleged infringement of both patents. Before trial, Gordon, an independent contractor under contract with defendant, died, and the action was not revived against his estate.

The court took from the jury all issues involving patent No. 997,002, and submitted the issues arising out of the asserted infringement of claims 2 and 7 of patent No. 705,287, which covered "a heating and distributing system." Defendant had several buildings to heat, and, desirous of installing a heating plant in a new building, entered into a contract with Gordon, the specifications requiring "combination expansion joints and T-fittings and combination anchor and T-fittings * * * of the same type and make as those now installed in the present north tunnel." Provision was made against loss through the use of any appliance covered by patents.

The "combination expansion joints" referred to were manufactured and sold by Pearce and were covered by the patent under consideration. Pearce, however, was not a contractor, but manufactured the expansion joints which he sold to contractors. Gordon endeavored to secure these joints from Pearce, but because of the price, or for some other reason, did not do so. He then made drawings of the Pearce joints in use in defendant's building, and submitted the same to the Charles R. Crane Company, and obtained and installed them in defendant's heating plant, where they were accepted.

Defendant attacks the judgment because (a) patent No. 705,287 is invalid; (b) claims 2 and 7 of said patent were not infringed; (c) because of errors in instructions; (d) because the court allowed plaintiff costs.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

Lincoln B. Smith, of Chicago, Ill., for plaintiff in error.
Samuel E. Daily, for defendant in error.

Before ALSCHULER and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge (after stating the facts as above). [1] Is the patent valid and infringed? No separate and extended discussion of this phase of the case is warranted. We have carefully examined the argument of defendant, and have examined the prior art citations with care, to ascertain whether the discovery of Pearce disclosed novelty, or constituted invention, or presented a jury question, and answer the question in the affirmative.

Upon the question of infringement there was, and could be, no serious doubt. Pearce manufactured a combination joint that was used in one of defendant's heating plants. It satisfied defendant, and the specifications for a heating plant in the new building called for similar joints. The manufacture and sale of this joint was controlled by Pearce. Having failed to agree upon a price with Pearce, Gordon made drawings from the joints referred to in the specifications, and the Crane Company made them.

While defendant now asserts that the joints thus obtained did not comply with the specific requirements of the contract and were not the same as those previously installed, we are convinced that this is but an effort to escape liability and that the joints used were of the kind designated in the specifications.

This question of infringement, while submitted to the jury, was not a jury question. The evidence established infringement so conclusively that the court would have been justified in directing a verdict in plaintiff's favor on this issue.

*Damages.* Criticisms under this head may be divided into: (a) Announcement of erroneous rule of damages; (b) failure to leave the amount to the jury; (c) allowance for four, instead of three, joints.

[2] Defendant assigns error because its liability, if any existed, was that of a user, whereas the judge applied the rule of damages applicable to cases of infringement by manufacturers or sellers. In other words defendant's position is that the liability of Gordon or the Crane Company for making the expansion joints, was different from the liability of the defendant for using them. Carried to its logical end defendant's position is that if a certain article covered by a patent is desired by A., who objects to paying the patentee his price therefor, A. may escape liability over and above nominal damages by contracting with B. as an independent contractor to secure or make such patented article and install it for him.

Defendant manufactured and sold his patented joints. No question arose over his ability to supply the trade. His damage, therefore, in view of the evidence received in this case, was represented by the difference between his cost price and his selling price. Walker on Patents, vol. 4, p. 441. Concerning this sum, this difference between the cost and selling price, there was no dispute.

[3, 4] As illustrating their point, and demonstrating the inapplicability of this rule, defendant suggests that it is still subject to an injunction

suit to prevent further use of the infringing joint, and therefore any rule of damages is unjust that holds it liable for all the damages represented by plaintiff's loss of sale. In this position we think counsel is in error. Plaintiff sued for and recovered its entire damage resulting from the infringement, and, having elected to pursue one remedy, will not be permitted to secure other relief inconsistent with what has been already obtained. In fact, counsel for plaintiff admitted in open court that the present money judgment was a bar to any restraining suit, so far as the four joints here involved were concerned.

The criticism that the court specified the amount which the jury was required to find, if any liability existed, is not well taken, for the reason that the amount of damages was not in dispute. In other words, if a liability existed at all, the amount was fixed and definite. There was no conflict of testimony in reference to it.

The record warranted the court's ruling that four, instead of three, joints were used in the heating plant. One of the four joints differed slightly from the other three, but in an unessential respect.

Defendant complains because of the allowance of costs against it, contending that, inasmuch as plaintiff originally relied upon two counts based upon two patents, one of which was dismissed, he was not entitled to costs.

In the presentation of this question it seems both counsel failed to appreciate that this is an action at law, wherein costs are always taxed against the losing party except where the statute otherwise directs. Trinidad Paving Co. v. Robinson (C. C.) 52 Fed. 347. The only exceptions seem to be those provided for in R. S. § 968 (section 1609, U. S. Comp. Stat. 1916), and R. S. § 973 (section 1614, U. S. Comp. Stat. 1916).

It follows that plaintiff was entitled to costs.

Judgment is affirmed.

Judge KOHLSAAT participated in the hearing of this appeal, and concurred in the conclusion, but died before the announcement of this opinion.

## In re WEST.

(District Court, E. D. Pennsylvania. November 4, 1918.)

No. 5941.

1. BANKRUPTCY ⊕=191(1)—BANKRUPTCY OF TENANT—CLAIM FOR RENT.
Where a landlord, before the expiration of the lease of an earlier tenant, who was indebted for rent, demised premises to the bankrupt under a lease providing that it should not affect the former lease, or remedies for collection of rent, and the bankrupt took over property of the first tenant in the premises, *held*, the landlord's claim for rent against the first tenant could not be asserted against the bankrupt's estate as a priority claim; there being no right to distrain.

2. FIXTURES ⊕=15—"TRADE FIXTURES"—REMOVAL.
"Trade fixtures" are those which a tenant places on property to promote the purpose of his occupation and which he may remove during the term.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trade Fixtures.]

3. BANKRUPTCY ⊕=138(1)—FIXTURES.
Where a tenant rejected the landlord's proposal that gas fixtures, etc., which the tenant desired, should be installed by tenant and become landlord's property, *held*, that, tenant having installed fixtures which were sold with rest of his property after bankruptcy, landlord could not maintain claim therefor.

In Bankruptcy. In the matter of William West, individually and trading as the William West Company, bankrupt. On petition for review of order allowing claim of landlord for rent. Order reversed, and cause remitted to referee, with instructions. On certificate for review of claim of landlord to fixtures. Order reversed, and claim denied.

Reber & Granger, of Philadelphia, Pa., for petitioner.
Coyle & Keller, of Lancaster, Pa., for landlord.

On Petition for Review of Order Allowing Claim of Landlord for Rent.

DICKINSON, District Judge. This case presents an unusual fact situation. We have not had the aid of an oral argument, but a perusal of the briefs of argument submitted seem to justify this broad statement of what the situation presented is:

A man by the name of Harry West occupied as tenant certain premises for which he owed rent. He was succeeded in his occupation of the premises by the bankrupt, to whom the owner demised the premises formerly occupied by Harry West. All the rent owing by the bankrupt has been paid, but a balance of $365.73 of the rent due by the first tenant, Harry West, remains unpaid. No distraint was made by the landlord. He presents, however, a claim for rent, which the referee has allowed. The allowance is based, as we understand it, upon the proposition of fact, to paraphrase the finding of the referee, that the bankrupt "took over," not only the premises which had been demised to the former tenant, but also his stock of goods, and that at

the time rent was owing by the former tenant to the landlord, a balance of which still remains unpaid.

The proposition of law is deduced from these facts that, when the bankrupt entered into possession of the premises and "took over" the personal property of the former tenant on the premises, he, to again paraphrase the language of the referee, took this stock subject to "the attendant liabilities," one of which was the right of the landlord to distrain for rent. From these premises the conclusion is drawn that the landlord has the right, not only to participate in the distribution of the assets of the bankrupt estate, but to have accorded to him priority of payment over other creditors.

The line of thought followed is that prior to the adjudication the personal property of the former tenant remaining on the premises was liable to distraint by the landlord, and that after the adjudication "this right to distrain under the law of Pennsylvania was converted into a valid priority claim" under the provisions of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544). Morris v. Parker, 1 Ashm. (Pa.) 187, is cited as an authority sustaining the right of the landlord to distrain.

The loss of the aid of an oral argument is felt, because we have been unable to rid ourselves of the feeling that the foregoing statement, for some reason which has not been disclosed by this record or the briefs of argument, does not adequately present the grounds for the order made by the referee.

[1] As presented, however, it would seem to involve this proposition: Premises are demised to A., who owes rent, and has personal property on the demised premises. This relation of landlord and tenant is dissolved, and the premises are then demised to B., who, under an arrangement made with A., "takes over" the personal property on the premises. An execution then issues against B., and out of the proceeds of sale the landlord may successfully assert priority of payment of rent due by A.

One of the facts upon which this conclusion of law is based, to wit, that there was personal property of the first tenant which came into the possession of the succeeding tenant, is averred not to be a fact properly found to be in the case presented, but, assuming this to be one of the facts in the case, we are unable to accept the proposition as sound. This is, for several reasons, so obvious as not to call even for their statement.

The supporting brief filed on behalf of the landlord seems to plant the right of the landlord upon an agreement of the bankrupt in the lease to him. The lease to the former tenant did not expire until April 1, 1917. The lease to the bankrupt was made before the expiration of this former lease, and the provision referred to was that the lease to the bankrupt should "in no wise affect" the former agreement of lease up to the beginning of the new demise, "nor any of the remedies for the collection of the rent" for the premises occupied by the former tenant. It is, we assume, clear that one of the agreed facts is that the first lease was ended by the agreement of the landlord and tenant, and was succeeded by the new lease, under which the bankrupt became the tenant under a new demise.

The leverage of the whole argument is, of course, upon the proposition of the landlord's right to distrain. To assume, as the argument does, or for the landlord to assert, as he clearly does, a right to have distrained ignores certain features of the situation. One is that the relation of landlord and tenant between the claimant and the predecessor of the bankrupt had been dissolved. What effect had this upon the right of the landlord to distrain? In the second place, the claim of the landlord is now asserted against the property of the bankrupt estate, irrespective of whether it was property which had formerly belonged to the first tenant or not. The argument, in consequence, would seem to assume the right of a landlord to distrain upon the property of his tenant for rent due by a former tenant. The principle is, of course, accepted that a tenant may agree that something shall be rent which otherwise would not be, and the landlord may in consequence have a right to distrain for it.

For illustration, a tenant might agree that water rent or taxes assessed against the demised premises should be paid by the tenant in addition to the rent reserved, and such water charges and taxes should be deemed to be rent and might be distrained for as such. This, however, would be because the tenant had so agreed.

We find no such agreement in this lease. On the contrary, the quoted agreement is restricted and limited in its scope, and is really an expression of the agreement between the landlord and his former tenant that the abrogation of the lease during its term should not affect the liabilities of the tenant up to the time of the beginning of the new lease. Moreover, the whole argument is pivoted upon the proposition that the goods upon the "demised" premises are liable to distraint for rent, although they may be in fact the goods of a stranger.

This general proposition, subject to certain well-known exceptions and limitations, is sound enough; but the application which the argument makes of it again ignores the distinction between "demised" premises and premises which have been demised. It would scarcely be contended that the property of a third person on rented property was liable to be seized and sold in payment of claims of a landlord for rent due him by former tenants, although it were true that the premises on which the property was were the same premises which had been demised to these former tenants.

The foregoing discussion adequately presents the real question involved in this controversy, so far as we have been able to gather it from the briefs submitted. If we have misunderstood the question intended to be presented, we will entertain a motion for a reargument, the application therefor to be made within five days; otherwise the petition for a review is allowed, the order made by the referee is reversed, and the cause remitted to him, with instructions to disallow the claim of the landlord as one entitled to priority of payment.

On Certificate for Review of Claim of Landlord to Fixtures.

The real question involved in this petition for review is that of the ownership of certain gas and electric fixtures on premises demised to the bankrupt. Gas fixtures of a kind were in the building leased.

It was deemed desirable to replace them with new fixtures. The tenant applied to the landlord to do this. The landlord refused. He, however, suggested to the tenant that he (the tenant) replace the old fixtures with new ones, the latter to become the property of the landlord. This proposition the tenant declined. The parties not being able to reach any agreement, the tenant finally met the situation by taking down the old fixtures, putting in new ones, and laying aside the old fixtures as the property of the landlord. The tenant was afterwards adjudged a bankrupt, and the new fixtures were sold as his property, for which the purchaser paid the sum of $286. The landlord then made claim to the fixtures, which the referee allowed, and made an order upon the trustee to return the purchase price to the purchaser.

We confess to the same feeling of embarrassment felt in the other petition for review in disposing of the question as presented in the printed briefs, because of the uncertainty of our having a grasp of the whole situation as intended to be presented.

[2, 3] All questions affecting fixtures are more or less difficult of answer, because the definite line which determines what the proper answers should be is one often and usually hard to fix. One view universally accepted is presented in the light of the practical situation. The thought is expressed in the term "trade fixtures," and is that whatever a tenant puts upon a property to promote the purpose of his occupation of the premises, he, retaining his ownership therein, may remove during the term. Substantially the same thought is embodied in the expressions, frequently met with, of whether the removal can be made without destruction of or injury to the premises.

The fixtures over which the controversy rages are electric light and gas fixtures. From this general description of it, the impression is received that they belong to the class of fixtures which presumably remain the property of the tenant, if he installs them, without any agreement on his part to make them the property of the landlord.

It is not wholly clear upon what ground as a legal basis the referee has based his order. The general view which he takes of the situation is clear enough. It is that, when the owner of the premises has adequately equipped them for occupation and use for a prescribed purpose, to require him to tear out that equipment and replace it with something different, in deference to the whim or fancy of the tenant, is something which the landlord is not called upon to do, and that "no legal or equitable rule compels the landlord" to do so. This, of course, is clear enough. The further view of the referee that the act of a tenant in replacing fixtures installed by the landlord with new fixtures which may not be acceptable to the succeeding tenant is an act "both unjust and inequitable" to the landlord. This may or may not be so. It depends upon the circumstances. The referee finds the circumstances of this situation not to have justified the tenant. Had the referee made any definite finding of fact with respect to a dedication by the tenant to the landlord, we would be very loath to disturb the finding. He, however, so far forth from so finding, expressly finds that there was no agreement reached by the parties, and

that in fact not only they failed to agree, but that the tenant had refused to so agree.

The referee finds that the landlord was asked to make the substitution. This he refused to do. He made, however, the counter proposition that the tenant might install the new fixtures at his own expense, if he would agree that the new fixtures should become the property of the landlord. This counter proposition, as before stated, the tenant declined.

The referee returns as a fact that the tenant did make the change, and he bases his order upon the proposition that the tenant thereby accepted the conditions laid down by the landlord.

We are unable to accept this view. As the parties could not agree, the tenant had a perfect right to take the position that he could put in the new fixtures and retain his ownership therein. The landlord on his part, of course, had the equal right to claim, and, if he chose, to warn the tenant that, if the change was made, the fixtures would become the property of the landlord. No such warning was given; but, even if it had been, its only effect would have been to have relegated the parties to a decision of what their legal rights were, and the only effect of the assertion of their respective claims of right would have been to have presented for the decision of somebody the conflict of view between them.

The case of Bank v. North, 160 Pa. 303, 28 Atl. 694, which the referee cites in support of the order made by him gives us a very clear statement of the controlling principles involved. These principles, however, it seems to us, lead to a different conclusion from that reached by the referee. A different conclusion is also indicated by the other features of the present fact situation and the practical consequences flowing from the conclusion reached. Had the question been raised in reclamation proceedings, a finding in favor of the landlord would have affected no one other than himself and the bankrupt estate. To present the claim, however, after the fixtures had been sold as part of the bankrupt estate, affects the rights of the purchasers to the fixtures, and otherwise adds to the difficulties of the practical situation.

We see no escape from the conclusion that the order of return of the fixtures should not now be made, and that the petition for a review should be allowed, and the findings and order made by the referee reversed. We grant, however, the same leave granted in the other petition for a review to make an application for a reargument. If no such application is made within five days, the order above indicated is to stand.

## UNITED TIMBER CO. v. BIVENS.

(District Court, E. D. South Carolina. October 11, 1918.)

No. 189.

1. TIME ⟸10(10)—COMPUTATION—EXPIRATION.
Where a timber deed gave the grantee the right to demand an extension, etc., on expiration of the time fixed for removal, and the time expired on Sunday, a tender and demand, etc., made on the following secular day, will be treated as made on the day of expiration.

2. TIME ⟸9(10)—COMPUTATION—TIMBER DEEDS.
Where a timber deed giving the grantee 10 years for removal provided for an extension of time on demand by the grantee and payment of interest, etc., the 10-year period should be computed by excluding the day of the deed and counting the last day, and a demand and tender on such day was in time, the grantee's estate not having determined.

3. LOGS AND LOGGING ⟸3(11)—TIMBER DEED—CONSTRUCTION.
Where a timber deed gave the grantee 10 years for removal, and provided for an extension, etc., the grantee took a determinable fee, which would expire at the end of 10 years unless the period should be extended.

4. LOGS AND LOGGING ⟸3(11)—TIMBER DEEDS—DEMAND FOR EXTENSION.
Where a timber deed fixing a period for removal provided that the grantee should have additional time desired on payment of interest on original purchase year by year, a demand for 15 years' additional time, or so much as desired, coupled with a tender of one year's interest, *held* sufficient.

5. LOGS AND LOGGING ⟸3(11)—TIMBER DEEDS—EXTENSION OF TIME—REASONABLE TIME.
Where a timber deed allowing 10 years for removal, provided that the grantee should have such additional time as desired, *held* that a demand for 15 years' additional time, or so much as desired, was reasonable.

6. INJUNCTION ⟸36(3)—INTERFERENCE WITH ACCESS TO LAND.
Where the owner of land, who had granted the timber, together with rights of way for removal, denied the grantee access to the lands, asserting the period for removal had expired without extension, *held* that, as the grantee's rights had not been determined, equity had jurisdiction to enjoin the owner from denying access, etc., there being no adequate remedy at law.

In Equity. Suit by the United Timber Company against Joseph Bivens, Sr. Decree for complainant enjoining defendant.

See, also, 248 Fed. 554.

Legare Walker, of Sommerville, S. C., and L. D. Lide, of Marion, S. C., for plaintiff.

J. P. K. Bryan, of Charleston, S. C., and Holman & Boulware, of Barnwell, S. C., for defendant.

CONNOR, District Judge. The bill, answer, exhibits, and evidence disclose the following facts:

On the 14th day of April, 1902, Ann Bivens and Prudence Bivens, the owners of several tracts of land situate in Dorchester, formerly Colleton county, S. C., aggregating about 5,000 acres, in consideration of $2,000, conveyed to R. P. Tucker "all of the timber, standing and fallen," on said tracts of land, with rights of way, easements, etc.

⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

On the same day John D. Boyle, being the owner of several tracts of land in the same county, in consideration of $1,500, conveyed to R. P. Tucker the standing and fallen timber on said tracts of the dimensions described in the deed.

On the same day Joseph Bivens, Sr., being the owner of several tracts of land in the same county, in consideration of $2,000, conveyed to R. P. Tucker the standing and fallen timber thereon of the dimensions described.

Thereafter the title to each of said tracts of land was conveyed to, and was at the dates hereafter set forth vested in, the defendant.

On the 14th day of October, 1903, defendant, Joseph Bivens, Sr., in consideration of $150, conveyed to F. S. Farr, trustee, the timber on one tract of land in said county. Each of said deeds contain the following clause:

"That the said party of the second part, his heirs and assigns, shall have, and the same is hereby granted to him or them, the period of ten years beginning from the date hereof, in which to cut and remove the said timber from the said land; and in case the said timber is not cut and removed before the expiration of said period, then that the said second party, his heirs or assigns, shall have such additional time therefor as he or they may desire, but in the last-mentioned event the said second party, his heirs or assigns, shall, during the extended period, pay interest on the original purchase price above mentioned, year by year, in advance, at the rate of six per cent. per annum."

By successive conveyances the title to the timber on the several tracts of land was conveyed to, and vested in, the Onieda Timber Company, a corporation chartered under the laws of South Carolina.

Plaintiff alleges that—

"at the expiration of said period of ten years, to wit, on the 15th day of April, 1912 (the 14th of April falling on Sunday), in the exercise of the right, power, and authority vested in and conferred upon it, in and by the said timber deed, * * * the Onieda Timber Company gave due notice in writing to Joseph Bivens, the defendant herein, that it desired fifteen (15) years additional time to cut and remove the said timber, and to use and enjoy the said timber rights, ways, privileges, and easements; and, in pursuance of the terms of the said timber deed, the said Onieda Timber Company, at the time of the giving of the said notice, tendered, in lawful money of the United States, the sum of one hundred and twenty dollars, being the interest on the purchase price of said timber."

The defendant refused to accept such amount, and it was deposited in the clerk's office for the use and benefit of defendant. Tender of the same amount was made on the 14th day of April of each and every year thereafter.

Tender of the interest on the purchase price of the timber on each of the other tracts of land set out in the bill was made, and notice given that the same period of time was required for cutting and removing the timber. Thereafter, and prior to filing the bill herein, the right, title, privileges, and easements which vested in R. P. Tucker, F. S. Farr, and the Onieda Timber Company were conveyed to, and vested in, complainant.

Defendant refused to accept the interest tendered on the purchase price of the timber on either of the said tracts of land, and refuses to

permit complainant to enter upon, cut, or remove any portion of the timber. Defendant admits that complainant is entitled to certain rights of way and easements over and across the lands. He denies that complainant is the owner of, or entitled to, the timber standing or fallen on said lands.

The two principal questions raised by the pleadings and the evidence are: (1) Was the tender of the interest made in apt time? (2) Was the time demanded by the Onieda Timber Company, 15 years for cutting and removing the timber, reasonable?

Both questions are earnestly and vigorously contested. Able and exhaustive arguments were made and briefs filed by counsel, with a wealth of authority.

[1-3] The briefs furnish an illustration of the truth of the observation of Justice Grier in Griffith v. Bogert, 18 How. 158, 15 L. Ed. 307:

"Whether the terminus a quo should be included, it must be admitted, has been a vexed question for many centuries, both among learned doctors of the civil law and the courts of England and this country. It has been termed by a writer on civil law (Tiraqueau) the 'controversia controversissima.' He says that: 'It was in consequence of the uncertainty introduced on this subject by the disquisitions and disputes of learned professors that Gregory IX, in his decretals, introduced the phrase of "a year and a day," in order to remove the doubts thus created, as to whether the dies a quo should be included in the term.'"

It seems that the rule in common usage included the day a quo, but many exceptions were introduced in its application to leases, limitations, etc., when forfeiture would ensue. The cases are conflicting, and have established no fixed rule as to such exceptions. Lord Mansfield in Pugh v. Leeds, Cowp. 714, reached the conclusion that the cases for two hundred years had only served to embarrass a point "which a plain man of common sense and understanding would have no difficulty in construing." The multitude of cases which find their way to the appellate courts fall into groups from which courts have evolved more or less general rules.

The tender will be deemed to have been made on April 14, 1912. Defendant insists that the day of the date of the deed, April 14, 1902, should be included in the computation of the 10 years to which the right to cut and remove is limited; that the right to tender the interest and give notice of the extension of time required expired on April 13, 1912.

The complainant insists that the Supreme Court of South Carolina has adopted the rule for the computation of time which excludes the first day and includes the last. This is controverted by defendant. It is not clear that the question comes within the rule that the construction given by the state court to language used in a contract, made in such state, is binding upon the federal court. It may be said, with much reason, that the court should assume that the parties used the language in the sense in which it had been construed by the state court, and that this court, for the purpose of effectuating their intention, should adopt that construction.

It appears that the Supreme Court of South Carolina has given the subject careful consideration. In Williamson v. Farrow (1830) 1 Bailey (17 S. C. L.) 611, 21 Am. Dec. 492, the judge, writing for the

court, after quoting the substance of the language of Lord Mansfield, says:

"The case before us, tried by this rule, will, I think, bring us to the conclusion that the day of the sale ought to be excluded. It was a sale on a credit of six months, and, if payment were not made at the end of that time, a resale was to take place on account of the purchaser. The intention of the parties, collected from the * * * subject-matter, and with a view to effect, and not destroy, the right of the purchaser, would manifestly lead us to the conclusion that the day of sale was intended to be excluded; for until the purchase was made, no credit could be given; and after it was made, and the credit had begun, it was to the purchaser important that he should have all the time. What was his natural conclusion? It certainly must have been that the credit began after the sale, and, as there are no fractions of a day, the day of sale must be excluded. * * * The rule may be deduced that whenever a forfeiture would be incurred by considering 'the day of the date,' or 'an act done,' as inclusive, then it shall be considered exclusive."

In cases of subsequent date the same rule is followed.

It is insisted, however, that in Hill v. Burton Lumber Co., 72 S. E. 1085 (1911), the court, dealing with a timber deed dated June 29, 1899, in which the grantee was given 10 years "from this date" to cut and remove the timber, included the first day. To estimate the value of this decision as an authority the facts must be understood. The deed was dated *June 29, 1899,* giving 10 years to cut. The grantee, construing it as conveying the timber in fee simple, on *January 8, 1910,* entered upon the land and began to cut. It appears that on *September 14, 1907,* the plaintiff, in consideration of "$250 to be paid annually in advance, commencing on *June 28, 1907,* for the term of five years, executed another conveyance to the defendant of all the timber on said tract excepting 100 acres of specified dimension," to hold the timber and rights of way for the full "term of five years from the *28th day of June, 1909.*"

It was conceded that on the 28th of June, 1909, defendant failed to pay the $250, but on October 11, 1909, the amount was tendered to the plaintiff, with interest, and refused, and on June 10, 1910, was again tendered and refused. The opinion of Chief Justice Jones makes it clear that the only question before the court was whether the deed of June 29, 1899, conveyed the timber in fee, with right in the grantee to remove it at its pleasure, or whether the title was a fee determinable, if not removed within 10 years from the date of the deed. The court held the latter to be the correct construction of the deed, citing a number of authorities. The Chief Justice, arguendo, said:

"As the ten-year limit for removal of timber under the above deed of June 29, 1899, expired June 28, 1909, it is clear that such deed affords no warrant for the acts of alleged trespass charged and admitted to have been committed on January 8, 1910."

Passing the question whether this language is not obiter—certainly not necessary to the decision of the question presented upon the record—it may be that the learned judge had in view the fact that, by the recitals in the deed of September 14, 1907, it was conceded that the time for cutting expired June 28, 1909. The defendant, to meet the difficulty presented by his failure to cut and remove the timber before June 29, 1909, contended that he had saved his rights by tendering the

$250 under the provisions of the deed of September 14, 1907, at any time prior to June 28, 1910, but the court held that this amount was to be paid "in advance, commencing June 28th, 1909."

The value of this decision, as an authority for the contention made by defendant, is much weakened by the fact that the question now being considered was not, and could not upon the facts as presented be, the basis of the decision. It is not probable that the court intended, by the language used, to decide a question to which, in earlier decisions, their learned predecessors gave careful consideration, reaching a conclusion differing from that which is attributed to the learned Chief Justice and his Associates. Giving to the *decision,* which is clearly in harmony with the best judicial thought of other courts and the decisions of that court, unquestioning concurrence, it is not a controlling authority upon this court for the contention made by defendant upon the question now under discussion. Counsel for complainant call attention to language used by the trial Judges in Gray v. Marion County Lumber Co., 102 S. C. 289, 86 S. E. 640, and Beaufort Lumber Co. v. Johnson, 107 S. C. 147, 92 S. E. 271, and Midland Co. v. Prettyman, 93 S. C. 13, 75 S. E. 1012, which they contend sustain their views. In his dissenting opinion upon another question in the Johnson case, Judge Watts says the complainant had until February 19, 1915, to make the payment, the deed being dated February 19th, 10 years prior thereto. Judge Gage concurred with him. While expressions are used by the judges indicating differing views, the question presented here was not in issue.

While an examination of the numerous cases, in both state and federal courts, discloses variant opinions, the conclusion reached by the author of the exhaustive note to Halbert v. Land & Live Stock Asso., 49 L. R. A. 193 (247), is sustained by the authorities:

"There seems to be one general rule, with reference to counting the first and last days in the computation of a period of time, which, subject to exceptions based upon the language of the provision for time or upon the surrounding circumstances, seems to have remained the same throughout the whole period of the common law, and which remains practically the same under the statutes and rules of court. That rule is that in the computation of time one of the first and last days of the period shall be included and the other excluded. The question as to which * * * shall be included and which excluded, however, has been differently decided in different * * * jurisdictions, and has given rise to much conflict of opinion. The general common-law rule, as it originally existed, was that the first day was to be counted when the computation was to be from an act or event, but that it was not to be counted when the reckoning was to be from a day or from the day of an act or event. The more modern decisions have changed this rule, and, in the absence of a statute or rule of court controlling the question, the courts now compute time, as a general rule, by excluding the first day and including the last day; * * * and the general rule now existing, whether at common law or under the statutes, probably is that the first day of a period of time is to be excluded and the last day * * * included, but that either or both days may be either included or excluded, if the language of the provision is such as to require it, or if by doing so a penalty or forfeiture will be avoided."

The same conclusion is reached in a later note to State v. Elson, 15 L. R. A. (N. S.) 686.

The rule, with its exceptions, is illustrated and enforced in a large number of cases cited in the notes. Homestead Fire Ins. Co. v. Ison, 110 Va. 18, 65 S. E. 463 (1909). In Sheets v. Selden, 2 Wall. 177, 17 L. Ed. 822, the question presented was when a lease expired. Judge Field says:

"The rent becoming due on the first of May, the one month from that time within which the payment was required to be made to prevent a forfeiture expired on the 1st day of June following. In the computation of the time the day upon which the rent became due was to be excluded. The general current of the modern authorities on the interpretation of contracts, * * * when time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period *from* or *after* a day named, is to exclude the day thus designated, and to include the last day of the specified period."

The rule is clearly stated by Chief Justice Shaw in Seekonk v. Rehoboth, 8 Cush. (Mass.) 371:

"We consider it now well settled, as a general rule, that when an act is to be done within a given number of days *from* the date, or day of the date, or act done, the day of the date is excluded; otherwise an act to be done in one day must be done on the same day, and, as there is no fraction of a day, such stipulation must create an obligation to do it instanter."

See, also, Seward v. Hayden, 150 Mass. 158, 22 N. E. 629, 5 L. R. A. 844, 15 Am. St. Rep. 183.

Looking to the intention of the parties, ascertained by reference to the subject-matter of the contract, it is manifest that they understood that the purchaser was to have 10 full years, of 365 days each, within which to cut and remove the timber. Fractions of a day will not be regarded. At the end of this period his right to the timber determined, unless he gave notice of the additional time required, and tendered the interest on the purchase price in advance. It is not probable that either party expected the purchaser to begin the work of cutting and removing the timber on a large body of land on the day upon which the contract was made and the deed executed. To do so required preparation, the hiring hands, taking team or machinery to the land. Courts must, in endeavoring to ascertain the intention of parties and giving a reasonable interpretation to their language and conduct, take notice of the usual and customary manner in which such contracts are made and performed. It is probable that the deed was drawn and executed during business hours of the day, that the parties were not on the land, and that the preparation necessary to performance was to be made after its execution. These considerations strongly impress my mind with the conviction that both grantor and grantee intended and understood that the day upon which the deed was executed should not be included in computing the period of time within which the cutting was to begin.

Adopting the construction placed upon deeds containing the same language used in this case by the Supreme Court of South Carolina, the grantee of the timber took by the deed a determinable fee. At the termination of 10 years the timber reverted to the grantors, unless extended by the tender of the interest and giving notice of the period de-

sired for cutting. The right of complainant to claim the benefit of the option to demand an extension of time for cutting is dependent upon the answer to the primary question when the period of time given to cut and remove the timber ceased. As the right to demand additional time is made conditional upon the payment "in advance" of interest "during the extended period," and this is required to be done "in case the said timber is not cut and removed before the expiration of the said period" of "ten years beginning from the date hereof," the tender on the 14th day of April, 1912, is within the time fixed by the contract.

It is conceded that the Supreme Court of South Carolina has uniformly held, in accordance with the courts of other states, that to avail itself of the right to demand the extension the grantee must, within the time or before the expiration of the period given by the deed to cut and remove the timber, notify the grantor or owner of the land what time is required and tender the interest in advance. It is generally held by the state courts that the title of the grantee of the timber expires, determines, at the end of the period fixed for cutting and removing, and that the superadded clause gives an option to the grantee of which it may avail itself by compliance with its terms to demand the extension. The decisions of the state courts are cited in Crown Orchard Co. v. Dennis (D. C.) 220 Fed. 516, to which others of a later date may be added. It is not, for the purpose of disposing of the instant question, very material to inquire whether this is the correct view. If the tender was made during or before the expiration of the period of time given to cut and remove the timber, complainant was entitled to demand a reasonable time in addition to the period of 10 years.

[4] Defendant insists that the written notice given defendant, stating that complainant required "fifteen years additional time from and after the 14th day of April, 1912, within which to cut and remove the said timber, and to use and enjoy the said rights of way, privileges, and easements, during which extended period, or so much thereof as may be used for such purposes," does not comply with the terms of the contract; that the time demanded should have been for a fixed and definite period, without any qualification, such as, "or so much as may be used for such purposes." I am unable to adopt this view. The requirement of the payment of "interest year by year" excludes the suggestion that "a lump sum," equal to the interest for the entire period demanded, was contemplated. It is manifest that the purpose of the extension was to enable complainant to cut and remove the timber, and when this was done his right or license to go upon the land determined, except so far as certain easements granted in fee enlarged it. It may be that owners of timber lands have by these contracts either made, or unconsciously been drawn into making, hard and inequitable bargains, granting exclusive rights and imposing heavy burdens upon their lands for long periods of time. The courts cannot, by strained construction, defeat the operation of the words used, or deprive the grantees of the rights conferred. An examination of the numerous decisions of the courts, with some exceptions, discloses an appreciation of the practical difficulties presented by them and the hardship imposed by their en-

forcement. But for the controlling authority of decided cases, I should find difficulty in imposing such burdens upon large and valuable tracts of land, upon unilateral contracts—when only one of the parties is bound, the other being permitted to abandon the contract and repudiate its obligations at its pleasure. I have been impressed with the language used by the eminently wise and learned late Chief Justice of Virginia in Young v. Camp Mfg. Co., 110 Va. 678, 66 S. E. 843. I am constrained to conclude that upon the authority of decided cases the notice complied with the terms of the contract.

[5] This leaves open the question whether the time required—15 years—was reasonable. This is a question of fact, to be decided upon testimony disclosing the conditions which should be taken into consideration in fixing a reasonable time to cut and remove the timber. I heard the witnesses orally. It is necessarily difficult for a court, having no other knowledge or information in regard to the conditions by which it must be guided, in respect to which the testimony is conflicting, more or less colored, by the relation which the witnesses bear to the parties and the subject-matter, to reach a very satisfactory conclusion. When the judge undertakes to put himself in the place of the parties to the contract at the date of the transaction, and from the viewpoint thus obtained say what they intended—that is, what both understood, what the owner of the land thought he was granting, the extent to which, in point of time, he was disabling himself from clearing his lands or bringing them under cultivation—he finds it difficult to see his way clearly. Courts have been impressed with the hardship worked by specifically enforcing these executory extension clauses of timber contracts, resulting in conflicting decisions. While there is much difference of opinion in the testimony of the witnesses, and it is largely a matter of opinion as to what constitutes reasonable time to cut and remove the timber on the lands included in the bill, I conclude that, in view of the size of the tracts and the situation of the parties, 15 years is not an unreasonable time within which to cut and remove the timber.

[6] Defendant insists that the only ground upon which complainant invokes the equitable jurisdiction of the court is found in the allegation that, unless relief is granted by injunction, it would be compelled to resort to a large number or multiplicity of actions at law for protection of its rights, and that the bill cannot be maintained until its legal title has been established in an action at law; that it must be adjudged that complainant has the legal title to the timber. It is argued that, although the evidence may show other grounds for equitable relief, complainant having relied upon the allegation that unless relief be granted, it will be driven to a multiplicity of actions, it is confined to that ground for relief. It may be conceded that a court of equity will not enjoin a trespass, except pendente lite, unless plaintiff has established its legal title to the property in an action at law. The basis of equitable jurisdiction in such as the instant case is found in the inadequacy of the remedy at law. A claim to the legal title to a tract of land of which defendant is in possession must be asserted and established in a possessory action at law or an action of trespass—this is elementary. If defendant is not in possession, a court of equity will entertain a bill

to remove a cloud from or quiet title, and, if necessary, effectuate its decree by a permanent injunction.

Here, however, complainant does not claim to own, or be entitled to possession of, the land upon which the timber is standing and growing. He alleges title to the timber, with a license, supported by a valuable consideration, to enter upon the land owned by, and in the possession of, defendant, for the purpose of cutting and removing its timber. The claim may be likened to an easement or a right of way. The refusal of defendant to permit it to enjoy the license or easement deprives complainant of the use of its property. It is manifest that in an action at law the remedy for the denial of this right would be inadequate. If complainant undertook to enter upon the land and was forcibly resisted, a judgment for damages for the assault upon its employés would be of no value in securing the enjoyment of the right to cut and remove the timber. The case presented upon the bill and evidence would seem to come within the class described by Prof. Pomeroy, 1 Eq. 250 (3d Ed.):

"The very object of preventing a multiplicity of suits assumes that there are relations between the parties out of which other litigations of some form might arise. But this prior existing cause of action, this existing right to some relief of the plaintiff, need not be equitable in its nature. Indeed, in the great majority of cases in which the jurisdiction has been exercised, the plaintiff's existing cause of action and remedial right were legal; and it is because the only legal remedy which he could obtain was clearly inadequate to meet the demands of justice, partly from its own inherent imperfect nature, and from its requiring a number of simultaneous or successive actions at law, that a court of equity is competent to assume or exercise its jurisdiction. It follows, as a necessary consequence, and this point is one of great importance to an accurate conception of the whole doctrine, that the existing legal relief to which plaintiff, who invokes the aid of equity, is already entitled, need not be of the same kind which he demands and obtains from a court of equity; on the contrary, it may be, and often is, an entirely different species of remedy."

Complainant, after setting out its title to the timber, and the tender of the interest on the purchase price, and refusal by defendant to accept it, alleges that on September 10, 1917, it sent its employés upon one of the tracts upon which the timber had been conveyed, known as and referred to in the deeds as the "Blue House" tract, for the purpose of—

"clearing out a right of way for the location and construction of a tram road to be used in connection with the cutting and removing of the said timber from the said tract of land, and all the other tracts of land hereinbefore mentioned and described, and for the purpose of doing other work preparatory to the cutting and removing of the said timber from the said lands and in the proper and legitimate prosecution and exercise of its rights; that the defendant, in willful and wanton violation of the complainant's rights as hereinbefore set forth, and with intent to hinder, delay, harass, and impede the complainant in the exercise of its said rights, forbade complainant's agents and servants from entering upon the said lands for the purposes aforesaid," etc.; "that defendant thereupon, instituted a suit against complainant in the United States court, alleging that he had suffered actual damage on account of said entry and trespass in the sum of $500, and demanding vindictive damage in the sum of $50,000."

A copy of the complaint in the action at law is attached to the bill.

Defendant admits complainant's allegations of fact, but alleges that complainant's employés cut trees outside of the right of way to which

he conceded complainant was entitled, and denied that "he has interfered, or has any intention of interfering, with the complainant in the lawful use of its permanent rights of way," etc.; that the tenders of interest, as the basis for its demand for an extension of the time for cutting and removing the timber, were not made within the time fixed by the contract, and that the time demanded was unreasonable. It is clear that the determination of this action would not settle the rights of the parties.

It is thus made apparent that the settlement of the controversy in this suit is dependent upon the solution of two questions: Was the tender made in apt time? This depends upon the construction of the language in the deed. Was the time demanded unreasonable? This is a question of fact. The timber in controversy is upon 11 tracts of land, aggregating many thousand acres, all belonging to defendant. Complainant's claim is based upon the same essential facts in respect to each tract.

Complainant's title to the timber is of no value unless it is permitted, or its right secured, to go upon the land for the purpose of cutting and removing it. No judgment, or number of judgments, in actions at law, would secure that right or its enjoyment.

While the general principle invoked by defendant in his attack upon the equitable jurisdiction of the court is conceded, as said by Prof. Pomeroy, "the rule is one of expediency and policy, rather than an essential condition and basis of equitable jurisdiction." Section 252.

In Kilbourn v. Sunderland, 130 U. S. 514, 9 Sup. Ct. 596, 32 L. Ed. 1005, Chief Justice Fuller said:

"The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

In Tyler v. Savage, 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82, it is said:

"Under section 723 of the Revised Statutes [Comp. St. 1916, § 1244], the remedy at law, in order to exclude equity, must be as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." Walla Walla v. W. W. Water Co., 172 U. S. 1, 19 Sup. Ct. 77, 43 L. Ed. 341.

In Wylie v. Coxe, 15 How. 415, 14 L. Ed. 753, it is said:

"There may be a legal remedy, and yet, if a more complete remedy can be had in chancery, it is a sufficient ground for jurisdiction."

In Crown Orchard Co. v. Dennis, 229 Fed. 657, 144 C. C. A. 62, it was held, upon similar facts, that plaintiff was entitled to a permanent injunction.

The state courts have taken jurisdiction on the equity side of their dockets in cases involving the rights of grantees of timber, with rights of way, upon similar state of facts. If complainant is entitled to the extension of time to cut and remove the timber, its title thereto has not determined or reverted to the defendant. It is manifest that its rights cannot be adequately enforced in an action or a series of actions at law.

Without further discussion, I will sign a decree enjoining defendant from preventing or interfering with complainant's employés and agents cutting and removing the timber in accordance with the terms of the deeds set forth in the bill. The defendant will pay the cost.

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## UNITED STATES v. BINDER.

(District Court, E. D. New York. June 22, 1918.)

WAR ⇐4—OFFENSES—VIOLATION OF ESPIONAGE ACT.

The publication of a book challenging the sincerity of the aims of the United States in entering war, and of a nature calculated to arouse dissatisfaction and induce opposition to its continuance by falsely stating that this country entered war to save England from defeat and to aid munition manufacturers, etc., *held* to violate Espionage Act, § 3, denouncing the willful making of false statements with intent to interfere with military operations, to cause insubordination or to obstruct the recruiting or enlistment service.

Stephen Binder was indicted for violation of Espionage Act, § 3, for making false statements with intent to interfere with the operation or success of the military or naval forces, etc. On demurrer to the indictment. Demurrer overruled.

GARVIN, District Judge. The defendant has been indicted upon three counts, each of which charges him with violation of section 3 of the act of Congress which went into effect June 15, 1917, known as the Espionage Act. This section is as follows:

Whoever, when the United States is at war, shall wilfully make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States or to promote the success of its enemies, and whoever, when the United States is at war, shall wilfully cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty, in the military or naval forces of the United States, or shall wilfully obstruct the recruiting or enlistment service of the United States, to the injury of the service or of the United States, shall be punished by a fine of not more than $10,000 or imprisonment for not more than twenty years, or both. 40 Stat. 219, c. 30.

It is to be observed that three offenses are designated: (a) Willfully making or conveying false reports or false statements, with the intent specified; (b) willfully causing or attempting to cause insubordination, etc.; (c) willfully obstructing the recruiting or enlistment service, etc.

The first count charges the defendant with a violation of the second offense above set forth, and the second and third counts charge him with two separate violations of the first part of the section. The defendant has demurred to each of the counts of the indictment. The questions involved are whether or not the book entitled "Light and Truth" contains false statements which are of a character that

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

would naturally cause insubordination, disloyalty, mutiny, or refusal of duty in the military forces of the United States, and whether or not it contains statements, true or false, which would have such an effect.

It seems to me entirely unnecessary to discuss the matter at any great length. The first paragraph of the preface reads as follows:

At a time when freedom of speech is silenced, the right of free Americans to criticize their government abridged, and this country practically ruled by English lords, great capitalists, and a handful of autocrats, this book was written and published as a defiance to our government's misrule and as the bold assertion of the injustice of America's entrance into the world's war.

On page 11 appears this:

To call it a war for American rights would be convincing if we had not submitted before the German violations to the English violations of our rights. No, the cause was deeper; it was to help England—to save her and her allies from defeat under the pretext that we commence war for American rights. It was the response to the call for help across the sea, the urgent plea of Anglo-Saxon blood to Anglo-Saxon blood in the New World in the gravest hour of England's national peril. It was to bolster up the dwindling hopes of big American financiers who had great fortunes at stake in the war gamble on England's side.

On page 28 appears:

Now remains the third and last means to conquer Germany, namely, by force of arms. To gain a clean victory over the German nation as she is arrayed would, however, mean the desolation of Europe, which would exceed human imagination, while the bitter sorrows and mourning of beloved ones would visit thousands of American families. Death and its attendant miseries are lurking on the thresholds of American homes, whose boys are told to fight for liberty over 3,000 miles from their own country and to defend their heritage in another part of the world.

Beginning at page 160 appears:

Many prominent citizens of German ancestry have been strong advocates for conscription, they having been misled by the promises of war-ready press of the advantages which the country and the young men should derive from compulsory military service. Now, they understand to what consequences the adoption of militarism in the United States leads when, after the country has been turned into a military camp, the power of American manhood is not at all to be used for the defense of America, but to be sent 3,000 miles away to a struggle in Europe in which we have less interest or could have been less interested than Holland or the Scandinavian countries, which took a wiser road than we did, and it may consequently seem foolish how anybody could be led so far astray from real democracy as to advocate conscription for which there is less need in the United States than in any other place in the world.

Many American youths who will have to travel to the battle fields of France may ask themselves if, to defend their home and native land, it is necessary to make that long journey and to be ready to lay down their lives in attacking an enemy which never had any intention of attacking or invading the United States. The young soldiers of German extraction may have one more sting added to this, namely, the prospect of killing their own people, the annihilation of that flesh and blood from which they came. Their fathers at home may also ponder over this question and accuse themselves of being partly responsible for this by their indifference in the lawmaking of the United States. Perhaps they voted at election, but that was the furthest they went. They did not write to their Congressman or speak to him. They did not organize and instruct their fellow citizens to oppose laws which are a menace to the freedom of America.

When their boys were conscripted to fight their kinsmen across the seas, the German-American fathers knew that this was no war of self-defense, but they could not resist fate and cannot now resist the authority after their representatives having pulled their caps over their eyes and betrayed and sold them.

On page 256 appears:

That small group of Senators and Congressmen who opposed war is the best proof that the majority, in voting for the war, was carrying out the wishes of the munition makers, money aristocrats, and political autocrats. Some of them, the so-called larger majority of the conservatives, were in possession of war babies (stocks and bonds of war industries with their paying of dividends largely depending on the continuation of the war), others were related to munition and powder manufacturers or were themselves rich and had attained their office more by their money power than by intelligence, while the small group of more radically inclined representatives who opposed war were mostly poor men known for their leadership in Congress and Senate and their past records of defending the cause of the masses of the American people instead of selling them to the interests of big capital. Mr. Kitchin, the floor leader of Congress, declared in his celebrated speech before the votes were taken for or against this issue that before his God and his conscience he never could vote for war.

If those autocrats who always are ready to remind the people of our democracy had been willing to prove to the world the existence of the advanced American democratic spirit, they would have had the finest opportunity to leave the final say as to for or against war to a referendum of the American people, which they refused because they knew the majority could see the issue clear enough and would vote "no." Just as now free speech must be suppressed because truth is too dangerous to our present administration, so had the decision on the war of all the American people through a referendum to be suppressed because the money plutocrats and their political autocratic henchmen feared their attempt might be foiled at the last hour by the will of the people.

On page 267:

But we shall first have to abandon the deceiving phrase that it was a war for justice and right, and to establish firmly in the minds of the present and of the succeeding generations that it was waged, as stated in the first chapter, in order to save the financial structure of the money kings, to continue the blood profits of the munition traffickers, and to save our Anglo-Saxon overlords under whose spirtual ban our government has always been a partial supporter of England's cause throughout the Wilson régime.

By the unification during this war of the big business interests of America with the cause of the allies the American people are at present compelled to sacrifice blood and money in the world's war for the continuance and maintenance of the dictatorship of a combined clique of great financial captains of industry and their autocratic assisting politicians who are ruling the great people of the United States.

While these are some of the most extreme passages, the entire book is evidently intended to arouse dissatisfaction with the war and to induce readers to oppose its continuance. The authorities amply justify my conclusion that no such publication can be allowed, and the contention that the sentiments contained in it are mere expressions of opinion, which as such may be lawfully written and circulated, irrespective of the effect they may have in influencing our people to withdraw their support from the military and naval operations of the government at this critical time in the nation's history, cannot be sustained. United States v. Pierce et al. (U. S. D. C., N. D. of N. Y.) Department of Justice Bulletin No. 15, 245 Fed. 878,

888; United States v. Krafft (U. S. D. C., D. of N. J.) Department of Justice Bulletin No. 6 (for Circuit Court of Appeals opinion, see 249 Fed. 919, —— C. C. A. ——); Masses Publishing Co. v. Patten, 246 Fed. 24, 158 C. C. A. 250, L. R. A. 1918C, 79, Ann. Cas. 1918B, 999; United States v. Gneiser et al. (U. S. D. C., N. D. of W. Va.) Department of Justice Bulletin No. 71.

The demurrer is overruled.

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In re GROWE CONST. CO.

(District Court, N. D. New York. December 7, 1918.)

1. BANKRUPTCY ⊂=223—SPECIAL MASTER—FEES.
Where the parties to a reclamation proceeding, by consent referred to the referee as a special master, orally agreed that the successful party should pay the master's fee, etc., *held*, as the matter was not one devolving on the referee by virtue of his office, that he could collect only the compensation provided for by the court rules; there being no stipulation as therein provided for increased compensation.

2. BANKRUPTCY ⊂=22—RULES—CHANGE NUNC PRO TUNC.
The rule of court fixing the fees in case of reference to the referee as a special master cannot be changed nunc pro tunc, after reference, so as to allow him greater fees.

In Bankruptcy. In the matter of the Growe Construction Company, bankrupt. On motion by the Truscon Steel Company to compel the special master in a reclamation proceeding to file his report, without being paid his compensation, etc. Special master ordered to file his report on payment of specified amounts.

This is a motion by the Truscon Steel Company, represented by Riegelman & Bach, its attorneys on this motion, to compel Hon. Edwin A. King, special master in a reclamation proceeding in this court, to file his report in a reclamation proceeding, which is in favor of the said Truscon Steel Company, without being paid his compensation as such special master, and without being paid his disbursements, $60, paid to stenographer by said special master for taking and transcribing the testimony in the said case.

Riegelman & Bach, of New York City, for Truscon Steel Co.
Arthur S. Golden, of Schenectady, N. Y., for Vrooman.
Geo. J. Hatt, 2d, of Albany, N. Y., for Savage.

RAY, District Judge. May 9, 1917, the Truscon Steel Company, then Trussed Concrete Steel Company, by one T. F. Tillott, Esq., its attorney, Wm. C. Vrooman, by A. S. Golden, his attorney, and B. Jermain Savage, trustee in bankruptcy, by Geo. J. Hatt, 2d, Esq., his attorney, of their own initiative, entered into a stipulation in writing that the matter of the claim of said Trussed Concrete Steel Company, now Truscon Steel Company, to certain property of the value of $2,024.90, and in the hands of the above-named adverse claimants, Vrooman and Savage, be referred to Hon. Edwin A. King as special master, to hear, try, and determine. Pursuant to such written stipulation this court

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes

made an order, which was duly entered, so referring the matter. T. R. Tillott, of Schenectady, N. Y., was then the attorney for said Trussed Concrete Steel Company, claimant, now Truscon Steel Company, and still is the attorney of record, but takes no part in this controversy.

[1, 2] The said Trussed Concrete Steel Company, now Truscon Steel Company, brought the matter on for a hearing before the said special master, and at the time fixed therefor, and before the presentation of the evidence was commenced, as is shown by the sworn answers by Vrooman and of the trustee in bankruptcy, Mr. Savage, an oral agreement was made between said Tillott and said Golden and said George J. Hatt, 2d, who represented the trustee, as to the payment of the fees, etc., of said special master, and it was then and there agreed by and between the said attorneys in the presence of the special master that his fees and expenses should be paid by the party to whom shall be awarded the title and possession of the property in dispute. It appears that the special master did not require this agreement to be reduced to writing; he relying, undoubtedly, on what was regarded as a gentleman's agreement. Several hearings were had, several witnesses sworn, and much time and labor expended, and the special master paid $60 to a stenographer for taking and transcribing the evidence and drawing his report. The special master worked 17 days, and, having examined the evidence, etc., and drawn his report in favor of the Truscon Steel Company, pursuant to said agreement, and evidently relying on same and the good faith of said attorneys, notified the said T. R. Tillott, attorney of record, then as now, for said Truscon Steel Company, that he had made his decision in its favor, and also the amount of his fees or charges and expenses as being $170 for his services, 17 days at $10 per day, and $60 paid stenographer—in all, $230. Mr. Tillott promised and agreed to pay Mr. King these charges, or that his client would, and that a check would be sent shortly. Instead of paying as agreed, the claimant has employed other attorneys and makes this motion.

On the faith of the agreement, Mr. King, as special master, accepted the reference and performed the service, and necessarily made the disbursement. The charge is reasonable. Mr. King is a most excellent lawyer, of high standing, long experience, and exceptionally well versed in the law relating to bankruptcy and such questions as were involved here. His integrity has never been questioned. This was not a matter which it was his duty to hear and determine. The parties selected him as special master to hear and determine the matter, because of his superior qualifications. The reference was not suggested by the court. The reference was a saving to the parties, as it made attendance at court at inconvenient times and places unnecessary.

If the successful claimant had paid the special master, who performed the service and earned the money and incurred the expense of stenographer, the amount so paid, if ordered by this court, could be made a taxable item against the other claimants to the property in question; but it takes the position it should have the fruits of the special master's labor and expense incurred, and that Mr. King shall go unrecompensed unless he can get his fees and expenses from the bankrupt estate. Evi-

dently in this effort to violate or disregard the agreement made by Mr. Tillott it will incur as much expense as the special master's charges, or more expense than the amount of the special master's compensation demanded.

There is a rule of this court in force (rule 30) which provides that issues under rules 8 and 11 are to be referred to the referee as special master, and that he shall receive $5 per day for each day actually spent in hearing such reference and in preparing his report. Those issues, mentioned in rules 8 and 11, relate to adjudication, discharges, and composition, and such compensation is chargeable in the first instance to the party opposing. The same rule contains this provision:

"In other cases, where matters are referred to the referee as a special master requiring services not devolving upon him, by virtue of his office [referee]"—and such is this case—"he shall receive a like compensation, which shall be chargeable in the first instance on the party bringing on the reference and shall be paid by the party ultimately defeated in such reference. Should such reference in the cases last referred to be unusually difficult or extraordinary, a higher rate of compensation may be paid if stipulated by both parties and sanctioned by the judge."

This rule of this court was prepared and adopted by Judge A. C. Coxe in 1898, and the compensation then deemed proper has not been increased to keep pace with the increased cost of living, etc. In this case "a higher rate of compensation" than $5 per day was not "stipulated by both parties," although the fair inference from the agreement is that the parties expected to pay such reasonable charges as the special master should make and demand. As this rule has not been amended or changed, this court cannot change it nunc pro tunc. It will result in the special master being compelled to accept as a condition of filing his report a small and insufficient compensation for arduous and valuable service, of which the successful claimant will reap the benefit, if the report is confirmed by this court. The reference provided for a review by this court. I see no way at this time to protect the special master, and the order will be that he file his report with the clerk on receiving from the successful claimant, Truscon Steel Company, formerly Trussed Concrete Steel Company, the sum of $145, made up of $60, the amount paid the stenographer, and $85, for 17 days' work in the case as special master at $5 per day, and for services not devolving on him by virtue of his office as referee; it appearing that the bankruptcy case is one referable to him, and which was referred to him in due course as referee in bankruptcy for the performance of such services therein as devolved upon him by virtue of that office, but of which these in question here formed no part.

In these matters of reference to a special master, care should be taken to have prepared and filed a written stipulation, which should specify the fees, and this should be submitted to the judge for approval or disapproval in advance.

## Ex parte FRONKLIN.

(District Court, N. D. Mississippi. November 11, 1918.)

1. WAR ⇐11—ENEMY ALIENS—INTERNMENT—PRESIDENTIAL DISCRETION.
The courts cannot review the discretion vested in the President by Rev. St. § 4067 (Comp. St. 1916, § 7615), to determine the manner and degree of restraint to which alien enemies shall be subjected.

2. WAR ⇐11—INTERNMENT OF ALIEN ENEMIES—EVIDENCE.
Evidence *held* to show that petitioner was an unnaturalized German, and so might be taken into custody, under presidential warrant issued under Rev. St. § 4067 (Comp. St. 1916, § 7615), as an enemy alien.

At Law. Petition by Willis Fronklin for a writ of habeas corpus to the United States marshal for the Northern district of Mississippi. Writ denied.

D. A. Scott and E. M. Yerger, both of Clarksdale, Miss., for petitioner.

W. S. Hill, U. S. Dist. Atty., of Greenwood, Miss., and J. Lake Roberson, Asst. U. S. Dist. Atty., of Clarksdale, Miss., for the United States.

HOLMES, District Judge. The petitioner avers that he is a citizen of the United States and is unlawfully restrained of his liberty by the United States marshal for the Northern district of Mississippi.

The proof shows that the petitioner is held in custody by the marshal by virtue of an order of the President of the United States, issued under Regulation No. 12 of the President's proclamation of April 6, 1917, promulgated in pursuance of section 4067 of the Revised Statutes (Comp. St. 1916, § 7615), which order commands the marshal to detain at the usual place of confinement in his district, or, if such usual place be not suitable, at such other place as may, in his discretion, seem hygienic and safe, the petitioner, one Willis Fronklin, on the ground that his presence at large in this district "is a danger to the public peace and safety of the United States." The order also reads: "Such person is to be detained until the further order of the President."

[1, 2] Under said section 4067 the discretion is vested in the President to determine the manner and degree of restraint to which alien enemies shall be subjected. I have excluded all evidence of any acts or utterances with reference to the loyalty of petitioner, because I think the only question for determination on this hearing is whether he is a citizen of the United States or is a German alien enemy.

The petitioner has lived in Mississippi for about 15 years, during which time, up to the very time of his arrest, he has stated repeatedly that he was born in Hamburg, Germany. He told witnesses that he came to this country from Germany when he was about 4 years of age, that he remembered crossing a large body of water, and that his brother died on the way over and was buried at sea. He asked his wife, when he proposed matrimony, whether she had any objections to marrying a German. He is shown to have had a marked German accent

when he first came to Mississippi. Taking the stand in his own behalf, he now claims that these statements were made by him to conceal his obscure parentage; that as a matter of fact he was born in the United States and raised by gypsies. He does not claim to have been naturalized.

From the evidence as a whole, I am convinced that the petitioner was born in Hamburg, Germany, and is a German alien enemy. Under section 4067, Revised Statutes, the President has determined that the petitioner (who is shown by the proof to be a German alien enemy) should be restrained or interned. I do not think this action of the President, exercised in the manner provided by law, is subject to review by the courts.

The petitioner will therefore be remanded to the custody of the marshal.

## MEMORANDUM DECISIONS.

AUGUSTINE v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 28, 1918.) No. 5305. In Error to the District Court of the United States for the District of Nebraska. Frank M. Tyrrell and J. H. Walker, both of Lincoln, Neb., for plaintiff in error. T. S. Allen, U. S. Atty., of Lincoln, Neb.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi) without costs to either party in this court.

BILBY v. BRIGHAM. (Circuit Court of Appeals, Eighth Circuit. May 6, 1918.) No. 4943. Appeal from the District Court of the United States for the Eastern District of Oklahoma. W. O. Rittenhouse and H. M. Brown, both of Wagoner, Okl., for appellant. David A. Kline, of Muskogee, Okl., for appellee.

PER CURIAM. Appeal dismissed, with costs, on motion of appellee, for failure of appellant to file brief.

BOND et al. v. HUME. (Circuit Court of Appeals, Fifth Circuit. November 21, 1918.) No. 2309. In Error from the District Court of the United States for the Western District of Texas, Austin Division; Thomas S. Maxey, Judge. Action by Allan Bond and another against J. L. Hume. Judgment for defendant, and plaintiffs bring error. Reversed. See 243 U. S. 15, 37 Sup. Ct. 366, 61 L. Ed. 565. W. D. Caldwell, of Austin, Tex., for plaintiffs in error. Frederick C. Von Rosenberg, of Austin, Tex., for defendant in error. Before WALKER and BATTS, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. After submission of this cause, a question was certified by us to the Supreme Court, as to the applicability of an Act of the Legislature of Texas, known as the "Bucket Shop Law" (Rev. Crim. Stats. 1911, c. 3, art. 538 et seq.), to a contract for the sale and future delivery of cotton, made and to be performed in the state of New York, and in accordance with the rules of the New York Exchange. The District Court had held that

plaintiffs' (plaintiffs in error's) first amended petition did not set out a cause of action, because the contract sought to be enforced by it was unenforceable, because it was in conflict with the public policy of the state of Texas, evidenced by that act, and had rendered judgment dismissing the petition, upon demurrer sustained. It was from this judgment that the writ of error was taken to this court. The Supreme Court held that the cause of action asserted in the petition, accepting the averments of the petition as true, was susceptible of enforcement in the courts of Texas and in courts of the United States in that state. Bond v. Hume, 243 U. S. 15, 31 Sup. Ct. 366, 61 L. Ed. 565. This determination results in the reversal of the judgment of the District Court. The judgment of the District Court is accordingly reversed, and the cause remanded to the District Court, for further proceedings in conformity with the opinion of the Supreme Court. Reversed and remanded.

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BRYAN v. ARNOLD. (Circuit Court of Appeals, Eighth Circuit. July 29, 1918.) No. 5220. Appeal from the District Court of the United States for the District of Colorado. R. R. Riley and George B. Gould, both of Colorado Springs, Colo., and J. E. Robinson, of Denver, Colo., for appellant. William C. Robinson, of Colorado Springs, Colo., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellant, per stipulation of parties.

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CHARLEY v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. August 12, 1918.) No. 5233. In Error to the District Court of the United States for the District of New Mexico. Frank J. Lavan and Catron & Catron, all of Santa Fé, N. M., for plaintiff in error. S. Burkhart, U. S. Atty., of Albuquerque, N. M.

PER CURIAM. Cause docketed, and writ of error dismissed, on motion of defendant in error, under rule 16 (188 Fed. xi, 109 C. C. A. xi), without costs to either party in this court.

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CITY OF PRESCOTT, ARK., v. TOLAND et al. (Circuit Court of Appeals, Eighth Circuit. May 24, 1918.) No. 4893. In Error to the District Court of the United States for the Western District of Arkansas. Thomas C. McRae, William V. Tompkins, D. L. McRae, and Chas. H. Tompkins, all of Prescott, Ark., for plaintiff in error. W. E. Hemingway, George B. Rose, D. H. Cantrell, J. F. Loughborough, and Vincent M. Miles, all of Little Rock, Ark., for defendants in error.

PER CURIAM. Judgment of District Court reversed, without costs to either party in this court, and remanded, with instructions to render judgment for plaintiffs below, etc., per stipulation of parties.

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DE GREE v. HINCHMAN. (Circuit Court of Appeals, Ninth Circuit. October 30, 1918.) No. 3202. In Error to the District Court of the United States for the District of Alaska, Division No. 1. J. H. Cobb, of Juneau, Alaska, for plaintiff in error. Cheney & Ziegler, of Juneau, Alaska, for defendant in error.

PER CURIAM. Motion of counsel for defendant in error for dismissal of writ of error, for noncompliance by plaintiff in error with provisions of rules 23 and 24 of the rules of practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi), granted, and writ of error dismissed.

DODSON v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 29, 1918.) No. 5171. In Error to the District Court of the United States for the Eastern District of Oklahoma. J. I. Howard, of Oklahoma City, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., and C. W. Miller, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error.

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DU BOIS ELECTRIC CO. v. PANCOAST'S ADM'R. (Circuit Court of Appeals, Third Circuit. November 27, 1918.) No. 2371. In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge. Action by the Fidelity Title & Trust Company, administrator of the estate of V. W. Pancoast, against the Du Bois Electric Company. There was judgment for plaintiff, and defendant brings error. Reversed. W. C. Miller, of Clearfield, Pa., for plaintiff in error. M. W. Acheson, of Pittsburgh, Pa., for defendant in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. The principal facts of this case will be found in the opinion delivered on the former writ of error. Du Bois Electric Co. v. Fidelity Title & Trust Co., 238 Fed. 129, 151 C. C. A. 205, L. R. A. 1917C, 907. We there decided that the only ground for holding the Electric Company liable for the injury to Pancoast "would be a continuing duty resting on the company so to maintain the banner that persons on the street should not be endangered." On the trial now under review some evidence was offered on this question, and the verdict must be based on a finding that the company had undertaken the duty of maintenance, as well as the duty of hanging the banner and taking it down. In our opinion, the only testimony in support of such a finding was too meager and too vague to justify the verdict, and the trial judge should therefore have given instructions in favor of the defendant. The judgment is reversed.

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FEDERAL LAND & SECURITIES CO. v. DUCLOS. (Circuit Court of Appeals, Eighth Circuit. September 3, 1918.) No. 5085. In Error to the District Court of the United States for the District of Wyoming. William B. Ross and Ray E. Lee, both of Cheyenne, Wyo., for plaintiff in error. Matthew Gering, of Plattsmouth, Neb., and Albert D. Walton, of Cheyenne, Wyo., for defendant in error.

PER CURIAM. Writ of error dismissed, with costs, for failure to print record and file briefs.

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FERRIOT v. ATLANTIC, W. & N. R. CO. et al. (Circuit Court of Appeals, Fifth Circuit. November 6, 1918.) No. 3244. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. Suit by Henry C. Ferriot against the Atlantic, Waycross & Northern Railroad Company and another. From a decree dismissing the bill, complainant appeals. Affirmed. Winfield P. Jones, of Atlanta, Ga., and Arthur H. Browne, and Sam A. Montgomery, both of New Orleans, La., for appellant. Sheppard Bryan, of Atlanta, Ga. (Grover Middlebrooks, of Atlanta, Ga., on the brief) for appellees. Before WALKER and BATTS, Circuit Judges, and SHEPPARD, District Judge.

PER CURIAM. Findings of fact, made by the special master and approved by the trial court, were to the effect that the evidence adduced did not sustain the claims asserted by the bill. Those findings fully justified the decree dismissing the bill. In our opinion the record does not disclose anything that would warrant a reversal of the decree appealed from. That decree is affirmed.

FOWLER et al. v. CAMPBELL et al. (Circuit Court of Appeals, Eighth Circuit. May 18, 1918.) No. 5048. Appeal from the District Court of the United States for the District of Minnesota. A. L. Agatin, of Duluth, Minn., C. A. Severance and Robert E. Olds, both of St. Paul, Minn., and Frank D. Adams and George W. Morgan, both of Duluth, Minn., for appellants. Fryberger, Fulton & Spear, of Duluth, Minn., for appellees.

PER CURIAM. Appeal dismissed, at costs of appellants per stipulation.

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FOWLER v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. October 28, 1918.) No. 5306. In Error to the District Court of the United States for the District of South Dakota. George A. Jeffers, of Rapid City, S. D., for plaintiff in error. Robert P. Stewart, U. S. Atty., of Deadwood, S. D.

PER CURIAM. Cause docketed, and writ of error dismissed, without costs to either party in this court, for want of prosecution, on motion of defendant in error and consent of plaintiff in error.

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GEORGE E. JAMES CO., Inc., v. McGRATH. (Circuit Court of Appeals, Ninth Circuit. October 7, 1918.) No. 3182. In Error to the District Court of the United States for the District of Alaska, Division No. 1. Gunnison & Robertson, of Juneau, Alaska, for plaintiff in error. Hellenthal & Hellenthal, of Juneau, Alaska, for defendant in error.

PER CURIAM. Writ of error dismissed, pursuant to stipulation filed September 25, 1918.

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GEYER v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 7, 1918.) No. 3216. In Error to the District Court of the United States for the Southern Division of the Southern District of California. James H. Ryckman, of Los Angeles, Cal., for plaintiff in error. Robert O'Connor, U. S. Atty., and Gordon Lawson, Asst. U. S. Atty., both of Los Angeles, Cal.

PER CURIAM. Motion of defendant to dismiss writ of error for noncompliance by plaintiff in error with provisions of rule 16 of this court (208 Fed. ix, 124 C. C. A. ix) granted, and writ of error dismissed.

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HOUCK et al. v. ELMER et al. (Circuit Court of Appeals, Eighth Circuit. May 23, 1918.) No. 4805. Appeal from the District Court of the United States for the Eastern District of Missouri. J. D. Johnson, Loomis C. Johnson, Clifford B. Allen, R. P. Williams, C. B. Williams, S. W. Fordyce, Jr., John H. Holliday, Thomas W. White, and Harry A. Frank, all of St. Louis, Mo., Follett W. Bull and Walter M. Johnson, both of Chicago, Ill., and Lon O. Hocker, of St. Louis, Mo., for appellants. Henry W. Taft, E. C. Henderson, and Albert Rathbone, all of New York City, and W. F. Evans, Franklin Ferriss, Charles Nagel, Allen C. Orrick, Thomas Bond, and Blodgett & Rector, all of St. Louis, Mo., for appellees.

PER CURIAM. Appeal dismissed, without costs to either party in this court, on motion of appellants and stipulation of parties.

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JONES et al. v. UNITED STATES. (Circuit Court of Appeals, Ninth Circuit. October 11, 1918.) No. 3149. In Error to the District Court of the United States for the District of Montana. Carl M. Thompson, of Roundup, Mont., and Collins, Campbell & Wood, of Forsyth, Mont., for plaintiffs in error. Burton K. Wheeler, U. S. Atty., and James H. Baldwin, Asst. U. S.

Atty., both of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

PER CURIAM. Dismissal of writ of error for noncompliance by plaintiffs in error with rules 23 and 24 of rules of practice of this court (231 Fed. v, vi, 144 C. C. A. v, vi) with leave to plaintiffs in error to ask for reinstatement of cause, if they can show merit in the matter.

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THE LAKEWOOD. (Circuit Court of Appeals, Second Circuit. April 24, 1918.) No. 212. Appeal from the District Court of the United States for the Southern District of New York. Libel by the New York Central Railroad Company against the ferryboat Lakewood, her engines, etc.; the Central Railroad Company of New Jersey, claimant. Decree for libelant, and claimant appeals. Affirmed. Macklin, Brown & Purdy, of New York City (P. M. Brown, of New York City, of counsel), for appellant. Harrington, Bigham & Englar, of New York City (D. R. Englar, of New York City, of counsel), for appellee. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

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McCURDY, County Treasurer, v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 13, 1918.) No. 5050. Appeal from the District Court of the United States for the Western District of Oklahoma. Preston A. Shinn, of Pawhuska, Okl., for appellant. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Decree of District Court reversed, without costs to either party in this court, and cause remanded, with directions to dismiss the bill of complaint, on confession of error and consent to reversal by appellee.

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NICHOLS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 13, 1918.) No. 5259. Appeal from the District Court of the United States for the District of Colorado. Melvin C. Goss, of Boulder, Colo., for appellant. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and John A. Gordon, Asst. U. S. Atty., of Denver, Colo. See, also, 253 Fed. 989, — C. C. A. —.

PER CURIAM. Decree affirmed in part and reversed in part, without costs to either party in this court, etc., per stipulation of parties.

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NICHOLS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. September 13, 1918.) No. 5260. Appeal from the District Court of the United States for the District of Colorado. Melvin C. Goss, of Boulder, Colo., for appellant. Harry B. Tedrow, U. S. Atty., of Boulder, Colo., and John A. Gordon, Asst. U. S. Atty., of Denver, Colo. See, also, 253 Fed. 989, — C. C. A. —.

PER CURIAM. Decree affirmed in part and reversed in part, without costs to either party in this court, etc., per stipulation of parties.

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NICHOLSON v. DEAVER. In re RAWLINS MERCANTILE CO. (Circuit Court of Appeals, Fifth Circuit. November 13, 1918.) No. 3260. Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge. In the matter of the Rawlins Mercantile Company, bankrupt. On petition for review by B. S. Deaver, trustee, findings of referee in favor of J. S. Nicholson, intervening claimant, were reversed (251 Fed. 164), and said claimant appeals. Affirmed. Charles Akerman, of Macon, Ga., for appellant. George S. Jones and Orville A. Park, both of

Macon, Ga., for appellee. Before PARDEE, WALKER, and BATTS, Circuit Judges.

PARDEE, Circuit Judge. In this case the trial judge filed a written opinion, found in the transcript, fully stating the facts and issues of the case, with his findings and conclusions of law. Considering the same in the light of the assignments of error, we find none of the errors assigned is well taken, and the judgment should be affirmed; and it is so ordered.

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NICKEL et al. v. WARDELL, Collector of Internal Revenue of First District of California. (Circuit Court of Appeals, Ninth Circuit. October 16, 1918.) No. 3168. Appeal from the District Court of the United States for the Second Division of the Northern District of California. Edward F. Treadwell, E. S. Pillsbury, and Alfred Sutro, all of San Francisco, Cal., for appellants. Annette Abbott Adams, U. S. Atty., of San Francisco, Cal., for appellee.

PER CURIAM. Pursuant to request of counsel for appellants, appeal dismissed.

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OLSON & MAHONEY, Inc., et al. v. EVERSON et al. (Circuit Court of Appeals, Ninth Circuit. September 25, 1918.) No. 3208. Appeal from the District Court of the United States for the First Division of the Northern District of California. See, also, 231 Fed. 559. William Penn Humphreys, of San Francisco, Cal., for appellants. Andros & Hengstler, of San Francisco, Cal., for appellees.

PER CURIAM. Appeal dismissed by clerk, pursuant to rule 20 (208 Fed. xi, 124 C. C. A. xi) and agreement of counsel.

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SHUR v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 4, 1918.) No. 5029. In Error to the District Court of the United States for the District of Minnesota. Victor L. Power, of Hibbing, Minn., and M. E. Louisell, of Duluth, Minn., for plaintiff in error. Alfred Jaques, U. S. Atty., of Duluth, Minn.

PER CURIAM. Writ of error dismissed, without costs to either party in this court for want of prosecution, on motion of defendant in error.

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SIMMONS v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 6, 1918.) No. 4948. In Error to the District Court of the United States for the Western District of Oklahoma. W. A. Briggs, of Woodward, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, for want of prosecution.

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SKINNER, Internal Revenue Collector, v. DE WITT. (Circuit Court of Appeals, Eighth Circuit. October 28, 1918.) No. 5014. In Error to the District Court of the United States for the District of Colorado; James D. Elliott, Judge. Action by Herbert M. De Witt against Mark A. Skinner, Collector of Internal Revenue, etc., to recover taxes, etc., assessed under Act May 9, 1902, § 4, against plaintiff as a manufacturer of adulterated butter. There was a judgment for plaintiff and defendant brings error. Affirmed. Harry B. Tedrow, U. S. Atty., of Denver, Colo. (John A. Gordon, Asst. U. S. Atty., of Denver, Colo., on the brief), for plaintiff in error. James J. McFeely of Denver, Colo., for defendant in error. Before HOOK and CARLAND, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an action by De Witt to recover of the collector of internal revenue taxes, penalties, and interest assessed against him

as a manufacturer of adulterated butter and paid under protest. The issue of fact was whether his use of a small quantity of lime in a large vat of water in which particles of butter were softened was "for the purpose or with the effect" of removing rancidity from the butter. Act May 9, 1902, c. 784, § 4, 32 Stat. 194. A judgment upon a former trial was reversed by this court. 146 C. C. A. 437, 232 Fed. 443. At the second trial the jury found for the plaintiff, and this writ of error is directed to the judgment in his favor. The request of the collector, the defendant, for an instructed verdict, was properly denied. There was substantial evidence to support the verdict that followed. The trial court had no doubt of it on motion for a new trial, nor have we. We also think that the assignments of error upon the admission and rejection of certain evidence are so clearly without merit that they need not be discussed. The judgment is affirmed.

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SMITH v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. June 20, 1918.) No. 5095. In Error to the District Court of the United States for the Eastern District of Oklahoma. J. H. Mathers and J. L. Hodge, both of Ardmore, Okl., for plaintiff in error. W. P. McGinnis, U. S. Atty., of Muskogee, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court for want of prosecution, etc.

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SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al. (Circuit Court of Appeals, Ninth Circuit. October 9, 1918.) No. 2808. Appeal from the District Court of the United States for the Second Division of the Northern District of California. For opinion below, see 252 Fed. 979. Edward J. McCutchen, A. Crawford Greene, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant. Percy V. Long, City Atty., and Robert M. Searles, Asst. City Atty., both of San Francisco, Cal., for appellees.

PER CURIAM. Appeal dismissed by clerk, under rule 20 (208 Fed. xi, 124 C. C. A. xi), and pursuant to agreement of counsel.

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SPRING VALLEY WATER CO. v. CITY AND COUNTY OF SAN FRANCISCO et al. (Circuit Court of Appeals, Ninth Circuit. October 9, 1918.) No. 2910. Appeal from the District Court of the United States for the Second Division of the Northern District of California. For opinion below, see 252 Fed. 979. Edward J. McCutchen, A. Crawford Greene, and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant. Percy V. Long, City Atty., and Robert M. Searles, Asst. City Atty., both of San Francisco, Cal., for appellee.

PER CURIAM. Appeal dismissed by clerk, under rule 20 (208 Fed. xi, 124 C. C. A. xi), and pursuant to agreement of counsel.

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WILLARD v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. May 9, 1918.) No. 5049. In Error to the District Court of the United States for the Western District of Oklahoma. E. J. Giddings, George H. Giddings, and T. A. Carson, all of Oklahoma City, Okl., for plaintiff in error. John A. Fain, U. S. Atty., of Lawton, Okl.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, on motion of defendant in error, for want of prosecution.

**End of Cases in Vol. 253**